LAW·COMMISSION
TE·AKA·MATUA·O·TE·TURE

Preliminary Paper 27

EVIDENCE LAW
CHARACTER AND CREDIBILITY

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:
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by 28 April 1997

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The Law Commission is an independent, publicly funded, central advisory body established by statute to undertake the systematic review, reform and development of the law of New Zealand. Its purpose is to help achieve law that is just, principled, and accessible, and that reflects the heritage and aspirations of the peoples of New Zealand.

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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 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

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

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

This is the tenth in a series of Law Commission publications on aspects of evidence law. Papers on principles for the reform of evidence law, codification of evidence law, hearsay evidence, and expert and opinion evidence were published in 1991, while papers on documentary evidence and judicial notice and on the law of privilege appeared in 1994. The Commission also published *Criminal Evidence: Police Questioning* (NZLC PP21) in 1992, a major discussion paper jointly under the evidence and criminal procedure references. This was developed into the report *Police Questioning* (NZLC R31, 1994). A further discussion paper under the evidence reference, *The Evidence of Children and Other Vulnerable Witnesses* (NZLC PP26), was published in October 1996.

Because of the highly technical nature of the subject matter of this paper – evidence of character and credibility – the Commission has limited its consultation to a group of experts who commented in detail on the paper as a whole or various aspects of it. The Commission would like to thank Professor G F Orchard of the University of Canterbury; Nigel Hampton QC; Dr Erihana Ryan, Director of Psychiatry, Sunnyside Hospital; Maureen Barnes and Meagan Spence of the Forensic Psychiatric Service; Charl Hirschfeld of Victoria University of Wellington; and Alison Quentin-Baxter (former Director of the Law Commission). It would like in particular to acknowledge the invaluable assistance of Richard Mahoney of the Faculty of Law, University of Otago, who acted throughout the preparation of this paper as consultant and provided extensive comment on the many drafts. The text and commentary were substantially drafted by Bill Sewell, a senior researcher at the Commission, while the code provisions were prepared by Mr G C Thornton QC, legislative counsel. The Commission also acknowledges the work of several past and present members of the research staff in researching and writing this paper, in particular Carolyn Risk, Paul McKnight and Elisabeth McDonald.

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

Submissions or comments on this paper should be sent to the Director, Law Commission, PO Box 2590, DX SP23534, Wellington, by 28 April 1997. Any initial inquiries or informal comments can be directed to Elisabeth McDonald, Senior Researcher (tel: 04 473 3453; fax: 04 471 0959; E-mail: EMcDonald@lawcom.govt.nz).

Summary of questions

Chapter 2: Concepts and distinctions

1 Is it helpful to divide the notion of character into "reputation" and "disposition"? (para 28)

Chapter 3: The nature of character evidence

2 To what extent is a person's character a useful indicator of how that person will act in a given situation? (para 38)

3 How effective are judicial directions in ensuring that juries give evidence of character its appropriate weight? (paras 52–53)

Chapter 4: Credibility and truthfulness

4 Is it helpful to divide the notion of credibility into "truthfulness" and "error"? (para 60)

5 Should evidence of truthfulness be subject to more rigorous control than evidence of error? (para 61)

6 Should the same broad rules concerning evidence of truthfulness apply both to defendants in criminal proceedings and to other defendants and witnesses? (paras 65–67)

7 Is it desirable to provide clearer guidelines than does the current s 13 of the Evidence Act 1908 on what are and what are not appropriate matters for cross-examination about truthfulness? (paras 69, 71)

8 Is a test of substantial helpfulness a useful basis on which to determine the admissibility of evidence of truthfulness? (para 74)

9 To what extent should evidence of truthfulness be excluded from examination-in-chief? (para 75)

10 Are the matters listed in *section 10* of the proposed code rules adequate to guide the court in deciding whether or not evidence of truthfulness is likely to be substantially helpful? (para 76)

11 Is it sufficient to allow the Commission's proposed opinion rule to control expert evidence of a witness's truthfulness? (paras 83–85)

Chapter 5: Some categories of evidence of truthfulness

12 Is there a valid link between a person's convictions and that person's disposition to be untruthful? (para 88)

13 Should cross-examination about a non-defendant witness's convictions be limited to convictions of a particular type, such as for offences of dishonesty?

If so, how should dishonesty be defined? (para 98)

14 Should evidence of reputation be excluded from the assessment of a witness's truthfulness? (para 108)

15 Should an evidence code feature a provision requiring a judge to consider warning the jury about the danger of misinterpreting the demeanour of witnesses; and if so, what should the content of that warning be? (paras 118–119)

Chapter 6: Bias, corroboration and jury warnings

16 Should an evidence code include a provision requiring judges to consider warning the jury about evidence which may be unreliable? (para 134)

17 What kinds of evidence should merit a jury warning because of their potential unreliability? (para 134)

Chapter 7: Procedural controls on evidence of truthfulness

18 Should evidence offered to rehabilitate a witness be restricted to matters arising out of the initial challenge to that witness's truthfulness? (para 138)

19 Should the rule prohibiting a party from cross-examining its own witness be abrogated? (para 148)

20 Does unfavourable evidence provide a sufficiently high threshold for allowing a party to cross-examine its own witness about matters relevant only to truthfulness? (para 151)

21 Should the collateral issues rule be abolished, and will the requirement of substantial helpfulness for evidence of truthfulness provide a sufficient control in its place? (para 160)

Chapter 8: The character of defendants and co-defendants in criminal proceedings

22 Where should the threshold be set for removing the defendant's protection against being exposed to prejudicial character evidence? (para 166)

23 To what extent should the court have a discretion to exclude prejudicial character evidence once the defendant's protection has been lost? (para 168)

24 What kind of evidence of character should be admissible? (paras 170–178)

25 Should evidence of the defendant's good character be relevant both to the defendant's truthfulness and to whether or not the defendant committed the offence? (para 181)

26 How useful is evidence of good character, and should an evidence code expressly allow the defendant to offer such evidence? (paras 185–186)

27 Should an evidence code require a judge to warn the jury of the limited weight of evidence of the defendant's good character? (para 188)

28 Should evidence of the defendant's bad character offered in rebuttal by the prosecution be relevant both to the defendant's truthfulness and to whether or not the defendant committed the offence? (para 192)

29 Should a co-defendant have the right to rebut evidence of the defendant's good character by offering evidence of the defendant's bad character? (para 193)

30 Should the prosecution be able to offer evidence of the defendant's bad character if a co-defendant offers evidence of the defendant's good character? (para 193)

31 Should cross-examination about the bad character of defendants who have attacked prosecution witnesses be relevant to the defendants' truthfulness only? (para 211)

32 Should there be a requirement of substantial helpfulness for cross-examination by the defendant of prosecution witnesses about bad character in relation to truthfulness? (para 211)

33 What is the most satisfactory way of treating defendants who give evidence of the bad character of prosecution witnesses and who testify? Is it:
   (a) to protect defendants from cross-examination about their own bad character, provided that their attack on the prosecution witnesses does not relate solely or mainly to the truthfulness of the prosecution witnesses? (para 211)
   (b) to protect them absolutely, but rely on the test of substantial helpfulness to ensure that the bad character evidence given by defendants about prosecution witnesses is not gratuitous? (para 214)
   (c) to remove all protection, apart from the requirement that any cross-examination of defendants about bad character evidence in relation to truthfulness must be likely to be substantially helpful? (para 215)

34 Should it be necessary for defendants to be called as witnesses before evidence of their bad character can be offered? (paras 218; 232)

35 Under what circumstances should a defendant be able to cross-examine a co-defendant as to bad character in relation to truthfulness? (para 231)

Chapter 9: Similar fact evidence in criminal cases

36 What range of behaviour should similar fact or propensity evidence encompass? (para 272)

37 Is the test which balances probative value against prejudicial effect an adequate basis on which to decide the admissibility of propensity evidence? (para 275)

38 Can any other factors be added to those listed in *sections 19(2)* and *19(3)* of the proposed code rules to assist the court in assessing the probative value of propensity evidence? (paras 276–277)

39 Is it meaningful to include the possibility of collusion amongst the factors; or is it more a question of weight for the jury to decide? (para 278)

40 Is it helpful to codify guidelines for assessing prejudicial effect, and if so, are the two guidelines featured in *section 19(4)* of the proposed code rules adequate? (para 280)

41 Is it appropriate to permit a defendant to offer propensity evidence against a co-defendant whenever it is relevant to the former's defence; and is it desirable to require in addition the leave of the court or notice to the co-defendant? (para 282)

42 Will the propensity rule and its exceptions be adequate to deal with poisoning cases? (para 285)

43 Will the propensity rule and its exceptions provide sufficient protection for defendants charged with the offence of receiving? (para 288)

Chapter 10: Evidence of truthfulness, character and propensity in civil proceedings

44 Is it sufficient to have the admissibility of propensity evidence in civil proceedings governed by the general code rules, together with a notice requirement provided for in the High Court Rules and the District Court Rules? (paras 309–310)

Chapter 11: Complainants in sexual cases

45 Should s 23A of the Evidence Act 1908 be extended to include an absolute prohibition on questions about or evidence of the complainant's reputation in sexual matters, in relation to:
- the complainant's truthfulness; and
- the complainant's consent? (para 347)

46 Should questions about or evidence of the complainant's sexual experience with the defendant be subject to the same restrictions as evidence of the complainant's sexual experience with third parties? (para 351)

Appendix A

47 Are there aspects of character other than truthfulness and propensity which are relevant in civil or criminal proceedings?

Part I

INTRODUCTION

1
Summary of views

1 CHARACTER AND CREDIBILITY are two concepts which in an evidentiary context cannot always be separated. Often the one is dependent on the other. Credibility is frequently gauged from an inquiry into a person's character; and sometimes a person's character is assessed in terms of his or her credibility. Nevertheless, they remain distinct concepts, and the law of evidence has traditionally treated them as distinct.

2 Evidence of character and evidence of credibility can both be of great assistance to the fact-finder, to the extent that they can be decisive. But they can also be of little or no relevance, with the result that their introduction may distract the fact-finder from the real issues in dispute. Moreover, for the defendant in criminal cases, evidence of character and credibility can be unfairly prejudicial. It is not always a simple matter for the fact-finder to decide on the merits of such evidence. The challenge is to strike a balance between making evidence of character and credibility available to the fact-finder if it is useful, and excluding such evidence if it is unfairly prejudicial or of only marginal relevance.

3 The Law Commission has identified the following principles as fundamental to the law of evidence:

- to ensure the admission of only relevant evidence;
- to avoid distracting the fact-finder;
- to protect parties from unfairly prejudicial evidence and witnesses from unfair questions; and
- to avoid the unnecessary extension of the time and cost of trial.[1]

A proper focus of a review of the rules for admission of evidence of character and credibility is the extent to which the rules fulfil those principles.

4 The detailed and interwoven rules which govern the use of evidence of character and credibility have been developed largely by the common law, but statutory provisions have also had an influence. The current rules have attempted to resolve certain difficult questions which the Commission revisits in the course of this paper. The following are some examples:

- To what extent should evidence of a person's previous convictions be admissible? Should such evidence be freely admitted in relation to any witness or party, or should it be limited, particularly in the case of defendants in criminal cases? Should evidence of previous convictions, if admitted, reflect on credibility only, or should it also go towards proving the issue?

[1] *Evidence Law: Codification* (NZLC PP14, Wellington, 1991) 6–8.

- To what extent is evidence of good character relevant, and should any witness or party be able to introduce it?
- What should the consequences be if a defendant in criminal proceedings attacks the credibility of a prosecution witness or of a co-defendant by offering evidence of bad character? To what extent should this expose the defendant to a reciprocal attack?

5 In spite of the complexity of the current rules, courts have managed to apply them sensitively. In New Zealand they do not appear to have caused significant difficulty, although it is possible that they are not widely understood. For this reason, the rules which the Commission has developed for its proposed evidence code in the area of character and credibility largely follow the common law approach. This means that they retain a measure of the common law's complexity. However, the Commission has also aimed to create a scheme for its rules which is clearer, fairer, and more coherent.

6 The scheme which the Commission has devised is based on two sets of rules which overlap at certain points. The first is concerned with an aspect of credibility which causes particular problems: truthfulness or the lack of it. The scheme in general excludes evidence concerning truthfulness in examination-in-chief, but not in cross-examination. The second set is concerned with evidence about the character of the defendant in criminal proceedings, which is in general prohibited. The two sets overlap where the truthfulness of a criminal defendant has to be gauged from an inquiry into matters which would expose the bad character of that defendant. In this situation the rule prohibiting evidence of the defendant's bad character will usually override the exception allowing evidence relevant to the defendant's truthfulness in cross-examination.

7 This discussion paper is divided into five parts:
- Part I (chapters 1 to 3) is introductory and clarifies some of the concepts central to the paper, in particular that of "character".
- Part II (chapters 4 to 7) discusses the many facets of credibility.
- Part III (chapters 8 and 9) considers the role of character in criminal proceedings.
- Part IV (chapter 10) focuses on aspects of character in civil proceedings.
- Part V (chapter 11) is concerned with the character and truthfulness of complainants in sexual cases.

The paper concludes with draft rules and a commentary (see pp115–137). *Note that for convenience the draft rules are referred to throughout the main body of this paper as "sections" and references to them are always distinguished from those to current legislation by appearing in italic type.* For the purposes of comparison, the Commission has also drafted a set of alternative rules, together with introductory text and commentary. These are detailed in appendix A. The alternative rules are less complex in that they make admissibility subject to fewer requirements and are not retaliatory in nature. While they would be simpler to apply, they would also rely to a greater extent on the exercise of judicial discretion. This may be a disadvantage in situations where it is important to protect the defendant in criminal proceedings.

8 Chapter 2 provides a brief outline of the key concepts and distinctions which feature in the paper, while chapter 3 expands on the nature of character, viewed largely from a psychological perspective. Character evidence is traditionally admitted for two reasons: to attack or support the credibility

of a witness or to prove a fact in issue; but the law has always recognised that it can be extremely prejudicial, especially to a defendant in criminal proceedings. Character is an elusive concept about which the law has made certain assumptions – that there is such a thing, for instance, and that it is constant. A survey of the psychological literature reveals that though character can be said to exist, it is variable and influenced by situational factors. The conclusion is that courts should continue to approach evidence of character with considerable caution, admitting only such evidence which is likely to be substantially probative or helpful and upon which they can rely.

Credibility

9 The credibility of a witness is determined by a number of disparate factors, ranging from whether the witness has previous convictions to whether he or she has a physical or mental disorder which might have impaired their perception of events. A lack of credibility may derive from the possibility that the witness is in error, or from the possibility that the witness is being untruthful. As chapter 4 explains, evidence of error does not require special rules, but evidence of a lack of truthfulness requires controls because it can be both of marginal relevance and prejudicial to a witness.

10 The current statutory provisions controlling questions about credibility, ss 13 and 14 of the Evidence Act 1908, do not provide sufficient guidance. Accordingly, the Commission proposes a new rule for evidence used to determine a witness's truthfulness: a *truthfulness rule* stating that any evidence used to determine a witness's truthfulness must be likely to be *substantially helpful*.

11 A number of factors can assist the court in applying the truthfulness rule. Chapter 5 considers four which commonly contribute towards assessing a witness's truthfulness: previous convictions; reputation; previous inconsistent statements; and demeanour. The question with convictions is whether any particular kind of conviction – such as one involving dishonesty, for instance – is more indicative of a lack of truthfulness than another; and if so, whether evidence should be limited to the former. The Commission concludes that it is difficult, if not impossible, to isolate an appropriate category of convictions; and that the requirement of substantial helpfulness will adequately control evidence of convictions that is irrelevant or unfairly prejudicial to the witness. The Commission is likewise unwilling to exclude evidence of a witness's reputation, even though it recognises that such evidence can be of dubious value. In the case of previous inconsistent statements, the Commission's proposed hearsay rules and its proposal to abolish the collateral issues rule will make a specific rule no longer necessary. Finally, the demeanour of witnesses, particularly of those belonging to minority cultures, can be misinterpreted. However, the Commission is not persuaded that an evidence code can effectively assist in ensuring that a witness's demeanour is correctly interpreted.

12 Another factor relevant to truthfulness is bias; that is, the degree of a witness's interest in the outcome of the proceedings. Bias not only reflects on truthfulness but is an indication of unreliable evidence. Chapter 6 proposes a general rule on unreliable evidence – to be located outside the rules on evidence of character and credibility – which would require the judge to

consider warning the jury when such evidence is offered, including that offered by a witness who appears biased.

13 Chapter 7 considers three procedural rules which comprise important controls over evidence of credibility: the rule against bolstering the credibility of a witness; the rule against impeaching a party's own witness; and the collateral issues rule. At present, the credibility of a witness may only be bolstered if it has been attacked in cross-examination. The Commission proposes to retain this rule, with the qualification that evidence used to rehabilitate the witness must be substantially helpful.

14 A party is also limited in the extent to which it can challenge the truthfulness of its own witnesses. The Commission proposes to relax this limitation. A new provision would allow a party to cross-examine its own witness about any matter if that witness offers evidence in examination-in-chief which is unfavourable to the party; or if the witness offers untruthful evidence. The requirement of substantial helpfulness should adequately control any possible abuse of this right.

15 The third procedural rule is the collateral issues rule, which applies when a witness is cross-examined about a matter which is not a fact in issue: the rule excludes evidence which is intended to contradict the witness's answers. The Commission proposes that this rule be abolished, the reason being that the requirement of substantial helpfulness will provide an equally effective control on evidence of little relevance, while not excluding evidence which is potentially useful.

Character

16 Because evidence of character is potentially so damaging to defendants in criminal cases, it has been necessary to devise special rules for their protection. These are the rules which apply to cross-examination of the defendant and to offering similar fact or propensity evidence about the defendant. Chapter 8 principally addresses the very complex and technical rules which have been developed by both statute and common law to protect the defendant against unfairly prejudicial cross-examination, balanced against the court's need to have available all relevant evidence. Chapter 9 proposes a codification of the similar fact rule based on common law developments.

17 It is in the context of evidence of the defendant's character that the overlap (outlined in para 6) between the Commission's proposed truthfulness rules and character rules becomes important. Although it will be possible to cross-examine a defendant who is called as a witness about his or her truthfulness (in the same way as any other witness), if that cross-examination is likely to reveal evidence of the defendant's bad character, then the character rules will override the truthfulness rules and control the cross-examination.

18 As a preliminary, two general character rules are proposed. The first states that any character evidence which is admissible may either be of a general nature or refer to particular incidents and matters. The reason for this rule is to eliminate any confusion created by the common law, especially the rule in *R v Rowton* (1865) Le & Ca 520. The second is a permissive rule which confirms that evidence of character is admissible in any proceedings provided that it is relevant and does not relate to defendants in criminal cases.

Cross-examination of the defendant in criminal cases

19 The reforms which the Commission proposes for the rules on cross-examination of the defendant in criminal cases are limited to simplifying them and removing anomalies. In general, evidence about the character of the defendant in criminal cases is prohibited – a prohibition which this paper refers to as the *character rule*. The character rule is, however, subject to certain exceptions.

20 The first exception would specifically allow defendants to offer evidence of their good character, to be used both to determine truthfulness and guilt. However, this would allow the prosecution to rebut the good character evidence by means of bad character evidence, and for the same purposes. A second exception would allow the defendant to offer bad character evidence about him- or herself – for example, to pre-empt later cross-examination – and also allow the prosecution to cross-examine the defendant about bad character if the defendant attacks the character of prosecution witnesses, and if the defendant testifies. However, in an important departure from the current rule, such cross-examination would only be permitted if the defendant's attack is solely or mainly in relation to truthfulness, and not if it goes to the issue. A third exception would allow defendants to attack the character of co-defendants; but, again, if they do so solely or mainly in relation to truthfulness, co-defendants can respond by cross-examining defendants about bad character in order to challenge their truthfulness.

Propensity evidence

21 The "similar fact" rule is a common law rule which restricts the introduction by the prosecution of evidence of the defendant's behaviour other than that which is the subject of the offence charged: evidence which, in other words, tends to establish a propensity in the defendant to commit such an offence. The rule has caused – and continues to cause – difficulty because such evidence can be unfairly damaging to the defendant and yet at the same time be highly relevant. The dangers of introducing it derive particularly from its potential to erode the presumption of innocence and to encourage propensity reasoning. The House of Lords devised a test for similar fact evidence in *Boardman v DPP* [1975] AC 421 which has by and large served the law well, although it has had to be reviewed from time to time. This test states that similar fact evidence is admissible only if its probative value sufficiently outweighs its prejudicial effect.

22 Although the Commission recognises that the test leaves a number of issues unclarified, it is of the view that a code rule based on the *Boardman* test can be drafted. Such a rule should provide a list of factors which a court may consider in deciding on the admissibility of similar fact evidence. Accordingly, the proposed rule – which bears the more appropriate name of *propensity rule* – prohibits evidence establishing the defendant's propensity to behave in the manner of the offence charged. This is subject to two major exceptions.

23 The first is that the prosecution may introduce propensity evidence if its probative value in relation to an issue in dispute sufficiently outweighs the danger that it may have a prejudicial effect on the defendant. Factors which

assist the court in determining probative value include such matters as the nature of the issue in dispute, the frequency of the instances of behaviour, the connection in time, and the extent of similarity. The two factors assisting the court in assessing prejudicial effect are the extent to which the evidence unfairly predisposes the fact-finder against the defendant, and the extent to which the fact-finder is likely to give disproportionate weight to the evidence. The second major exception is that a defendant may introduce evidence of a co-defendant's propensity, provided that it is relevant to the former's defence.

Character in civil proceedings

24 Generally, the Commission does not distinguish between criminal and civil proceedings in evidential matters, except when the defendant in criminal proceedings is exposed to unfair prejudice. However, propensity evidence in civil cases has always been subject to certain restrictions, which have been inconsistently formulated and applied. Recent case law has established that the admission of propensity evidence in civil proceedings should be a matter of relevance, but qualified by a judge's discretion which depends on three factors: that the evidence has probative value; that its admission must not unjustifiably prolong the proceedings; and that it must not unfairly surprise or oppress the opposing party. In chapter 10 the Commission endorses this approach, but does not propose including a rule to that effect in the evidence code. The first two factors are already subject to the proposed general power of the court to exclude evidence; while the third is a procedural matter which can be best addressed in the High Court Rules or District Court Rules.

Complainants in sexual cases

25 In New Zealand, as in other jurisdictions, complainants in sexual cases are protected by a "rape shield" provision from unnecessarily intrusive questioning at trial. Chapter 11 considers the New Zealand provision, s 23A of the Evidence Act 1908, and proposes that, while the statute has reduced the ordeal of complainants, it could be strengthened to offer further protection in two main ways.

26 First, although s 23A prohibits raising the matter of the complainant's reputation in sexual matters, it still allows a party to do so with the leave of the court. The Commission considers that reputation in sexual matters is irrelevant to assessing both the complainant's general truthfulness and whether the complainant consented (but may be relevant to the defendant's belief in consent). It therefore proposes an absolute prohibition on evidence of the complainant's reputation in sexual matters if it is used for such purposes. Secondly, s 23A restricts evidence of the complainant's sexual experience only with persons other than the defendant. The Commission is of the view, however, that while evidence of the complainant's sexual experience with the defendant is more likely to be relevant to consent than evidence of the complainant's sexual experience with another person, this is not inevitably the case, and such evidence should also be subject, therefore, to the control of the provision.

THE LAW COMMISSION'S PROPOSALS IN BRIEF

- Courts should continue to approach evidence of character and credibility with considerable caution.
- Evidence of credibility has two aspects: truthfulness and error. Special rules are required for evidence of truthfulness but not for evidence of error.
- Evidence which is relevant only to assessing the truthfulness of a person should be in general prohibited (the *truthfulness rule*), except:
  - if it is offered in cross-examination;
  - if it is expert opinion evidence admissible under the Commission's proposed opinion rules;
  - if it is evidence about the truthfulness of the maker of a hearsay statement admitted under the Commission's proposed hearsay rules;
  - if it is evidence offered to support the truthfulness of a person whose truthfulness has been challenged.

  In all cases, the evidence must be likely to be substantially helpful.
- Matters which assist a court in determining whether evidence relevant to the truthfulness of a person is likely to be substantially helpful include (but are not limited to) the person's record for being untruthful; previous convictions; previous inconsistent statements; bias; motive to be untruthful; and remoteness in time.
- The rule against cross-examination of a party's own witness should be abrogated.
- The collateral issues rule should be abolished.
- The rule in *R v Rowton* (1865) Le & Ca 520 should be abolished, allowing any character evidence that is admissible to be either of a general nature or to refer to particular incidents and matters.
- All evidence of character should be admissible provided that it is relevant and does not relate to defendants in criminal proceedings.
- Evidence about the character of the defendant in criminal proceedings should be in general prohibited (the *character rule*), except:
  - if the defendant offers evidence of his or her good character;
  - if the defendant offers evidence of his or her bad character;
  - if the prosecution offers bad character evidence about the defendant in order to rebut evidence of the defendant's good character;
  - if the prosecution offers bad character evidence about the defendant in response to an attack by the defendant on prosecution witnesses which is solely or mainly relevant to their truthfulness;
  - if co-defendants offer bad character evidence against each other which is relevant to truthfulness.
- Evidence which establishes the defendant's propensity to behave in the manner of the offence charged should be in general prohibited (the *propensity rule*), except:

  - if when offered by the prosecution its probative value in relation to an issue in dispute sufficiently outweighs the danger that it may have a prejudicial effect on the defendant;
  - if it is offered by a defendant against a co-defendant and it is relevant to the defendant's defence.

- Matters which may assist the court in assessing the probative value of propensity evidence include (but are not limited to) the nature of the issue in dispute; frequency; connection in time; extent of similarity; the number of persons making a similar allegation; the possibility of collusion; and the degree of unusualness.
- Propensity evidence in civil proceedings should be admissible subject to relevance.
- Evidence of or questions about the complainant's reputation in sexual matters should be prohibited absolutely if designed to assess the complainant's general truthfulness or to establish the complainant's consent.
- There is a question whether restrictions on evidence of or questions about the complainant's sexual experience with third parties should be extended to evidence of the complainant's sexual experience with defendants.

2
Concepts and distinctions

27 THE RULES relating to character and credibility are very technical. To understand their operation better and to provide a common basis for discussion, it may be helpful to outline briefly some of the fundamental concepts and distinctions which are employed.

28 Character has two evidential aspects: first, **reputation**, which is a question of public estimation; and secondly, **disposition**, which relates more to the individual's inherent personality and habitual behaviour. Actions for defamation focus on the plaintiff's reputation. Disposition, on the other hand, becomes an issue in attempts to offer similar fact evidence. For example, the fact that an individual has been convicted of a series of similar offences could be considered sufficient – although usually it is not – to prove a disposition in that person to commit such offences.

Is it helpful to divide the notion of character into "reputation" and "disposition"?

29 Disposition is a term which applies to an individual's personality in a total sense. **Propensity**, although largely synonymous, is a term frequently used in connection with similar fact evidence. It refers specifically to the notion that the defendant is inclined to behave in a certain way or to commit certain offences. Evidence tending to show such a propensity is called propensity evidence (or, as in s 97(1) of the Evidence Act 1995 (Aust), "tendency" evidence). This evidence is ordinarily inadmissible.

30 **Evidence of good character** and **evidence of bad character** are relevant to both credibility and guilt or innocence. Evidence of good character may be used to bolster the defendant's credibility and to persuade the court that the defendant is unlikely to have committed the offence charged. It may consist, for example, of an employer's testimony on the witness's reliability and honesty. Evidence of bad character seeks to bring about the reverse, by establishing the witness's lack of credibility or an increased probability that the defendant committed the offence. Evidence of the latter, in particular, is admitted only under strict conditions.

31 **Credibility** (sometimes expressed as "credit") is the product of the fact-finder's assessment of whether or not to believe statements made by a witness. Credibility must not be confused with truth. Although the credibility of the maker may have a bearing on the truth of a statement, it cannot be determinative of it.

32 Likewise, the truth of a statement and the truthfulness of its maker must be distinguished. It is important to recognise that if a statement is false its maker is not necessarily lying. The maker may still be truthful, though mistaken. A witness's credibility may be challenged whether he or she is thought to be lying or merely mistaken.

33 To impeach a witness's credit is to challenge his or her credibility in cross-examination and rebuttal.

34 Although the rules of evidence relating to character and credibility generally apply equally to both the defendant in criminal cases and other (non-defendant) witnesses, there are some situations in which a distinction is made. The immediate example is that of prior convictions, which are ordinarily inadmissible as evidence offered against the defendant, but are more readily admissible when challenging the credibility of non-defendant witnesses.

35 Different rules apply depending on whether a party is challenging the credibility of its own witness or that of the other party. The former is possible under the current law of evidence only if the witness is declared hostile by the court. This means that the witness has become deliberately uncooperative. If, on the other hand, the party's own witness offers evidence which fails to meet counsel's expectations, then that witness is simply unfavourable, and his or her evidence can be contradicted only by other evidence.

36 If counsel are cross-examining a witness *as to a fact in issue*, they are at liberty to challenge the witness's answers, if necessary by adducing other evidence. If counsel are cross-examining a witness *as to credibility*, the witness's answers must be treated as final and cannot be contradicted by other evidence: this is the collateral issues rule.

3
The nature of character evidence

37 CONSIDERABLE DIFFICULTIES have always derived from the way in which evidence relating to the character or disposition of a person – whether a party or a witness – may be used in proceedings. As *Cross on Evidence* states, ". . . the topic is made more difficult by confusion of terminology, by the disparity of contexts to which the terminology is applied, by the vicissitudes of history, and by the impact of piecemeal statutory change".[2] Character evidence has assumed particular significance in relation to defendants in criminal proceedings and to complainants in cases involving sexual offences;[3] and these aspects will be examined in detail in chapters 8, 9 and 11. But difficulties surround its use even in relation to witnesses other than defendants or complainants in a sexual case, when fewer restrictions apply to the kind of character evidence which can be offered. This chapter considers the general issues raised by the use of character evidence in a trial.

38 The current rules controlling the use of character evidence, such as those contained in s 5(4) of the Evidence Act 1908 (as interpreted with the assistance of the Criminal Evidence Act 1898 (Eng) s 1(f)), reflect a view of character which assumes that:

- there is such a thing as "character";
- people act in conformity with identifiable and measurable traits which can be the subject of testimony (eg, honesty, violence);
- people act in conformity with those traits across a range of circumstances; and
- "good" character traits indicate a "good" person, and "bad" character traits indicate a "bad" person.

To what extent is a person's character a useful indicator of how that person will act in a given situation?

39 The assumption that there is a discernible pattern to behaviour which is influenced by character traits has led the law to admit character evidence for two purposes (although sometimes it is difficult to draw a clear distinction between the two):

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2 *Cross on Evidence* (Tapper) (7th ed, Butterworths, London, 1990) 312.

3 The Commission recognises that terms like "complainant" and "victim" have unfortunate negative connotations. This paper uses the term "complainant" largely because it features in the relevant legislation (eg, s 23A Evidence Act 1908), and its continued use avoids confusion. Alternatives such as "principal witness" are too general and could result in ambiguity.

- to attack or bolster the credibility of a witness; and
- to prove a fact in issue (as circumstantial evidence).

For either purpose, however, the evidence is admitted on the assumption that it indicates how a person might act in a given situation, and that the fact-finder will more accurately ascertain the fact in issue by hearing such evidence. This reasoning is said to be in accordance with everyday experience.[4]

40 But the common law rules have also reflected the clear recognition by judges that such evidence can be highly prejudicial in certain circumstances. This is particularly so in the context of a criminal trial. The rules allowing admission of character evidence have become so complex because of attempts to strike a balance between the desire to admit character evidence believed to be useful and the potential for unreliability and unfairness if the evidence is used inappropriately.

CHARACTER AND EMPIRICAL RESEARCH

41 Much research has been done by psychologists to test commonsense assumptions about character and to explore the existence of individual disposition and its effect on behaviour. This research was thoroughly traversed by the Australian Law Reform Commission, and the Law Commission acknowledges extensive use of its work.[5] The results of the research are instructive. On the one hand, they confirm that character as a concept can be said to exist and that it can assist in predicting behaviour. On the other, they vindicate the common law's caution about the use of character evidence, showing that character evidence is reliable only in limited circumstances.

42 The term applied by psychologists to character is *personality*. One widely accepted definition of personality is that it refers to "more or less stable, internal factors that make one person's behaviour consistent from one time to another, and different from the behaviour other people would manifest in comparable situations".[6] The particular relevance of this definition to evidence of character and credibility is in the assumption of consistent – and therefore predictable – behaviour.

43 The influence of personality alone on behaviour appears to be limited, however, as it is important also to take environmental or situational factors into account. The prevailing view is that it is the *interaction between personality and situational factors* which comprises the primary influence on behaviour.[7] This means that situations of differing significance to an individual will induce differing behaviour. To take an obvious example, an individual might have a tendency to lie when questioned by a figure in authority, but not when questioned by peers. Or, in the case of anxiety, an individual may become anxious in a situation threatening physical harm, but not in a situation where

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4 "The character or disposition of the persons we deal with is in daily life always more or less considered by us in estimating the probability of his future conduct." (*Wigmore on Evidence*, Vol 1 (3rd ed), para 55)

5 See ALRC Report 26 (interim), *Evidence Law* (Canberra, 1985) 451–456.

6 See Hampson, *The Construction of Personality* (2nd ed, Routledge, London and New York, 1988) 1.

7 See Davies, "Evidence of Character to Prove Conduct: A Reassessment of Relevancy" (1991) 27 Crim LB 504, 518–519; Mendez, "The Law of Evidence and the Search for a Stable Personality" (1996) 45 Emory LJ 221, 230.

his or her ego is threatened. For one situation to have any predictive effect on behaviour in another situation, there will normally need to be a close correlation between the two situations.

44 Interactionism, as this theory is known, is open to criticism. For instance, although it "demonstrate[s] the importance of interactions, [it] does not explain them".[8] Nevertheless, it is widely accepted, and more recent research has attempted to refine the methodologies claiming to demonstrate behavioural consistency. The work on personality and its consistency does at least allow two conclusions to be drawn:

- even if an individual has a specific personality trait, its existence cannot be inferred with confidence from a single observation of a person's personality; and
- even if a personality trait is known, it will not necessarily assist in predicting an instance of conduct in isolation.

High predictive value requires a number of instances of conduct and a degree of similarity between the situations.

45 Research has also focused on the way in which information on personality can be used when people are asked to ascertain facts by reference to it. The results show that the probative value of character evidence can be overestimated and relied upon to a greater extent than it may warrant.

46 In a typical experiment, two separate groups of people were presented with the personal characteristics of a fictitious person. The characteristics were disclosed to the groups by reading out a list of adjectives which described known personality traits. The presentations were different in only one respect: one person was described as warm, the other as cold. On the basis of the information given, the two groups formed significantly different impressions of the person presented. The group who were advised that the person was "warm" formed more positive views of the person than the group who were told otherwise identical facts about a person described as "cold".[9] The results of this experiment have been confirmed repeatedly;[10] and their consistency has been explained by psychologists in a number of ways. Two explanations which are particularly illuminating are the "halo effect" and "attribution theory".

The halo effect and attribution theory

47 Thorndike, a pioneer in the field, described the "halo effect" as "a marked tendency to think of the person in general as rather good or rather inferior and to color the judgments of the qualities by this general feeling."[11] The perception of a dominant "good" quality will lead to favourable judgments and the perception of a dominant "bad" quality to unfavourable judgments. Perhaps the most immediate example is physical attractiveness: exploited by the advertising industry on the basis that an attractive presenter will make a product equally attractive, it has similarly been shown to result in favourable

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8 Hampson, 87.

9 Asch, "Forming Impressions of Personality" (1946) 41 J Abnorm & Soc Psychol 258.

10 See ALRC Report 26, 454–455, for a full discussion of research in this area.

11 Quoted in Lachman and Bass, "A Direct Study of Halo Effect" (1985) 119 The J of Psychol 535.

treatment by the justice system.[12] However, although research has clearly demonstrated the occurrence of the halo effect, it has not been able to explain how it happens.[13]

48 Research further shows that the context in which the information is received is an important influence on the way the information is used. This is particularly relevant in a criminal trial because the fact-finder's perceptions of the defendant are likely to be influenced by his or her arrest and charging, which will correspondingly reinforce any negative view of the defendant.

49 "Attribution theory" describes the process which occurs when one observation of a person's behaviour is seen as indicative of long-standing and stable personality traits. Since it has been established that people's responses to what is said by a person can be influenced by the personality they attribute to them,[14] this process has particular implications for the assessment of a witness's credibility by the fact-finder. It means that factors such as reputation or demeanour may have an influence on the fact-finder out of all proportion to their actual evidential value. It also throws into relief the distortions that can be brought about by the fact-finder's failure to recognise and take into account behavioural characteristics which are culturally determined. In New Zealand this failure is apparent, for instance, in the response to witnesses and defendants who are of Mäori or Pacific Island origin.

50 The conclusions to be drawn from psychological findings, then, are, first, that assessments of character and credibility are frequently made on a superficial basis; and, secondly, that evidence which relies on an individual's propensity to behave in a certain way runs the risk of being misleading or, worse, of resulting in an invalid inference of guilt. They therefore vindicate the wariness traditionally shown by the courts towards such evidence.

Regret matrix

51 The operation of what has been termed the "regret matrix" compounds the distortions brought about by the perception of personality when dealing with the defendant.[15] It has been observed that a decision-maker will usually seek to minimise regret at the outcome of any decision. Thus, in making a decision about guilt, a juror will seek to minimise the regret felt if a wrong decision is made. Jurors will not want to wrongly convict someone about whom they have a positive impression, and, conversely, they feel less regret at wrongly convicting someone about whom they have a negative impression. A defendant whose previous convictions or misconduct are disclosed is more likely to make just such a negative impression on jurors and thus minimise the jurors' regret at a wrong conviction.

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[12] See Cialdini, *Influence: The New Psychology of Modern Persuasion* (Quill, New York, 1984) 166–169.

[13] Lachman and Bass, 539.

[14] Kelman and Eagly, "Attitude Toward the Communicator, Perception of Communication Content and Attitude Change" (1965) 1 J Pers & Soc Psychol 63. It should be noted, however, that more recently psychologists have concluded that the inaccuracy in assessing the character of others might have been exaggerated: see Davies, "Evidence of Character to Prove Conduct: A Reassessment of Relevancy" (1991) 27 Crim LB 504, 529.

[15] Lempert and Saltzburg, *A Modern Approach to Evidence* (West Publishing, St Paul, 1977) 151–153.

Jury direction

52 Once evidence about the character of a party or witness is admitted, the major means used by the court to control its reception is to direct the jury as to its proper use. There have been studies of the efficacy of judicial directions in restricting the use of evidence by jurors.[16] The results clearly show that such directions have at best a limited effect on jurors' use of evidence, and that the direction of the judge is not the only factor which influences the way in which the evidence is used. Some research suggests that the strength of the case against a defendant – quite apart from the evidence to which the direction applies – is a factor in how the jury decides to use the evidence. When there is an otherwise strong case, they are more likely to use the evidence in accordance with directions. But if other evidence is weak, providing little alternative information on which to base a decision, then the jury is less likely to confine its use to that directed by the judge.[17]

53 Another factor influencing jury adherence to a limiting direction appears to be the scope of the direction. If a judge's direction is limited to a point of law – for example, in ruling evidence inadmissible that has been heard by the jury and directing that it be totally disregarded – the jury is more likely to adhere to the direction.[18] Adherence is likely to diminish, however, if, as well as giving a legal ruling, the directions extend to *how an admissible item of evidence should be used*. When jurors perceive that the judge is encroaching on their responsibility for finding facts, they seem to react by resisting direction.

How effective are judicial directions in ensuring that juries give evidence of character its appropriate weight?

PRINCIPLES FOR REFORM

54 Psychological research suggests that care should be taken when admitting character evidence. It also indicates that once the evidence is admitted it may be misused by jurors in ways which can adversely affect the party against whom it is offered. Directions given by the judge in summing up may be of limited value in controlling the potential misuse of character evidence, since they might not provide a sufficiently effective counterweight to its prejudicial effect.

55 The present rules controlling the admission and use of character evidence have been developed in an attempt to strike an appropriate balance – between the commonsense assumption that it is useful for a fact-finder to know about the character of a defendant or witness, and an instinctive concern to ensure that such information does not unfairly prejudice the party against whom it is offered or indeed spuriously bolster a party's case. That remains the appropriate

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16 See, for example, Sue, Smith and Caldwell, "Effects of Inadmissible Evidence on the Decisions of Simulated Jurors: A Moral Dilemma" (1973) 3 J App Soc Psychol 345; Wolf and Montgomery, "Effects of Inadmissible Evidence and Level of Judicial Admonishment to Disregard on the Judgments of Mock Jurors" (1977) 7 J App Soc Psychol 205; Wissler and Saks, "On the Inefficacy of Limiting Instructions: When Jurors Use Prior Conviction Evidence to Decide on Guilt" (1985) 9 Law and Human Behaviour 37.

17 Sue, Smith and Caldwell, 351–352.

18 Wolf and Montgomery, 217.

balance to strike. However, because so many of the assumptions that gave rise to the rules were untested and because the rules and the manner in which they are applied have become so complex and technical, the balance is not always achieved. The Commission considers that the rules should be reviewed to ensure that they

- reflect what the empirical research has discovered about the reliable use of character evidence;
- aim to admit only that character evidence which is likely to be substantially probative or substantially helpful; and
- exclude as far as possible evidence about character which is now considered to be an unreliable indicator of behaviour.[19]

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[19] The rules on character evidence should also endeavour to restrict the use of jury directions to situations where directions are known to be effective. However, this proposal will be reviewed in the light of research which is currently being undertaken on jury warnings in general.

Part II

CREDIBILITY

4
Credibility and truthfulness

56 THE FACT-FINDING PROCESS of a courtroom trial is based on the giving of oral testimony. The credibility of witnesses is therefore a fundamental concern. Indeed, credibility may often be the pivot on which the outcome of litigation turns. Frequently, the question for the fact-finder is whether there is more reason to believe the witness or witnesses of one party than the other.

57 The function of determining credibility lies exclusively with the tribunal of fact, whether judge or jury.[20] This function is respected by appellate courts, which have long been reluctant to interfere with findings of fact, particularly those based on credibility. A consequence of this attitude is that an assessment of credibility made at first instance is rarely disturbed on appeal. It is therefore vital that the rules which provide the framework for assessment of credibility are rational, consistent and fair.

58 The assessment of credibility depends on a number of factors, some of which have become legally significant and are reflected in the rules (both statutory and common law) which determine the admissibility of credibility evidence. These factors include

- prior convictions,
- reputation,
- previous statements,
- physical or mental disorder,
- demeanour,
- bias,
- corroboration,
- the weight of contrary or supporting evidence, and
- the fact-finder's experience.[21]

59 Not all of these factors will be considered here. The last two in particular must be omitted.[22] This is not because they are of less significance, but because – in the context of credibility at least – they cannot be subject to rules and depend rather on the unique circumstances of each trial. In many instances these two factors may play a larger role in the assessment of credibility than those which are subject to specific rules. It will more commonly arise, for instance,

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[20] See *R v B* [1987] 1 NZLR 362, 367: "The assessment of the credibility of a witness is first and foremost a jury function."

[21] The fact-finder's experience is relevant not only to credibility, but also to an aspect of judicial notice (see *Evidence Law: Documentary Evidence and Judicial Notice* (NZLC PP22, Wellington, 1994) paras 268–276) and to opinion evidence (see *Evidence Law: Expert Evidence and Opinion Evidence* (NZLC PP18, Wellington, 1991) ch IV).

[22] Corroboration, while an aspect of the weight of evidence, is discussed separately in ch 6 because until recently it was subject to a number of technical rules.

that a witness is seen to lack credibility through giving evidence which is internally inconsistent (or inconsistent with other evidence) than through being shown to have previous convictions.

TRUTHFULNESS

60 Credibility is a term which is used somewhat loosely. It in fact encompasses two principal notions: *truthfulness* and *error*. With truthfulness the issue is the intention of the witness; that is, whether the witness is lying. In the case of error, even though the witness intends to tell the truth, the reliability of the evidence is in question because the witness:

- may be unable to remember; or
- may be mistaken about or even unaware of certain aspects of the evidence.[23]

Error may also be the subject of expert evidence (see paras 79–85). Provided that the evidence is relevant and, where necessary, satisfies expert and opinion rules, there is no limit on adducing evidence which shows a witness to be in error.

Is it helpful to divide the notion of credibility into "truthfulness" and "error"?

61 The law of evidence has not always explicitly isolated the concept of truthfulness,[24] even though it lies at the heart of the rules governing evidence of credibility. But it is important to do so, because while parties are relatively free to show that a witness is in error, there are more restraints on challenging a witness's truthfulness. The reason is that such challenges are more likely to waste the court's time and lead to confusion, and that, in the case of the defendant, they can be unfairly prejudicial. The concern of Part II of this paper is therefore primarily with assessing truthfulness, and with developing rules for an evidence code which provide the best framework for that assessment. If the focus of the rules were to remain on the broader concept of credibility, then it would be necessary to devise exceptions relating, for example, to the ability of a witness to see and perceive accurately.

Should evidence of truthfulness be subject to more rigorous control than evidence of error?

62 Parties often seek to determine truthfulness by an investigation of character. The conclusions reached by the psychological research into the nature of character, as outlined in chapter 3, confirm that only evidence which has been shown to have a high level of predictive and therefore probative value

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[23] This is a distinction broadly recognised by the courts. See, for example, *Police v Tavinor* (unreported, HC Whangarei, AP 6/90, 20 September 1990) 8; *A v The Police* (unreported, HC Christchurch, CP 315/93, 17 December 1993) 9; *R v T* (unreported, HC Christchurch, T No.45/93, 15 March 1994) 4. Elsewhere the distinction has been drawn between credit ("whether a witness can be relied on to tell the truth") and credibility ("whether a witness is accurate"): see Seniuk, "Judicial Fact-Finding and Contradictory Witnesses" (1994) 37 Crim LQ 70, 78.

[24] An exception is r 608 of the Federal Rules of Evidence (US) (see appendix C).

should be admissible (paras 54–55). This part of the research paper acknowledges the safeguards already in place to ensure that only relevant and reliable evidence is admitted, but also concludes that some of the rules relating to evidence of truthfulness are no longer adequate and require modification or extension.

63 Part II begins in this chapter by examining the principles which should control admission of evidence of truthfulness and by considering briefly the interplay between expert evidence and credibility. The following two chapters address various types of evidence concerning truthfulness. The first considers previous convictions, reputation, inconsistent statements, and demeanour, and the second, the issues of bias, corroboration and jury warnings. In each case the paper examines the adequacy or otherwise of the current rules which attach to them. The final chapter in Part II (chapter 7) discusses three procedural rules which have considerable impact on the assessment of credibility – the rule prohibiting a party from bolstering the credibility of a witness, the rule prohibiting a party from impeaching its own witness, and the collateral issues rule – and makes proposals for their reform.

The fundamental principles

64 In the Commission's view, two fundamental principles should underlie a court's consideration of evidence about truthfulness. First, the rules should ensure that potentially misleading or low value evidence of truthfulness is excluded. This can be achieved by a requirement that evidence concerning truthfulness must be *substantially helpful*. Secondly, the rules should ensure that the questions put to witnesses are *fair*: that is, they are not unnecessarily offensive or intended to harrass, insult, annoy or intimidate the witness.

The defendant and other witnesses in a criminal trial

65 Apart from these fundamental principles, there is a question whether in a criminal trial different rules for assessing truthfulness should apply to the defendant on the one hand, and to non-defendant witnesses on the other. Their positions can be distinguished. Other witnesses do not risk suffering such serious consequences as the defendant if their truthfulness is unfairly challenged,[25] since they are not likely to face conviction and potential loss of liberty as a result.

66 The law clearly recognises this distinction, and gives defendants a greater measure of protection from particular kinds of evidence, such as evidence of previous convictions and bad character; and the Commission endorses the importance of that special protection. However, the defendant does not always enjoy such protection; for instance, when being cross-examined by a co-defendant. We consider that the general rules governing evidence of truthfulness should be applied to all witnesses, including defendants in criminal cases. Whether it concerns defendants in criminal cases or other witnesses, evidence of truthfulness will not promote the rational ascertainment of facts if it is not substantially helpful. Also, it is unacceptable to expose witnesses,

[25] See Friedman, "Character Impeachment Evidence: Psycho-Bayesian [!?] Analysis and a Proposed Overhaul" (1991) 38 UCLA LR 637, 682–684.

including defendants in criminal cases, to unfair harrassment or attacks on their dignity.[26]

67 Thus, the following discussion of the current rules and of the proposals to modify them relates to both criminal and civil proceedings, and to all witnesses, including defendants in criminal cases. However, it must be borne in mind that further rules discussed in chapters 8 and 9 give defendants in criminal cases additional protection from evidence about character which may be unfairly prejudicial.

Should the same broad rules concerning evidence of truthfulness apply both to defendants in criminal proceedings and to other defendants and witnesses?

Existing statutory safeguards

68 Two existing safeguards which are consistent with the principles of substantial helpfulness and fairness are ss 13 and 14 of the Evidence Act 1908. These two sections state the general rules which constrain the manner in which a witness's credit may be challenged. They provide:

13 Cross-examination as to credit

(1) If any question put to a witness upon cross-examination relates to a matter not relevant to the proceeding, except in so far as it affects the credit of the witness by injuring his character, it shall be the duty of the Court to decide whether or not the witness shall be compelled to answer it, and the Court may, if it thinks fit, warn the witness that he is not obliged to answer it.

(2) In exercising this discretion the Court shall have regard to the following considerations:

(a) Such questions are proper if they are of such a nature that the truth of the imputation conveyed by them would seriously affect the opinion of the Court as to the credibility of the witness on the matter to which he testifies;

(b) Such questions are improper if the imputation they convey relates to matters so remote in time or of such a character that the truth of the imputation would not affect, or would affect in a slight degree only, the opinion of the Court as to the credibility of the witness on the matter to which he testifies;

(c) Such questions are improper if there is a great disproportion between the importance of the imputation made against the witness's character and the importance of his evidence.

(3) Nothing herein shall be deemed to make any witness compellable to give evidence upon any matter he is now by law privileged from disclosing.

14 Indecent or scandalous questions

The Court shall forbid any question it regards as

(a) Indecent or scandalous, although such questions may have some bearing on the case before the Court, unless the question relates to facts in issue, or matters necessary to be known in order to determine whether or not the facts in issue existed; or

[26] It is significant that one of the primary concerns of the report of the Royal Commission on Criminal Justice in the United Kingdom (Cm 2263, HMSO, London, 1993) related to this very issue (see recommendations 182 and 201).

(b) Intended to insult or annoy, or needlessly offensive in form, notwithstanding that such question may be proper in itself.[27]

69 Section 13 offers protection to witnesses by subjecting questions to what amounts to a test of probative value weighed against the factors of remoteness and the magnitude of the attack ("imputation") made against the witness's character. The concern is to ensure that the question will elicit information which assists the court in assessing credit, and not simply harm the witness by unfairly "injuring character". The wording of the provision, however, provides only limited guidance on the factors which go towards determining what is and what is not an improper question.

70 Section 14 has a more general ambit than s 13, in that it is not concerned solely with credit, nor is it applicable only to cross-examination. It appears to be rarely invoked in practice, yet is a valuable provision for preventing any abuse of the power to examine and cross-examine witnesses. But there may be some difficulty, under subs (b), of separating a question which is "proper in itself" from the same question when asked with the intention to insult or annoy, or when phrased in a "needlessly offensive form". If this is so, it may be that subs (a) alone provides sufficient protection.

The fundamental principles and an evidence code

71 Although there is little doubt that ss 13 and 14 are consistent with the principles of fairness to witnesses and substantial helpfulness, which are the reference point for all the rules relating to truthfulness, these sections do not articulate them clearly enough. An evidence code needs not only to do so, but also, in the case of a replacement for s 13, to offer guidelines for determining just what evidence of truthfulness will be substantially helpful.

Is it desirable to provide clearer guidelines than does the current s 13 of the Evidence Act 1908 on what are and what are not appropriate matters for cross-examination about truthfulness?

Fairness to witnesses

72 Fairness to witnesses, as noted before, requires witnesses to be protected from unfair and unnecessary attacks on their dignity and from undue harrassment. It is best controlled by means of a rule prohibiting improper questions. But while the kind of questions subject to such a rule often arise in the context of cross-examination as to truthfulness, this is not always so; and a rule prohibiting improper questions will be located amongst the trial process rules in the evidence code.

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[27] See also s 23F(5) of the Evidence Act 1908, which controls the cross-examination and questioning of a child complainant by the defendant's counsel in cases involving sexual violation:

(5) Where the complainant is being cross-examined by counsel for the accused, or any questions are being put to the complainant by the accused, the judge may disallow any question put to the complainant that the judge considers is, having regard to the age of the complainant, intimidating or overbearing.

Substantial helpfulness

73 The Commission considers that a test of substantial helpfulness should become the basis upon which evidence of truthfulness is admitted under an evidence code.[28] This will be achieved by providing that evidence which is relevant only to truthfulness is inadmissible, unless it is offered in cross-examination and is likely to be substantially helpful in assessing the witness's truthfulness (the *truthfulness rule*: see *sections 3* and *4*). Note that if evidence relevant only to truthfulness is offered about a defendant in a criminal proceeding, then that evidence will only be admissible if it is not already excluded by the character rule: *section 3(2)*.

74 The Commission is aware that in the context of cross-examination a judge may need to exercise care in deciding on the helpfulness or otherwise of evidence of truthfulness. But judges regularly control cross-examination and inquire why cross-examination is being pursued, and in most instances the judge should not have difficulty in determining whether cross-examination about truthfulness will be substantially helpful.

Is a test of substantial helpfulness a useful basis on which to determine the admissibility of evidence of truthfulness?

75 The Commission is inclined to limit the introduction of evidence of truthfulness to cross-examination (as is the case with the present rules concerning credibility) because, generally speaking, evidence-in-chief relating to truthfulness will not be an issue and should be excluded as unnecessarily time-consuming. An exception is made for evidence of a defendant's good character or for evidence of the defendant's bad character offered by the defendant (paras 179-188; 194), which may encompass that defendant's reputation for truthfulness. Once there is a rule requiring evidence of truthfulness to be substantially helpful, there may also be other occasions when it could be argued that evidence should be able to be led in chief: for example, when it is known that a witness's truthfulness will be challenged. The Commission seeks readers' views on the extent to which evidence of truthfulness should be excluded from direct examination.

To what extent should evidence of truthfulness be excluded from examination-in-chief?

76 The rule will also be accompanied by a provision offering guidance to the court in deciding whether or not the evidence is likely to be substantially

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[28] Compare s 103(2) of the Evidence Act 1995 (Aust), which has a requirement of "substantial probative value" for evidence relevant only to credibility in cross-examination. The Law Commission was initially inclined to use the same term, but decided that, for two reasons, it could lead to confusion: first, truthfulness is not a matter that has to be *proved*, as such; and, secondly, "probative value" is part of the balancing test in the Commission's proposed propensity rule (*section 18*), discussed in ch 9. The term "helpfulness" also has the advantage that it aligns with the test proposed by the Commission for expert and opinion evidence: see *Evidence Law: Expert Evidence and Opinion Evidence* (NZLC PP18, Wellington, 1991) ch V.

helpful: *section 10(1)*. It includes such matters as:

- the witness's record for untruthfulness (that is, whether the witness has been untruthful when under a legal obligation to tell the truth);
- the witness's previous convictions;
- previous inconsistent statements made by the witness; and
- the possibility that the witness is biased or has a motive to be untruthful.

Also relevant will be the time which has elapsed since the events which underlie the evidence of a lack of truthfulness: *section 10(2)*. This preserves the notion of remoteness contained in the current s 13(2)(b) of the Evidence Act 1908.

Are the matters listed in *section 10* of the proposed code rules adequate to guide the court in deciding whether or not evidence of truthfulness is likely to be substantially helpful?

77 The Commission proposes further exceptions to the rule, which will allow expert evidence about truthfulness (see paras 79–85) and evidence which bolsters credibility after truthfulness has been challenged: *sections 5* and *9* (see chapter 7, paras 137–139). It also proposes to abolish the collateral issues rule, bringing collateral facts within the test of substantial helpfulness: *section 8* (see paras 152–160).

78 Another exception is required for the situation where the truthfulness of the maker of a hearsay statement is challenged. Under the Commission's proposed hearsay rules,[29] hearsay statements can be admitted, and their makers will not be called to give evidence. *Section 6* allows a party to offer evidence challenging the truthfulness of makers of hearsay statements, provided that the evidence is likely to be substantially helpful. It is comparable to s 107 of the Evidence Act 1995 (Aust) which allows evidence relevant only to truthfulness about matters on which the person could have been cross-examined if that person had given evidence. Criminal defendants who offer evidence (through another witness) of their own exculpatory or other statements are themselves exposed under the Commission's hearsay rules.[30] That situation is not affected by *section 6* and is one of the reasons why that provision includes no leave requirement.

EXPERT EVIDENCE OF CREDIBILITY

79 Evidence reflecting on credibility – whether relating to error or to truthfulness – can sometimes be given by an expert witness such as a doctor, a psychiatrist, or a psychologist. Often this evidence concerns some form of mental or physical disorder which affects a witness's ability to give accurate testimony. The complex case law in this area indicates that the courts have viewed expert evidence reflecting on credibility with considerable caution. In its proposed reforms the Law Commission seeks to maintain this cautious approach to such evidence while simplifying the law.

80 Expert evidence reflecting on credibility has many forms. Most often it concerns the possibility of error in testimony which the witness sincerely

[29] See *Evidence Law: Hearsay* (NZLC PP15, Wellington, 1991) 32–35.

[30] See s 4(2)(b), *Evidence Law* (NZLC PP15) 34.

believes is true. Often, rather than dealing solely with credibility, it corroborates testimony by providing evidence of physical, mental or emotional symptoms which are consistent with the witness's account of events. Sometimes, however, it suggests directly that the witness is capable of and is giving a true (or false) account. Some examples are useful to illustrate the range of testimony:

- An ophthalmologist may give evidence of an impairment of vision to show that a person's testimony as an eyewitness to events may be inaccurate. This relates more to whether the witness is mistaken about the observation than to whether the witness is lying.
- A psychologist may seek to give evidence that a witness suffers from a mental disorder which leads that witness to have delusions and to be unable to distinguish those delusions from reality. This testimony is relevant to truthfulness, though it may also be directly relevant to whether what the witness said actually ever happened.[31]
- In sexual abuse cases, psychologists may be called upon to give evidence that the child complainant's behaviour or emotional state is consistent with sexual abuse.[32] This evidence confirms the child's account, but is generally presented as corroborative observation rather than an opinion on credibility. Formerly, such evidence was excluded (see *R v B (an accused)* [1987] 1 NZLR 362), but some expert evidence in this form is now admissible under s 23G of the Evidence Act 1908 (as amended in 1989).[33]

81 Parties therefore seek to offer diverse types of expert evidence reflecting on credibility. The matter is further complicated because often the expert evidence is directly relevant to the facts in issue as well as to the credibility of a witness. There is considerable confusion and uncertainty in the case law concerning when and on what terms expert evidence reflecting on credibility is admissible. Not only have rules relating to expert evidence been applied, such as the ultimate issue rule and the common knowledge rule,[34] but also reliance has been placed on the rules governing credibility evidence, such as the rule that a party may not bolster the credibility of its witness unless it has first been impugned: see para 137.

82 The Commission's view, expressed in the earlier discussion paper *Evidence Law: Expert Evidence and Opinion Evidence*, is that the value of the expert evidence depends crucially on its reliability. Reliability may be evaluated in turn with reference to such factors as the expert's qualifications, the quality of the expert's assessment, and the state of knowledge on the particular topic. In general, expert evidence which is demonstrably reliable, on whatever topic, should be admitted; and unreliable expert evidence should be excluded.

83 However, in the earlier paper the Commission indicated that expert evidence on credibility was a difficult topic which needed to be specifically considered

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[31] See, for example, *R v Toohey* [1965] AC 595 (HL).

[32] Such evidence has been referred to as "social framework evidence", which may "be necessary not because the subject is a matter of common knowledge but rather because what is commonly 'known' about is simply wrong": see Norris and Edwardh, "Myths, Hidden Facts and Common Sense: Expert Opinion Evidence and the Assessment of Credibility" (1995) 38 Crim LQ 73, 83.

[33] See NZLC PP18, paras 49–54, for a more detailed discussion of this issue.

[34] See NZLC PP18, paras 39–54. These rules are now in a state of flux: see *R v Decha-Iamsakun* [1993] 1 NZLR 141; *R v Hohana* (1993) 10 CRNZ 92.

in the context of credibility (NZLC PP18, para 50). Having reviewed this topic, the Commission now considers that the test of substantial helpfulness also proposed for expert evidence is an appropriate test of reliability for expert evidence reflecting on credibility.[35] The Commission proposes to allow all expert evidence reflecting on credibility or truthfulness to be admitted so long as it is substantially helpful under that rule: see *section 5* which provides that truthfulness evidence which satisfies the opinion rule is admissible. The Commission recognises that there is at present no means by which experts can determine a witness's *intention* to tell the truth, but it prefers to include a code rule which at least allows for that possibility.

84 The Commission's approach simplifies the law by requiring that expert evidence concerning credibility – whether error or truthfulness – will be assessed under the code provisions governing expert evidence. To apply the truthfulness rules to expert evidence would unnecessarily complicate the issue. Expert evidence reflecting on credibility is most often relevant directly to the fact in issue as well as to credibility. It would therefore be extremely rare that the truthfulness rules alone would apply;[36] rather than engage in complex arguments in individual cases about whether the truthfulness rule applies to particular expert evidence, it is preferable in the first instance to consider that evidence under the expert evidence regime.

85 However, this does not mean that expert evidence reflecting on credibility will be readily admitted. As noted in the paper on expert evidence, where such evidence relates solely and directly to credibility it must, on the current state of knowledge, be regarded as suspect. The rule of substantial helpfulness is a significant additional control on the quality of expert evidence and will operate to exclude unreliable evidence as well as evidence which is valueless and time-wasting. Further controls are unnecessary.

Is it sufficient to allow the Commission's proposed opinion rule to control expert evidence of a witness's truthfulness?

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[35] The opinion rule developed by the Commission in its discussion paper on *Evidence Law: Expert Evidence and Opinion Evidence* (NZLC PP18) will be modified correspondingly to require that the evidence *substantially* "help[s] the court or jury to understand other evidence in the proceeding or to ascertain any fact that is of consequence to the determination of the proceeding": *section 4*.

[36] A recent example of a case which might fall into this category is *R v Meads* [1995] Crim LR 521, in which the defence sought on appeal to offer fresh evidence from two forensic experts in relation to whether police witnesses could have made handwritten notes of disputed interviews in the time they claimed.

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Some categories of evidence of truthfulness

86 THIS CHAPTER FOCUSES ON CERTAIN KINDS OF EVIDENCE traditionally used to challenge the truthfulness of a witness. The object is to examine the law relating to each and determine how an evidence code should address it. The categories of evidence in question are

- previous convictions,
- reputation,
- previous inconsistent statements, and
- demeanour.

PREVIOUS CONVICTIONS

87 In this area of the law, the position of defendants in criminal proceedings and that of other witnesses have always been distinguished, on the ground that introducing a defendant's convictions in evidence will frequently be unfairly prejudicial. Previous convictions can only be offered against the defendant in the limited situations which are detailed in chapters 8 and 9. But witnesses other than defendants in criminal cases receive less protection, and they are the focus of the following discussion.

88 Although it is doubtful whether people are inherently "truthful" or "untruthful",[37] some psychological research suggests that there is a correlation between past antisocial behaviours and the readiness to lie.[38] That is, an individual who commits criminal offences on an habitual basis is less likely to have a regard for telling the truth. This provides some theoretical justification for admitting previous convictions when truthfulness is challenged. However, the connection between the two should be treated with considerable caution, because it does not take into account the variability of human behaviour across situations and across time. In addition, it is not clear whether all or only some kinds of previous convictions increase the probability that a witness is lying; and if only some kinds do, how they can be identified.

Is there a valid link between a person's convictions and that person's disposition to be untruthful?

[37] See ch 3, paras 43, 47.

[38] Friedman, "Character Impeachment Evidence: Psycho-Bayesian [!?] Analysis and a Proposed Overhaul" (1991) 38 UCLA LR 637, 654. See also Australian Law Reform Commission, interim report No 26, *Evidence* (Canberra, 1985) 451–456.

What kind of convictions should go to truthfulness?

89 Section 12 of the Evidence Act 1908 allows a party to put to a witness in cross-examination a previous conviction for an *indictable* offence, and to prove it if necessary:

> 12 Proof of previous conviction of witness
> A witness may be questioned as to whether he has been convicted of any indictable offence, and, upon being so questioned, if he either denies or does not admit the fact, or refuses to answer, the cross-examining party may prove such conviction.

In *Wilson v Police* (1991) 7 CRNZ 699, the Court of Appeal noted that the aim of s 12 is not to limit the scope of cross-examination, but to overcome the collateral issues rule (see paras 152–160) so far as indictable offences are concerned. Section 12 allows the cross-examining party to prove an indictable conviction which the witness does not admit, whereas the ordinary operation of the collateral issues rule would prevent this when the conviction does not go to prove a fact in issue. Thus, the section is not meant to imply that questions about *summary* convictions may not be *asked*. The Court in *Wilson* did, however, temper its conclusion by pointing out that in view of s 13 of the Act (which protects witnesses during cross-examination), counsel should seek leave before cross-examining the witness about any conviction (703).

90 The Court of Appeal's approach to s 12 reflects the common law position, which has not sought to distinguish between classes of convictions which may be put to a witness. As was said in *Clifford v Clifford* [1961] 3 All ER 231, 232: "It has never, I think, been doubted that a conviction for any offence could be put to a witness by way of cross-examination as to credit, even though the offence was not one of dishonesty."[39] Thus, subject to the leave requirement and s 13 of the Evidence Act 1908, counsel can generally confront witnesses with their convictions, whether they are for offences which demonstrably reflect on the truthfulness of the witness or not. The issue as far as reform of the law is concerned, therefore, is whether convictions put to the witness should be limited to those for offences of *dishonesty*. This is because there may be a higher correlation between committing offences of dishonesty and a tendency not to tell the truth.

The approach of other jurisdictions and law reform agencies

91 The Canadian Task Force recommended that "cross-examination as of right should be permitted on convictions for offences of dishonesty". In doing so, it pointed to the "greater probative value on the issue of credibility" which such offences have.[40] It recognised, however, that the meaning of "dishonesty" is not entirely clear, and its response was to widen the definition "to include convictions for crimes involving theft or robbery as well as such offences of express or implied misrepresentation as forgery, false pretences, perjury and giving contradictory testimony" (346). It recommended further that if the

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[39] For a contrary position, compare *R v Sweet-Escott* (1971) 55 Cr App R 316; *Morgan v Steel* (unreported, CA 40/91, 17 August 1992).

[40] Report of the Federal/Provincial Task Force on Uniform Rules of Evidence (Carswell, Toronto, 1982) 345.

conviction is not for a crime of dishonesty, the court should retain a discretion to allow cross-examination if the evidence is nevertheless of "substantial relevance" to credibility (351).

92 The English Criminal Law Revision Committee, on the other hand, did not believe that dishonesty should be the test, being satisfied instead with a more general criterion of relevance.[41] However, the Rehabilitation of Offenders Act 1974 (UK) makes evidence of spent convictions inadmissible in civil proceedings (s 4), excluding those for a term exceeding 30 months (s 5); and a practice direction ([1975] 1 WLR 1065; [1975] 2 All ER 1070) recommended that in criminal proceedings court and counsel should "never [refer] to a spent conviction when such reference can be reasonably avoided".[42] More recently, the Law Commission of England and Wales has proposed that this practice direction be enacted in statutory form.[43] Significantly, it has also reached the provisional conclusion that, as far as the relevance of previous convictions to credibility is concerned, it is not appropriate "to prescribe in a statute which kinds of conviction are and are not probative" (para 6.63).

93 The Australian Law Reform Commission proposed that, in general, before evidence of previous convictions should be allowed in cross-examination it must first meet the requirement of "substantive probative value".[44] The Evidence Act 1995 (Aust) does not deal expressly with previous convictions in relation to credibility. Instead it features a general provision (s 103(1)) requiring substantive probative value for any evidence relating to credibility. It further highlights in subs (2) two factors which must be taken into account in determining the latter (although these factors are non-exhaustive):

(a) whether the evidence tends to prove that the witness knowingly or recklessly made a false declaration when the witness was under an obligation to tell the truth; and
(b) the period that has elapsed since the acts or events to which the evidence relates were done or occurred.

Section 106, which is concerned with rebuttal evidence, makes explicit mention in paragraph (b) of convictions, and there seems to be no limit to the type of convictions which may be proved.[45]

94 The US Federal Rules of Evidence also take a restrictive approach. Rule 609 lays down certain conditions for admissibility of convictions in order to attack the credibility of non-defendant witnesses. First, the conviction must be for a crime punishable by death or imprisonment in excess of one year. Secondly,

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41 Eleventh Report, *Evidence (General)* (Cmnd 4991, HMSO, London, 1972) 99.

42 A subsequent decision, *R v Evans* [1992] Crim LR 125, has qualified the effect of this practice direction by holding that in a situation where there is "evidentially speaking a head-on collision" between two witnesses, and one of them has a spent conviction, then the jury is entitled to know that witness's criminal record.

43 Consultation Paper No 141, *Criminal Law: Evidence in Criminal Proceedings: Previous Misconduct of a Defendant* (HMSO, London, 1996) para 14.22.

44 Report 38, *Evidence* (Canberra, 1987) 105.

45 The conclusions reached by the ALRC on cross-examination about previous convictions are reliant on the findings of psychological research which indicate that evidence of previous convictions may have an impact on the fact-finder out of proportion to its importance and may therefore be misused (451–456). The restrictions proposed by the ALRC are therefore consistent with the policies underlying this discussion paper, as expounded in ch 3.

there is a limitation period of 10 years from the date of the conviction or the release from prison of the witness (whichever is the later). Thirdly, the evidence is subject to Rule 403 which requires that it must not be unfairly prejudicial, or confuse the issues or waste time. However, it is significant that there are no restrictions if the conviction involved dishonesty or a false statement, whatever the category of witness and whatever the punishment.

95 Rule 609 further states that with defendants evidence of a conviction for a non-dishonesty offence can only be admitted if the court is satisfied that its probative value outweighs the prejudicial effect. It does not allow such discretion in the case of other witnesses. The rationale is that ". . . the danger of prejudice to a non-defendant witness is outweighed by the need for the trier of fact to have as much relevant evidence on the issue of credibility as possible".[46]

96 However, as one commentator points out, to allow evidence of convictions for non-dishonesty offences in the case of non-defendant witnesses in a criminal case creates a real danger of unfair prejudice, not so much to the witness as to the defendant.[47] A perceived lack of truthfulness in the witness, based on evidence of a conviction for a non-dishonesty offence, may reflect unfavourably not only on the credibility of the witness but also on the case of the party calling the witness.

The Law Commission's approach

97 In the Commission's view, evidence of previous convictions can only be of limited predictive value – and therefore helpfulness – in assessing the truthfulness of a witness. It may be that only convictions for offences such as perjury correlate closely with the possibility of the witness lying at trial. But to exclude other kinds of convictions altogether might unnecessarily impede the fact-finding process.[48] For instance, in cases where a defendant pleads self-defence to a charge of assault, the fact-finder's assessment of the alleged victim's truthfulness could properly be influenced by his or her previous convictions for violent offences.[49]

98 The circumstances of individual cases can vary so much that it is in the Commission's view unhelpful – if not impossible – to list in advance the kind of convictions which may or may not be put to a witness during cross-examination. As the law in New Zealand now stands, s 13 of the Evidence Act probably already has the effect of restricting the type of convictions which may be put in cross-examination as to credit. The Commission's requirement that all evidence of truthfulness be substantially helpful will maintain that restriction. For this reason the Commission, while accepting that some previous

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[46] Federal Rules of Evidence for United States Court and Magistrates (West, St Paul, 1993) 77.

[47] Williams, "Witness impeachment by evidence of prior felony convictions: the time has come for the Federal Rules of Evidence to put on the new man and forgive the felon" (1992) 65 Temple LR 893, 928.

[48] An example of a case where convictions not involving deceptive behaviour were taken to reflect on truthfulness is provided by the Australian case of *Bugg v Day* (1949) 79 CLR 442. Here, in an action for negligence arising out of a motor accident, the court allowed convictions for traffic offences to be put to the defendant during cross-examination as to credit.

[49] See, for example, *R v Wilson* [1991] 2 NZLR 707, 709–711 (HC).

convictions can be relevant to truthfulness and should therefore be admissible, does not propose to specify the kinds of previous convictions which are admissible. However, it seeks readers' views on whether this is the best course.

Should cross-examination about a non-defendant witness's convictions be limited to convictions of a particular type, such as for offences of dishonesty? If so, how should dishonesty be defined?

REPUTATION

99 Reputation presents particular difficulties in an evidentiary context. On the one hand, the law distinguishes between evidence of general reputation and evidence of individual opinion and, in the case of the defendant in criminal proceedings, has historically recognised only the former.[50] On the other hand, it is not always clear what is meant by reputation. On occasion, it appears to be used interchangeably with *character*. It may be important therefore to distinguish between character as *public estimation* – which is perhaps more correctly referred to as reputation – and character as *disposition* – which is something more intrinsic to the individual in question.[51]

100 In actions for defamation the first meaning is paramount, since it is the public perception of an individual which the law of defamation protects. The second meaning is of primary significance when a party seeks to offer similar fact evidence to show an individual's propensity to commit certain offences: see chapter 9. In both cases, the evidence of reputation goes to the issue. But reputation has also traditionally been a factor indicative of a person's truthfulness. Its meaning in this context seems to be an amalgam of public estimation and individual disposition. The following paragraphs consider reputation as a measure of truthfulness and examine its value as evidence.

General reputation

101 Bad reputation is an aspect of bad character and might encompass convictions. Ordinarily, such evidence cannot be offered against a criminal defendant. On the other hand, the criminal defendant can offer evidence of his or her good reputation, although not without incurring certain consequences. The rules which relate to reputation evidence in respect of defendants and co-defendants are specifically addressed in chapter 8, and will not be considered further here.

102 When it comes to non-defendant witnesses, the situation is by no means certain. But, stated in general terms, the rules appear to be as follows:

- In cross-examination, a non-defendant witness may be questioned as to his or her "antecedents, associations, or mode of life which, although irrelevant to the issue, would be likely to discredit his testimony or degrade his character".[52]

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[50] *R v Rowton* (1865) Le & Ca 520.

[51] See *Plato Films v Speidel* [1961] AC 1090, 1128; 1138 (HL).

[52] *Phipson on Evidence* (14th ed, Sweet & Maxwell, London, 1990) 252; approved in *R v Tinker* [1985] 1 NZLR 330, 333.

- On the other hand, it appears that evidence of the good character of a non-defendant witness may be offered only if the truthfulness of that witness has been attacked, although there is little authority to specifically confirm even this.[53]

A witness's reputation for veracity

103 A now little-used means of challenging a witness's credibility is to question another witness about the former's reputation for veracity. This may be either a matter of general reputation or individual opinion based on personal knowledge. The practice of questioning one witness about another witness's reputation for veracity has fallen into disfavour. The reason may be that the procedure which such questioning entails is somewhat cumbersome,[54] and because the actual information yielded is of such low probative value.

104 *R v Richardson and Longman* [1969] 1 QB 299 (CA) gives a good summary of the relevant common law rules concerning reputation for veracity:

> 1 A witness may be asked whether he has knowledge of the impugned witness's general reputation for veracity and whether (from such knowledge) he would believe the impugned witness's sworn testimony.
> 2 The witness called to impeach the credibility of a previous witness may also express his individual opinion (based upon his personal knowledge) as to whether the latter is to be believed upon his oath and is *not* confined to giving evidence merely of general reputation.
> 3 But whether his opinion as to the impugned witness's credibility be based simply upon the latter's general reputation for veracity or upon his personal knowledge, the witness cannot be permitted to indicate during his examination-in-chief the particular facts, circumstances or incidents which formed the basis of his opinion, although he may be cross-examined as to them. (304–305)

105 *R v Richardson and Longman* appears to be an accepted part of New Zealand law,[55] and has been applied in *R v Royal* (unreported, HC Hamilton, T 66/91 & 6/92, 29 April 1993) 10. However, in *R v T* (unreported, HC Greymouth, T2/92, 30 July 1992), the court restricted the operation of the rule to a general challenging of veracity, and would not allow it to apply to the credibility of particular testimony (7). This further dilutes what little usefulness the rule might have.

The dubious worth of reputation evidence

106 The major issue is whether reputation evidence is a valid basis on which to assess truthfulness. The highly unsatisfactory nature of reputation evidence is now well recognised. As *Cross on Evidence* (Mathieson) points out, "[e]vidence of reputation, general or specific, is likely to be thoroughly unconvincing. It necessarily rests upon hearsay, gossip and rumour, and permits a witness without

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[53] *Phipson on Evidence* (14th ed, Sweet & Maxwell, London, 1990) 269. Orchard ("Directions on a defendant's good character" [1994] NZLJ 56, 58) questions whether any authority exists at all.

[54] See *Cross on Evidence* (Mathieson) (Looseleaf edition, Butterworths, Wellington, 1996) 364.

[55] In *R v Brosnan* [1951] NZLR 1030, 1038, a case which predates *R v Richardson and Longman*, the Court of Appeal approved this pattern of questioning.

perjury to state something which he believes to be unjustified" (596). Both the Canadian Federal/Provincial Task Force and the Australian Law Reform Commission have recommended that in the case of non-defendant witnesses, evidence of general reputation or individual opinion be inadmissible to attack or support credibility.[56] The principal reason given is that such evidence is unreliable and of low probative value. However, with respect to general reputation, the Canadian report adds that because the "concept of community is out of date", reputation may be extremely difficult to establish, other than in the case of a prominent person.

107 The Commission agrees that reputation is a weak basis upon which to assess truthfulness. The value of such evidence must be particularly doubted in the light of what is now known about the perception of character traits; namely, that factors such as reputation can exert a disproportionate influence on determining whether a witness can be believed or not: see chapter 3. There is also the risk that the witness's reputation may become unfairly compromised through unsubstantiated or false evidence.

108 However, there may be occasions on which evidence of a witness's reputation, whether bad or good, might have a useful bearing on that witness's truthfulness or lack of it. An example might be an individual's reputation within a small rural community for being an habitual liar.[57] In these circumstances the Commission would not wish such evidence to be excluded, and the rules propounded by the Commission will permit the admission of evidence of reputation if it is likely to be substantially helpful: *section 4*. This will encompass evidence of both a general nature and of particular facts (*section 11*), but evidence of individual opinion will be governed by the opinion rule as proposed in the Commission's earlier discussion paper, *Evidence Law: Expert Evidence and Opinion Evidence* (NZLC PP18, Wellington, 1991). Because reputation evidence will rarely be of substantial helpfulness, no reference to such evidence is made in the non-exhaustive list of factors provided to assist the court in *section 10(1)*.

Should evidence of reputation be excluded from the assessment of a witness's truthfulness?

PREVIOUS INCONSISTENT STATEMENTS

109 When a witness offers evidence at trial which is inconsistent with a statement made about the same matter on an earlier occasion, it may reflect adversely on the witness's credibility. There are of course a number of reasons why a witness might give inconsistent evidence – ranging from outright lying, to a desire to correct or modify an originally incorrect statement, to a simple memory lapse. Under the current law, a witness may be cross-examined on

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[56] Report of the Federal/Provincial Task Force on Uniform Rules of Evidence (Carswell, Toronto, 1982) 333-334; *Evidence Law*, interim report 26 (Canberra, 1985) 467-468.

[57] See Davies, "Evidence of Character to Prove Conduct: A Reassessment of Relevancy" (1991) 27 Crim LB 504, 522.

an earlier statement which is inconsistent with the evidence given at trial. This right is recognised, for example, in s 10 of the Evidence Act 1908, which lays down the procedure for proving the statement in cross-examination.[58]

110 Cross-examination on a previous inconsistent statement can only go to attack the witness's credibility, and not to prove the contents of the statement, unless the witness is a party and distinctly admits the statement. The reason is that the statement is regarded as hearsay.[59] However, questions designed to show that a witness has previously made a statement inconsistent with evidence given at trial are a recognised exception to the collateral issues rule. As such, it is currently possible to pursue cross-examination on a previous inconsistent statement in a manner which would normally be prohibited by that rule (see para 153).[60]

What is an inconsistency?

111 There will be cases where it is relatively easy to determine what constitutes an inconsistency. For example, "He told me he killed her" is in clear contrast to "He did not tell me he killed her". However, in other cases the inconsistency is less distinct. For example, the statements "she was a little upset", "she was distressed", "she was distraught" vary in the degree of the emotion expressed, but they are not necessarily inconsistent with each other.

112 The issue of what constitutes an inconsistency was discussed in *R v Speers* (unreported, High Court, Hamilton, 18 February 1991, T.60/90). The test for inconsistency before a previous inconsistent statement may be put to a witness was held to require a "head-on conflict". In the specific situation where information is omitted by the witness the court stated:

> Only if the statement taken in the round would be positively misleading without the omitted remark would I regard it as involving an inconsistency which could then be used as a basis for producing the prior statement. (5)

113 This approach is helpful. The test of head-on conflict allows for some flexibility but it stops pedantic cross-examination where no real inconsistency exists. If information is omitted, the requirement that the statement must be positively misleading without the information also goes a long way toward ensuring that cross-examination occurs only if there is a real inconsistency.

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[58] 10 Proof of contradictory statements of witness

Every witness under cross-examination, and every witness on his examination-in-chief (if the Judge, being of opinion that the witness is hostile, permits the question), may in any proceeding, civil or criminal, be asked whether he made any former statement relative to the subject-matter of the proceeding, and inconsistent with his present testimony, the circumstances of the supposed statement being referred to sufficiently to designate the particular occasion, and, if he does not distinctly admit that he made such statement, proof may be given that he did in fact make it.

[59] Note that the Law Commission is elsewhere proposing to reform the law of hearsay so that previous statements, whether inconsistent or not, will be admissible to prove the contents of the statement: *Evidence Law: Hearsay* (NZLC PP15, Wellington, 1991) ch VI.

[60] A recent New Zealand discussion of previous inconsistent statements as an exception to the collateral issues rule can be found in *R v Manapouri* [1995] 2 NZLR 407, 415–416 (CA) .

Previous inconsistent statements and credibility

114 The Commission considers that, in the light of other proposals which it has put forward for an evidence code, previous inconsistent statements as a means of assessing credibility or truthfulness no longer present any significant difficulties. For, on the one hand, they will become more readily admissible under the proposed hearsay rule, which is premised on the ground that if the witness is available to be cross-examined on the previous statement, then most hearsay problems are eliminated.[61] On the other hand, since there is also a proposal to abolish the collateral issues rule, the admission of previous inconsistent statements will no longer need to be justified as an exception to that rule. They will be sufficiently controlled by relevance, the general exclusion,[62] and, in the case of previous inconsistent statements offered to attack truthfulness, the requirement of substantial helpfulness. Other aspects of cross-examination on previous statements which have caused difficulty in the past are more appropriately dealt with in the context of the Commission's proposals on trial process rules. Such aspects include whether or not the cross-examining party is obliged to produce the statement, whether the judge should have a specific discretion to exclude the statement or parts of it, and the extent to which an *inadmissible* previous statement can be used.

DEMEANOUR

115 The demeanour displayed by witnesses and the manner in which they present their testimony are traditionally regarded as relevant to assessing truthfulness. This has contributed to the reluctance of appellate courts to interfere with first instance findings of fact based on a determination of truthfulness. However, a determination of truthfulness by reference to demeanour has a subjective basis which will inevitably reflect the values, experience and cultural norms of the fact-finder. The danger of assessing truthfulness by reference to demeanour alone was well expressed by the Privy Council in *AG of Hong Kong v Wong Muk Ping* [1987] AC 501, 510:

> It is a commonplace of judicial experience that a witness who makes a poor impression in the witness box may be found at the end of the day, when his evidence is considered in the light of all the other evidence bearing upon the issue, to have been both truthful and accurate. Conversely, the evidence of a witness who at first seemed impressive and reliable may at the end of the day have to be rejected. Such experience suggests that it is dangerous to assess the credibility of the evidence given by any witness in isolation from other evidence in the case which is capable of throwing light on its reliability . . .[63]

116 In addition, there is psychological research to show that "those behaviours which are popularly believed to manifest a speaker's deception are *qualitatively* and *quantitatively* different than those which are actually observed during

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[61] Although in the case of consistent statements the Commission is likely to recommend a further filter.

[62] The general exclusionary rule proposed by the Commission in *Evidence Law: Codification* (NZLC PP14, Wellington, 1991) 20, which controls evidence whose probative value is outweighed by the danger that it will have an unfairly prejudicial effect, or confuse the issues, or mislead the court or jury, or result in unjustifiable consumption of time or expense.

[63] See also Eggleston, "The Assessment of Credibility" in Morris and Perlman (eds), *Law and Crime: essays in honour of Sir John Barry* (Gordon and Breach, New York, 1972) 26, 42–44.

deception".[64] Moreover, research in the area of communication has suggested that the failure of the adversarial trial process to meet the basic communication needs of witnesses – such as the need to have some control over the discourse – can result in a negative witness demeanour which bears little relation to truthfulness.[65]

117 To misinterpret the demeanour of a witness is always a danger, but it is a particular danger when the fact-finder is confronted with a witness belonging to a different culture. In New Zealand, Mäori and Pacific Island witnesses may well display a demeanour in court which makes a fact-finder from a different cultural background less inclined to consider them truthful. But the reason why they behave in a particular manner may have nothing to do with unwillingness to tell the truth and may, for example, result from a lack of confidence in strange surroundings or a desire to please the questioner.

118 In view of the danger of misinterpreting demeanour, it might seem desirable to include in an evidence code a "statutory reminder" to the judge – similar to that in s 12C of the Evidence Act 1908 (see paras 130-132) – to consider warning the jury (or, in a judge-alone trial, to remind him- or herself) against placing too much weight on the demeanour of a witness, if the circumstances so require.

119 However, the Commission doubts that such a provision would serve a useful purpose. In the first place, the question of a warning can be addressed only according to the circumstances of each case. Secondly, an evidence code is unlikely to provide an effective framework for correcting cultural perceptions within the legal system.

Should an evidence code feature a provision requiring a judge to consider warning the jury about the danger of misinterpreting the demeanour of witnesses; and if so, what should the content of that warning be?

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[64] Blumenthal, "A Wipe of the Hands, A Lick of the Lips: The Validity of Demeanor Evidence in Assessing Witness Credibility" (1993) 72 Nebraska LR 1157, 1194.

[65] Penman, "Regulation of Discourse in the Adversary Trial" (1987) 7 Windsor Yearbook of Access to Justice 3; "Goals, Games, and Moral Orders: A Paradoxical Case in Court?" in Tracey (ed), *Goals and Discourse* (Lawrence Erlbaum, Hillsdale, NJ, 1991) 21, 39.

6
Bias, corroboration and jury warnings

120 THIS CHAPTER DEALS WITH A FURTHER CATEGORY of evidence reflecting on truthfulness: evidence of bias. It also considers the historically and conceptually linked topics of corroboration and the use of warnings to the jury.

BIAS

121 Bias is one of the factors under *section 10(1)* which the court should consider in determining whether evidence relevant only to truthfulness would be likely to be substantially helpful (see para 76). In assessing the truthfulness of a witness, it is always important for the fact-finder to know whether the witness has some interest in the outcome of the proceedings and is therefore biased. Bias might express itself positively; that is, in favour of a party. For example, the witness might be a paid informer for the prosecution.[66] Or bias might express itself negatively; that is, against a party. For example, a witness who offers evidence against the defendant might have had a sexual relationship with the defendant's husband.[67]

122 But bias can also appear in other guises. It may become an issue when the identity of witnesses must be withheld from the court, as with certain police informers[68] or undercover officers.[69] In such cases, the very withholding of identity carries with it the possible inference that the witness is predisposed in favour of the prosecution. Other forms of bias have been discerned in evidence of misconduct by police witnesses towards defendants in earlier proceedings,[70] and in evidence that the police have gone to improper lengths to secure conviction.[71]

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66 *R v Chignell* [1991] 2 NZLR 257, 273 (CA).

67 *R v Green* (1893) 11 NZLR 736 (CA). See also *R v Lintott* (unreported, CA 168/95, 25 September 1995) 13.

68 See *R v Chignell*, 273.

69 See, for example, *R v Hughes* [1986] 2 NZLR 129 (CA).

70 See Pattenden, "Evidence of Previous Malpractice by Police Witnesses and *R v Edwards*" [1992] Crim LR 549; Wolchover, "A Note of Previous Police Malpractice" [1992] Crim LR 863.

71 See *R v Funderburk* [1990] 1 WLR 587; [1990] 2 All ER 482, 492 (CA).

CORROBORATION

123 The extent of bias or disinterest a witness may have is a measure of truthfulness which has been interwoven with the rules on corroboration. Historically, the law has sometimes required corroboration of the testimony of witnesses who are not neutral, such as accomplices. In such cases, it used to be necessary for there to be more than one witness, or independent evidence confirming the individual testimony of a witness, before courts could act on that testimony.

124 A requirement of corroboration used to apply in a wide variety of situations, some involving possibly biased witnesses. However, the law of corroboration was often criticised, and it has undergone much change in recent years, to the extent that in most situations corroboration is no longer essential. In New Zealand, much of the change came about as a result of the recommendations of the 1984 Report of the Evidence Law Reform Committee.

125 Under present New Zealand law, corroboration is required as a matter of law in only two situations, namely in cases of perjury and treason. Sections 112 and 75(1) of the Crimes Act 1961 provide respectively that no one may be convicted of either offence on the evidence of one witness only, unless the evidence of that witness is corroborated in some material particular by evidence implicating the accused. In two other situations the statute expressly states that not only is corroboration *not* required, but that the judge is also not required to warn the jury about the absence of any corroboration: these involve the evidence of accomplices and of complainants in sexual cases (sections 12B and 23AB of the Evidence Act 1908[72]).

UNRELIABLE EVIDENCE AND JURY WARNINGS

126 Rules of practice sometimes require judges to warn juries of the dangers of convicting on uncorroborated or possibly unreliable evidence, including the evidence of potentially biased witnesses. As chapter 3 indicates, the effectiveness of jury warnings is problematic (see paras 52–53). They do, however, constitute a compromise between admitting evidence which may be unreliable, but which might nevertheless assist the fact-finder, and excluding it altogether.

127 As *Cross on Evidence* (Mathieson) points out, the situations which may require jury warnings are not closed (294). A number of Australian cases provide useful examples. In *Bromley v R* (1986) 161 CLR 315, 319, where evidence was given by a witness who suffered from a mental disability, the High Court of Australia indicated that trial judges must give a clear warning of the danger of basing a conviction on evidence which is potentially unreliable. In *McKinney and Judge v The Queen* (1991) 171 CLR 468, the requirement was extended to uncorroborated police evidence of a disputed confession allegedly made whilst the defendant was in custody; and in *Pollitt v R* (1992) 66 AJLR 613; 108 ALR 1, 33, it was extended to witnesses who were prison informants.

128 It is significant, however, that s 165 of the Evidence Act 1995 (Aust), which deals with unreliable evidence, does not follow the common law in requiring a jury warning. Instead, it requires the judge to warn the jury if, during a jury trial, a party makes such a request to the judge (subs (2)). But the judge need

[72] See also s 23H(b), relating to cases involving child complainants, which also states that the judge is not required to warn the jury about the absence of corroboration.

not give a warning if there are good reasons not to do so (subs (3)). It is clear that s 165 applies to all evidence which may be unreliable (commentary 165.1). However, subs (1) provides a useful list of the kinds of evidence which may be unreliable, including evidence affected by a physical or mental disorder of the witness and evidence offered by prison informers in criminal proceedings. As the commentary to the Act notes (165.3), recovered memory evidence could also come into the category of unreliable evidence warranting a jury warning.

129 New Zealand courts have not taken such a categorical stance as their Australian counterparts. The Court of Appeal, in *R v Harawira* [1989] 2 NZLR 714, 726, indicated that a jury warning is merely *desirable* in the case of a witness suffering from mental illness. This was also the view of the court in *R v Royal* (1993) 10 CRNZ 266, 277, 284 (HC), in which evidence was considered to be unreliable because the witness was not only an accomplice, but also a police informer, had suffered from blackouts and amnesia, and had a record of convictions for dishonesty. The judge accordingly gave an appropriate direction to the jury.[73]

130 New Zealand statutory law also provides for some jury warnings. Section 12C of the Evidence Act 1908, which was enacted in 1986, provides for a warning in criminal proceedings that the witness may be biased:

> 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 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.

131 *R v Smith* (1993) 10 CRNZ 184, is a case characterised by the Court of Appeal as "the type of case for which s 12C was introduced" (188), even though the witness in this instance was the co-defendant, rather than a witness for the Crown. The case involved the evidence of a witness who in the court's view wished to rid herself of the appellant because she had reason to believe that she would not recover custody of her children if she continued to live with him. The court accepted that there was a considerable risk of false evidence and stated that "[t]here can be no doubt that s 12C of the Act was introduced as some safeguard to accused persons where the law previously required corroboration or a duty to warn the jury of the danger of convicting in the absence of corroboration" (187).[74]

132 Section 12C protects the defendant from evidence offered by a biased witness, but there is no corresponding provision for a warning if it is thought that unreliable evidence might be offered *in favour of* the defendant. While unreliable evidence against the defendant can be unfairly prejudicial, and for that reason requires some intervention by the court, unreliable evidence offered in favour of the defendant can mislead the fact-finder and also needs to be treated with caution.

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[73] Another situation in which the High Court of Australia has required a jury warning is where there have been long periods between alleged offending and trial: see *Longman v R* (1989) 168 CLR 79. In *R v Meaclem* (unreported, CA 187/95, 11 November 1995) the court declined to make a similar requirement for New Zealand (7).

[74] For a more recent instance of the exercise of the discretion under s 12C, see *R v Haig* (unreported, CA 517/95, 24 July 1996) 16–17.

133 A provision similar to s 12C, which operates in relation to hearsay evidence admitted under the Evidence Amendment Act (No 2) 1980, seems to cover the possibility of evidence both in favour of and against a party. In s 17(b) the Court is directed, when determining the weight of any item of evidence so admitted, to have regard to

> [t]he question whether or not the maker of the statement, or any person by or through whom information was supplied to the maker of the statement had any motive to conceal or misrepresent any fact or opinion relating to the subject matter of the statement.[75]

Conclusion: a general provision on unreliable evidence

134 The question of jury warnings has a wider scope than potential witness bias in relation to truthfulness, and the topic is addressed elsewhere in the evidence reference, in a research paper on warnings. In addition, the categories of case in which jury warnings are said to be mandatory or desirable need further examination. In summary, however, the Commission believes that it will be useful to include in an evidence code a general provision on unreliable evidence similar to s 165 of the Evidence Act 1995 (Aust). This would require the judge to consider a warning in both criminal and civil jury proceedings, whether the evidence is offered against or in favour of any party. Such a provision would extend beyond bias to most evidence which is potentially unreliable and would include evidence from a witness suffering from a mental or physical disorder (see para 80) or from a witness who is an accomplice[76] or a prison informant.[77]

Should an evidence code include a provision requiring judges to consider warning the jury about evidence which may be unreliable?

What kinds of evidence should merit a jury warning because of their potential unreliability?

135 One particular kind of evidence which might seem to belong in the same category is that arising in cases of sexual violation derived from recovered memory. Although the Commission recognises that the abolition of the corroboration rule may have made it easier to base a case on such evidence,[78] it does not propose a return to the requirement of a corroboration warning in all cases involving sexual offences. The disadvantages of doing so would still clearly outweigh the advantages. However, this issue is given further consideration in the Commission's forthcoming work on corroboration and judicial warnings.

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[75] In addition to these current provisions, the Law Commission's discussion paper, *Evidence Law: Hearsay*, also addresses the reliability issue in the context of hearsay evidence rendered admissible by the proposed changes (NZLC PP15, Wellington, 1991: draft code provisions s 1(4)(c)).

[76] See *Allinson v Police* (unreported, HC Timaru, AP 24/92, 13 November 1992) 15–16.

[77] See *Pollitt v R* (1992) 66 AJLR 613; 108 ALR 1.

[78] See Hampton, "Recovered Memory Syndrome v false memory syndrome; or in repression and revenge, where resides justice?" [1995] NZLJ 154.

7
Procedural controls on evidence of credibility

136 THIS CHAPTER IS CONCERNED WITH THOSE RULES of a somewhat procedural nature which govern aspects of the admissibility of evidence of credibility. They are the rule prohibiting a party from bolstering the credibility of a witness, the rule which prohibits a party from impeaching the character of its own witness, and the collateral issues rule.

BOLSTERING THE CREDIBILITY OF A WITNESS

137 At common law a party cannot bolster the truthfulness of a witness – except in a tacit fashion, such as by way of introductory questions – unless that witness's truthfulness has first been attacked.[79] This is so even if a party anticipates an attack on that witness by another party. However, a party may rebut an attack on a witness's truthfulness by calling another witness to affirm the first witness's truthfulness: see paras 103–105. Under the current law a witness whose truthfulness has been attacked in cross-examination may also be rehabilitated in re-examination, but it is uncertain what kind of evidence can be offered to do so. For instance, it is debatable whether a party can offer evidence of general good character to rehabilitate the witness.[80]

138 The Commission proposes to retain the rule: *section 9*. Evidence which bolsters truthfulness is of little value to the fact-finder unless the truthfulness of the witness is in issue.[81] However, it is desirable to remove the uncertainty as to what kind of bolstering evidence may be used to rehabilitate a witness. A provision could stipulate that any evidence offered to rehabilitate may address only matters arising out of the initial challenge to the truthfulness of the person. However, such a restriction would be inconsistent with the Commission's proposal to abolish the collateral issues rule (see para 160). We believe that the requirement of substantial helpfulness would be sufficient.

Should evidence offered to rehabilitate a witness be restricted to matters arising out of the initial challenge to that witness's truthfulness?

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[79] *R v Turner* [1975] QB 834, 842 (CA).

[80] See *Cross on Evidence* (Tapper) (7th ed, Butterworths, London, 1990) 338; Orchard, "Directions on a defendant's good character" [1994] NZLJ 58.

[81] See Norris and Edwardh, "Myths, Hidden Facts and Common Sense: Expert Opinion Evidence and the Assessment of Credibility" (1995) 38 Crim LQ 73, 75, 87–91, and Mewett, "The Credibility of Witnesses" (1995) 37 Crim LQ 129, for discussions of the dangers of admitting evidence which bolsters credibility.

139 The Commission's proposal to exempt expert evidence of substantial helpfulness from the rule prohibiting evidence relevant only to truthfulness should also be noted. This will allow a party to use expert evidence to bolster truthfulness without there having been a prior challenge to the truthfulness of the witness. This is appropriate both because the expert opinion rules provide a sufficient control on expert testimony (see paras 79–85), and because expert evidence is rarely relevant solely to truthfulness.

IMPEACHING THE CREDIT OF ONE'S OWN WITNESS

140 At common law, a party cannot impeach the credit of its own witness, although it can call other evidence to *contradict* its own witness. In New Zealand this is reflected in s 9 of the Evidence Act 1908:[82]

> 9 How far witness may be discredited by the party producing him
> A party producing a witness shall not be allowed to impeach his credit by general evidence of bad character, but may contradict him by other evidence.

The section applies to both hostile and unfavourable witnesses, in both criminal and civil proceedings. Its prohibition of "general evidence of bad character" presumably includes evidence of such matters as the witness's convictions and reputation for veracity.

141 If the witness proves hostile, he or she may be cross-examined by the party calling the witness, but not, as previously noted, about bad character, although cross-examination about possible bias is probably permissible.[83] Cross-examination may also extend to prior inconsistent statements of the hostile witness. In New Zealand this right is explicitly recognised in s 10 of the Evidence Act 1908 (see para 109).

142 Three main justifications have been advanced for the rule against impeaching credit currently embodied in s 9 of the Evidence Act 1908:[84]

- The party is morally bound by its witness's statement.
- The party guarantees its witness's general truthfulness.
- The rule prevents a party from coercing a witness into testifying as instructed, by threatening, for example, to disclose the witness's disreputable past. If the party cannot impeach its witness it has less opportunity to use such unscrupulous means.

143 The first two justifications are linked to each other and have little validity. A party does not necessarily have control over its own witnesses: it is often limited in its choice of witnesses and may be compelled to call those on whom it cannot rely to co-operate. For this reason, it is unreasonable to expect a party either to be morally bound by its own witness's testimony, or to guarantee the witness's truthfulness.

144 The third justification is more substantial, but it has been questioned for the following reasons:

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[82] This derives from an earlier English provision, s 3 of the Criminal Procedure Act 1865.

[83] *Cross* (Tapper), 314.

[84] See Bryant, "The Common Law Rule Against Impeaching One's Own Witness" (1982) 32 University of Toronto LR 412, 416–418; also *McCormick on Evidence* (4th ed, West Publishing, St Paul, 1992) vol 1, § 38, 126.

- While the rule may protect witnesses from impeachment by the party calling them, they are still exposed to cross-examination by the opposing party.
- The sanction threatened by the party calling them will not necessarily outweigh the fear of a possible perjury charge.
- It makes the unwarranted assumptions that counsel are prone to indulging in such coercion of witnesses; that a witness is aware of the subtleties of cross-examination such as the right to impeach; and that the courtroom is the sole forum for making revelations about a witness.[85]

145 The Commission considers that, taken as a whole, these arguments have merit. It is significant that the rule against a party impeaching its own witness has been generally abrogated by statute in many jurisdictions in the United States of America. Rule 607 of the Federal Rules of Evidence, for example, states: "The credibility of a witness may be attacked by a party, including the party calling the witness." However, r 607 is silent on whether or not impeachment of unfavourable witnesses may proceed by way of leading questions, which under r 611(c) are permitted only in the case of hostile witnesses, witnesses identified with the opposing party, and the opposing party itself.

146 In the United States the common law rule has also been declared unconstitutional in criminal cases[86] on the basis that if a defence witness proves hostile, then in the interests of justice the defence must have the right to confront that witness by impeaching credit. In New Zealand, however, it is uncertain whether such an argument would prevail in terms of the New Zealand Bill of Rights Act 1990, since its "confrontation clause", s 25(f), refers only to the right of the defendant to examine *prosecution* witnesses.[87]

147 The Evidence Act 1995 (Aust) abrogates the rule against a party impeaching the credit of its own witness. Clause 38(3) allows a party to question its own witness "about matters relevant only to the witness's credibility". The witness need not be declared hostile – indeed, it is sufficient for the witness to have offered evidence that is *unfavourable* to the party – but counsel must seek leave of the court to ask such questions.

148 The Commission believes that the rule against cross-examination of a party's own witness should also be abrogated in New Zealand: *section 7*. It suggests that a party should be at liberty to cross-examine its own witnesses about:

- evidence offered by the witness in examination-in-chief which (for whatever reason) is unfavourable[88] to the party calling him or her; and
- matters about which the witness's evidence in examination-in-chief shows a lack of truthfulness.

Some measure of protection is afforded the witness by obliging a party to seek the leave of the court before cross-examining.

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85 Bryant, 417.

86 *Chambers v Mississippi* 410 US 285, 294 (1973); cf *R v Williams* (1985) 44 CR (3d) 351 (Ont CA).

87 Note *R v Gunthorp* (unreported, CA 46/93, 9 June 1993) 83–84, in which the Court of Appeal held, for the purpose of s 25(f) of the Bill of Rights, that where co-accused persons are led by the prosecution in cross-examination to give evidence against the accused, they can be treated as witnesses for the prosecution.

88 "Unfavourable" evidence includes evidence which fails to meet the calling party's expectations.

Should the rule prohibiting a party from cross-examining its own witness be abrogated?

149 The right to cross-examine would also allow a party to pursue matters relevant only to truthfulness – including, where appropriate, general evidence of bad character such as previous convictions – provided that such matters are likely to be substantially helpful.

150 The Commission recognises that including evidence which is merely unfavourable amongst the triggers allowing a party to cross-examine its own witness could be contentious. It is possible that the procedure could be misused by the prosecution or defence in calling a witness whom they know will offer evidence unfavourable to them, with the purpose of gaining the opportunity to cross-examine the witness. Such a witness may have made previous statements which might contain inaccuracies, exaggerations and even falsehoods which the witness is reluctant to repeat in court.

151 Because of the risk that a more liberal regime might be abused, some may prefer to retain *hostility* to the party calling the witness as a necessary trigger for that party's right to cross-examine its own witness. However, the Commission doubts that the risk is significant, particularly when the party will be required to seek the leave of the court before cross-examining its own witness. The Commission asks for readers' views on this issue.

Does unfavourable evidence provide a sufficiently high threshold for allowing a party to cross-examine its own witness about matters relevant only to truthfulness?

THE COLLATERAL ISSUES RULE

152 The collateral issues rule applies when cross-examination is directed to a matter which is not a fact in issue. It treats a witness's answers as final and does not permit evidence which is intended to contradict them.[89] Commonly the cross-examination is directed to credibility, whether relating to error or to truthfulness.

153 Collateral issues do, however, vary in their degree of relevance.[90] As a consequence, a number of exceptions to the collateral issues rule,[91] have become established. They relate to questions designed to show:

- that the witness has previous convictions for indictable offences;

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[89] This rule was affirmed in England in *R v Gunewardene* [1951] 2 All ER 290 (CA), and has been followed in New Zealand in *R v Brosnan* [1951] NZLR 1030, 1038 (CA); *R v Katipa* [1986] 2 NZLR 121, 128 (CA); *R v Accused (CA 92/92)* [1993] 1 NZLR 553, 557 (CA). *R v Parata* (unreported, CA 456/95, 1 November 1995) 4, made it clear that, although the rule treats a witness's answers as final, it does not in itself confine the cross-examiner to questions specified in advance.

[90] See *R v Griffiths* (unreported, CA 545/93, 5 May 1994) 8.

[91] See *Cross* (Tapper) 310–311; *Cross on Evidence* (Mathieson) (Looseleaf edition, Butterworths, Wellington, 1996) 361.

- that the witness has previously made a statement inconsistent with his or her present testimony;
- that the witness is biased in favour of or against one of the parties; and
- that the witness suffers from a physical or mental disorder which affects the witness's credibility.

In all of the above instances, contradictory evidence may be offered. It will be apparent that the exceptions correspond to varieties of credibility evidence discussed earlier in chapters 4, 5, and 6.

154 The policy behind the rule is essentially one of efficiency: it would be too costly and time-consuming to divert the court from the main issue and have the fact-finder embark upon an inquiry directed solely to the credibility of the witness. In addition, it is claimed that the rule reduces the possibility of "trial by ambush" – unfair surprise to the party under cross-examination.[92]

Determining a collateral issue

155 The test for collateral issues was laid down in 1847 by Pollock CB in *AG v Hitchcock* (1847) 1 Exch 91:

> The test, whether the matter is collateral or not is this: if the answer of the witness is a matter which you would be allowed on your part to prove in evidence – if it has such a connection with the issue, that you would be allowed to give it in evidence – then it is a matter on which you may contradict him. (99)

Though commonly applied as a "rigid test of strict relevance to the facts alleged in the indictment and the facts necessary to any defence raised",[93] the test is not entirely satisfactory and was criticised in *R v Funderburk* [1990] 1 WLR 587; [1990] 2 All ER 482, 491 (CA), as being "circular". Collateral issues are not only difficult to distinguish, but the distinction between credibility and fact in issue may itself be somewhat illusory. Newark makes the point that "the issue is not a static concept" (170), and that facts which may appear collateral can, in the course of proceedings, "approach or cross the threshold of relevance to the issue." Similar thinking appears to be behind the decision in *R v M* [1996] 3 NZLR 502, 509 (HC), which, rather than employing a "rule and exceptions" approach, prefers to consider collateral evidence in relation to a "continuum of relevancy and cogency".

156 Where the cross-examination involves a witness who was a participant in the events, it becomes particularly difficult to distinguish between credibility and issue. In *Natta v Canham* (1992) 104 ALR 143 (FCA), for example, the appellant had sought damages in respect of two traffic accidents. The question was whether a witness's evidence that the appellant had proposed to stage the accidents was a collateral issue going simply to truthfulness. The court concluded that:

> [T]he creditworthiness of a witness is always indirectly relevant to facts in issue and may be decisive of those facts particularly where the witness is a participant in events to which they relate. It is then difficult to justify, by reference to the credit/issue distinction, disallowing evidence which may rebut such testimony. (160)

157 But it is in cases involving sexual offences that the distinction between truthfulness and the issue can become most problematic.[94] Often the proceeding

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[92] Newark, "Opening up the Collateral Issue Rule" [1992] 43 Northern Ireland LQ 166, 168–169.

[93] Newark, 170.

[94] See, for example, *R v Funderburk* [1990] 1 WLR 587; [1990] 2 All ER 482 (CA); *R v Clifton* (1993) 10 CRNZ 373 (HC).

is a contest of truthfulness revolving around the issue of consent, with little or no other evidence available to assist the fact-finder. The particular difficulty which arises in these cases is the extent to which the defence can pursue the (strictly collateral) question of the complainant's truthfulness. This question is further discussed in ch 11, which considers whether New Zealand's rape shield provision, s 23A of the Evidence Act 1908, needs to be amended.

Reforming the rule

158 It appears that the courts are increasingly doubting, and even eroding, the collateral issues rule. This trend is also evident to some extent in the law reform area. The Australian Law Reform Commission's interim report describes the collateral issues rule as "an artificial and inflexible limitation which may result in the court being misled", which may even encourage perjury and which also "does not reflect the general concern to admit relevant evidence" (226). Its recommendation was that the rule "should not be retained in its present form" (468). The ALRC's draft Act modified the rule by widening the exceptions to it. Section 106 of the Evidence Act 1995 (Aust) reflects this recommendation by adding to the exceptions

- evidence tending to prove that the witness has made false representations knowingly and recklessly and in circumstances where he or she was under an obligation to tell the truth, and
- evidence tending to prove the witness's inability to be aware of matters to which his or her evidence relates.[95]

159 The collateral issues rule has a sound foundation. It contributes towards reducing the distractions with which a court has to contend and has particular validity, therefore, in jury trials and in situations where the witness under cross-examination was not a participant in the events. But if it is too rigidly applied, there is a danger of excluding evidence which may well assist the fact-finder and may even become relevant to the issue. In these circumstances, it is important to consider whether it is appropriate to retain the rule in an evidence code.

160 Although, as suggested in the previous paragraph, the collateral issues rule currently operates as a restraint on adducing evidence of truthfulness of little value, the Commission considers that other rules in the evidence code will perform the same function. Thus, the relevance rule and the general exclusion will be significant restraints. The Commission also considers that the truthfulness rule will provide a significant check, with its requirement that evidence relevant only to truthfulness must be likely to be substantially helpful. In these circumstances, the collateral issues rule can be safely abolished, provided it is clear that any evidence led to challenge evidence of truthfulness must also be likely to be of substantial helpfulness: *section 8*.

Should the collateral issues rule be abolished, and will the requirement of substantial helpfulness for evidence of truthfulness provide a sufficient control in its place?

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[95] This is, however, a question of general credibility, and not of truthfulness.

Part III

CHARACTER IN CRIMINAL PROCEEDINGS

8
The character of defendants and co-defendants in criminal proceedings

161 IT IS THE DEFENDANT in criminal proceedings who is most likely to be unfairly prejudiced by evidence of bad character, since, even if offered simply to challenge truthfulness, such evidence can be inappropriately relied on to establish guilt. For this reason, the current law is that evidence of the defendant's bad character is ordinarily inadmissible. On the other hand, defendants have an advantage which is not normally available to non-defendant witnesses: they may offer evidence of their own good character. But they do so only at a price. The price is that the prosecution gains the right to offer evidence of bad character in rebuttal.

162 This chapter is concerned with the rules which allow evidence of the defendant's bad character to be offered in spite of the general prohibition. It deals with the operation of the rules under common law and statute, and how they affect the parties in criminal proceedings, whether defendant, co-defendant or prosecution. It starts with a summary of some of the common issues arising out of evidence of the defendant's character, then states two rules proposed by the Commission which relate to character evidence in general, and another prohibiting evidence of the defendant's character. It then proceeds to discuss specific exceptions to offering evidence of character about the defendant: these involve evidence of good character, evidence of bad character in cases where the defendant attacks prosecution witnesses, and, finally, the use of character evidence by co-defendants. This chapter does not address similar fact or propensity evidence, which is considered in the next chapter.

THE ISSUES

163 Evidence about the defendant's character raises a number of general issues. The first concerns the meaning of "character". It has already been indicated in chapter 5 that in an evidential sense "character" has two quite separate meanings – "reputation" and "disposition" (see paras 99–100). Nevertheless, it is frequently difficult to separate the two, and in this chapter no attempt is made to do so, even though evidence of reputation alone may be less relevant and of less probative value than evidence of disposition.

164 A second issue is the fundamental one of what constitutes evidence of bad or good character. Must evidence of bad character be confined to criminal convictions, or can it extend to behaviour which is not criminal as such?

Similarly, does a *lack* of convictions provide evidence of good character, and how are convictions incurred long ago to be treated?

165 A third issue is whether evidence of character reflects only on the truthfulness of the defendant or also indicates whether the defendant is likely to have committed the offence charged; that is, whether it goes to the issue of guilt. This is important because the consequences to the defendant can differ. Challenging the defendant's truthfulness through evidence of bad character is in theory less damaging to the defendant than offering bad character evidence to establish his or her guilt. However, in a jury trial it is difficult, if not impossible, to prevent evidence which goes only to truthfulness from being used, once admitted, to infer guilt.

166 Apart from the general issues, the structure of the present law also raises some difficult questions. The principal question which courts must address is: what can trigger the removal of the defendant's protection against prejudicial character evidence? In general terms, defendants at present lose the protection if they put their character in issue. There are three ways in which character can be put in issue:

- the defendant seeks to establish good character in the course of the trial, either through his or her own evidence or that of other witnesses (paras 179–193);
- the defendant offers evidence attacking the character of a prosecution witness (paras 194–218);
- the defendant offers evidence against a co-defendant (paras 219–236; 281–282).

Where should the threshold be set for removing the defendant's protection against being exposed to prejudicial character evidence?

167 At common law, if the defendant puts his or her character in issue by offering evidence of good character, the prosecution can offer evidence of bad character in rebuttal, whether or not the defendant testifies. Certain statutory provisions, on the other hand, permit the loss of the shield and expose the defendant to cross-examination only if the defendant testifies; they also apply when the defendant attacks a prosecution witness or offers evidence against a co-defendant. In New Zealand, s 5(4) of the Evidence Act 1908 outlines in a very general way when such evidence is admissible, but courts also refer to s 1(f) of the Criminal Evidence Act 1898 (England) for more detailed guidance.

168 A question related to what triggers the loss of the defendant's shield is the extent to which the court has a discretion to control the admission of evidence once the shield is lost. The court always has the ability to exclude evidence whose prejudicial effect outweighs its probative value. But it appears that in England at least, if a defendant offers evidence against a co-defendant, then the statutory provision removes the court's discretion, allowing the co-defendant to offer evidence against the defendant in response which may be highly prejudicial and lacking in probative value.[96] The New Zealand approach is thought to be more flexible, but the influence of the English statute and ensuing

[96] *Lobban v R* [1995] 2 All ER 602, 612 (PC), confirms the lack of any such discretion.

case law require some clarification. Of the possible ways of countering the prejudice – such as jury directions, editing of statements, and severance of trials – none is free from difficulty.

To what extent should the court have a discretion to exclude prejudicial character evidence once the defendant's protection has been lost?

EVIDENCE OF CHARACTER

169 In constructing a framework for rules relating to evidence of character it is useful to begin with two proposed general rules which form the basis from which the others depart. The first is concerned with the nature of the evidence which may be offered, once evidence of character is admitted; and the second makes evidence of character admissible. Unlike their exceptions, they are simply stated and require little discussion.

The nature of admissible evidence of character

170 The first general rule will state that any evidence of character which *is* admissible may either be of a general nature or refer to particular incidents or matters: *section 11*. It would thus abolish that part of the rule in *R v Rowton* (1865) Le & Ca 520 which prohibits evidence of particular facts in relation to character.

171 The rule in *R v Rowton* restricts evidence of character, whether good or bad, to evidence of general reputation. This means that both evidence of individual opinion and evidence of particular facts are inadmissible.[97] The rationale for this rule is, first, that although evidence of general reputation is hearsay its reliability is enhanced by the fact that general reputation is a collective rather than an uncorroborated individual opinion.[98] Secondly, as Willes J put it in *Rowton*:

> Evidence of particular facts is excluded, because a robber may do acts of generosity; and the proof of such acts is therefore irrelevant to the question whether he was likely to have committed a particular act of robbery. (541)

172 With its prohibition of evidence of particular facts, the *Rowton* rule is less than satisfactory, indeed illogical. General reputation should only ever be founded on particular facts, such as instances of the defendant's good conduct (an act of honesty, for example) or bad conduct (as represented, for example, by previous convictions).[99] Such evidence is certainly no less relevant to truthfulness or guilt than general reputation, and probably has greater probative value. Nevertheless, the rule in *Rowton* has never been overruled, although it appears that in practice evidence of particular facts is given without objection.[100]

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[97] See also *Cross on Evidence* (Mathieson) (Looseleaf edition, Butterworths, Wellington, 1996) 596.

[98] See *R v Wilson* [1991] 2 NZLR 707, 713 (HC).

[99] Compare *Plato Films v Speidel* [1961] AC 1090, 1131; *Goody v Odhams Press* [1967] 1 QB 333, 340 (CA).

[100] See *Andrews & Hurst on Criminal Evidence* (London, Sweet & Maxwell, 1992) 440–441; *R v Young* (unreported, HC Rotorua, T 9/90, 9 May 1990).

173 The rule in *Rowton* relates only to evidence offered about defendants in criminal cases. However, on rare occasions, character evidence can be relevant in relation to a witness in civil proceedings.[101] There was also a rule that limited evidence of the plaintiff's bad reputation in mitigation of damages in defamation cases to general evidence of reputation: *Scott v Sampson* (1881–82) 8 QBD 491. This was abolished by ss 30 and 42 of the Defamation Act 1992. In order to maintain consistency with the Defamation Act, it is desirable that *section 11*, as proposed by the Commission, should apply to all character evidence, whether in criminal or civil proceedings.

Evidence of character generally admissible

174 Evidence of character is not problematic in most contexts; that is, in those which do not concern the defendant in criminal proceedings. However, to avoid any doubt, it is helpful to include in the code a second general rule which specifically permits evidence of character to be offered: *section 12*. The concern with most character evidence is not that it is prejudicial but that it may be irrelevant. There are already quite adequate rules in the code to deal with such an eventuality – namely, the relevance rule and the general exclusion – and there need be no further controls.

175 The existence of a rule making character evidence generally admissible means that evidence supporting the character of a witness would become generally admissible. In particular, complainants in sexual cases would be permitted to offer good character evidence about themselves. This is consistent with the expansion of the protection offered to complainants which is proposed by the Commission for New Zealand's rape shield law, outlined in chapter 11 of this paper, as well as with recent developments in England: *R v Hickmet* [1996] Crim LR 588.

THE CHARACTER RULE

176 Character is a comprehensive term which can encompass not only disposition or propensity, but also reputation (both general reputation and that founded on particular facts) and truthfulness (see paras 99–108). The defendant's character is often inferred, therefore, from such matters as the defendant's previous convictions (or the lack of them), associations, conduct, and way of life.

177 In view of the often limited probative value of character evidence and the fact that evidence of bad character can be highly prejudicial to the defendant in criminal cases, the Commission proposes that another general code rule should prohibit evidence about the character of the defendant: *section 13*. This rule is referred to in the text which follows as the *character rule*.

178 As with the truthfulness rule, the character rule would be subject to certain exceptions. The exceptions to the general prohibition derive largely from the current rules governing the admission of character evidence relating to defendants and co-defendants. These stem from both common law and statute and are detailed in the following discussion of evidence of good character and bad character (paras 179–236).

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[101] See, for example, *Deep v Wood* (1983) 143 DLR (3d) 246, in which cross-examination was permitted about the plaintiff's credibility in connection with an earlier finding of professional misconduct.

What kind of evidence of character should be admissible?

EVIDENCE OF GOOD CHARACTER

Common law

179 At common law the defendant has always been allowed to offer evidence of good character. English authority goes back at least to *R v Stannard* (1837) 7 Car & P 673, 674, and in Australia the leading authority is *R v Trimboli* (1979) 21 SASR 577. In New Zealand, the issue has arisen only rarely, notably in *Gurusinghe v Medical Council of New Zealand* [1989] 1 NZLR 139 (HC). In this case, a medical practitioner appealed against the removal of his name from the medical register, one of the grounds being that his legal representative failed to lead evidence of good character.

180 There are a number of rationales for the admissibility of good character evidence, ranging from an historical desire to mitigate the rigour of the law to the notion that good character evidence carries with it no risk of prejudice.[102] The rationale which seems most favoured today is that it is "a humane concession which is one of the law's devices designed to minimise the risk of a wrongful conviction".[103]

181 The question, however, is not so much whether evidence of good character can be offered, but to what purpose. That is, does it go only towards establishing truthfulness or also to whether the defendant committed the offence? A further question is the role which the judge must play in bringing such evidence to the attention of the jury. These matters have been much debated in the English courts, and in *R v Vye* [1993] 1 WLR 471; [1993] 3 All ER 241 the Court of Appeal articulated some rules:

- If the defendant testifies or has made pretrial statements, good character evidence is relevant to credibility; and the judge is obliged to direct the jury accordingly.
- Whether or not the defendant testifies, good character is relevant to the question of whether the defendant is likely to have committed the offence charged; and the judge is likewise obliged to direct the jury on the significance of that evidence.

However, because the distinction between truthfulness and the likelihood of the defendant having committed the offence is, as one commentator puts it, "too nuanced for most jurors to grasp",[104] it may be doubted just how clear *Vye* has made the rules.

Should evidence of the defendant's good character be relevant to both the defendant's truthfulness and to whether or not the defendant committed the offence?

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[102] ALRC, interim report 26, 447.

[103] Orchard, "Directions on a defendant's good character" [1994] NZLJ 56, 58. See also ALRC, interim report 26, 447.

[104] Munday, "Evidence of Good Character – *Thanki*, M'Lud" [1991] CLJ 246, 248.

182 The other question which has been the subject of some debate is what kind of evidence can be offered in support of the defendant's good character. It is manifest that the defendant cannot offer evidence of reputation in person – although he or she can call others to do so – the reason being that reputation depends on how others see the defendant. But the defendant can offer evidence of specific instances of his or her own good conduct. Such specific evidence may include the fact that the defendant has no convictions.[105]

183 *R v Aziz* [1996] 1 AC 41; [1995] 3 WLR 53; [1995] 3 All ER 149, confirmed that where evidence of good character has been offered, the judge should give a direction on the effect of that evidence. In addition, *Aziz* established that "a trial judge has a residual discretion to decline to give any character directions in the case of a defendant without previous convictions if the judge considers it an insult to common sense to give directions in accordance with *Vye*" (53). A New Zealand practice note of 27 May 1996 stated that in the absence of an authoritative New Zealand decision on the effect of good character evidence, it might be "prudent" to follow *Aziz*.

184 Such "an authoritative New Zealand decision" was finally delivered in *R v Falealili* [1996] 3 NZLR 665, where the Court of Appeal held that as a matter of "general practice":

- an appropriate direction should be given as to the use of evidence of good character offered by the defendant;
- generally the direction will cover both credibility and propensity; and
- no particular form of words is necessary for the direction, which will be "tailored to meet the circumstances" (667).

The Court of Appeal also noted that an absence of previous convictions is in itself "generally neutral" in establishing whether a person is of good character; it did "not think it necessary for directions to be given merely because absence of previous convictions [had] been elicited". The Commission agrees that absence of convictions should not have a special status as evidence of good character, requiring, without more, a direction on the part of the judge.[106]

Proposed rule for evidence of good character

185 Evidence of good character is of limited probative value and is perhaps more properly relevant to mitigation in sentencing than to guilt or even truthfulness. Though it benefits and does not prejudice the defendant, it suffers from the same flaw as any other character evidence: it may generate the "halo" effect explained in chapter 3 (see paras 47–50). The result is that a jury is just as likely to be positively influenced when the defendant is a community-spirited professional without a criminal record as it is to be negatively influenced when the defendant is an unemployed young male who keeps bad company. The marginal probative value of good character evidence is a ground on which one commentator, Orchard, has raised serious doubts about its usefulness. Another

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[105] However, the jury must not be misled about the defendant's spent convictions (*R v O'Shea* [1993] Crim LR 951). This is a question which New Zealand courts do not yet need to consider, because no provision is made for spent convictions.

[106] See also *R v Thompson* (unreported, CA 75/96, 14 August 1996). But note Thomas J's dissenting judgment in *Falealili*, in which he said that it was sufficient for the Court of Appeal "to clarify the law" and "perhaps, to suggest guidelines for the exercise of a trial judges's discretion whether to give a good character direction" (668).

ground is that the defendant's ability to tender good character evidence gives the defendant an unfair advantage over prosecution witnesses such as complainants in rape cases, who are not generally considered to be at liberty to offer such evidence about themselves.[107]

186 The Law Commission acknowledges the unsatisfactory nature of good character evidence, but it also recognises that for defendants in criminal cases there is a genuine policy reason for making it available to the fact-finder. That is the traditional common law insistence on fairness to the defendant, which expresses itself in the presumption of innocence and the abhorrence of wrongful convictions, and which allows the defendant to bring any evidence which might bear on innocence before the court.

How useful is evidence of good character, and should an evidence code expressly allow the defendant to offer such evidence?

187 The Commission proposes, therefore, to include in an evidence code a rule which specifically allows a defendant to offer evidence of good character: *section 14(1)*. This rule would also make clear

- that such evidence goes to both the issue of guilt and truthfulness: *section 14(2)*; and
- that the hearsay rule and the opinion rule do not apply to good character evidence that relates to the defendant's reputation: *section 14(3)*.

188 It may sometimes be necessary to ensure that the limited probative value of the evidence is communicated to the jury. This could be achieved by way of a direction to the jury that the weight of good character evidence, whether going to the issue or to truthfulness, is limited. For two reasons, however, the Commission does not propose that the evidence code should include a provision to this effect. First, jury directions may be of limited value in this context (see para 52); and, secondly, the precise direction will vary from case to case and will be a matter for the individual judge.

Should an evidence code require a judge to warn the jury of the limited weight of evidence of the defendant's good character?

Evidence in rebuttal of good character evidence

189 It is important that the admission of good character evidence about the defendant does not mislead the court, and there are mechanisms both at common law and under statute which allow the prosecution to introduce evidence of the defendant's bad character in rebuttal. At common law, if the defendant puts his or her character in issue by offering evidence of good character, the prosecution may rebut either by leading evidence of bad character or by eliciting it in cross-examination. If the defendant has offered evidence in person of his or her good character, the prosecution can also cross-examine

[107] [1994] NZLJ 56, 58.

the defendant as to bad character under s 5(4) of the Evidence Act 1908, as interpreted with reference to s 1(f)(ii) of the Criminal Evidence Act 1898 (Eng) (see para 196).

190 The operation of these mechanisms can be justified in two ways. First, the prosecution must have the right to correct any false impression made by the defence; otherwise the policies of rational ascertainment of facts and the need for fair procedures which underlie the trial process would be subverted. Secondly, the defence can always choose whether or not to tender evidence of good character; it can avoid any adverse consequences of doing so by not adducing evidence which it knows can be rebutted.

191 Their operation has also been tempered to some extent by the case law. This has established that the evidence of good character necessary to trigger the introduction of evidence of the defendant's bad character has to be of a positive kind: a mere assertion of innocence on the part of the defendant does not suffice (*R v Ellis* [1910] 2 KB 746); nor does a voluntary statement as to the defendant's good character made by one of the witnesses called for the defence (*R v Redd* [1923] 1 KB 104); nor does a simple statement of profession or occupation, unless it clearly implies that the defendant would not be likely to commit the offences charged (*Pix* (Court of Criminal Appeal, South Australia, 21 July 1993) (1994) 18 Criminal LJ 290). Indeed, the evidence must be offered with the *intention* of establishing good character (*R v Fuller* (1994) 34 NSWLR 233, 238).[108] In *Maxwell v DPP* [1935] AC 309, it was also established that the prosecution cannot rebut evidence of a defendant's good character by asking questions about a previous *charge* on which the defendant had been acquitted.

192 The Law Commission favours retention of the rules which allow the prosecution to rebut good character evidence. But it believes that they should operate on a reciprocal basis. That is, just as evidence of the defendant's good character can go to both truthfulness and whether or not the defendant committed the offence, so evidence offered by the prosecution in rebuttal should have the same two purposes: *section 15(4)*.[109] Moreover, the defendant will not enjoy the protection of either the truthfulness rule or the propensity rule when another party offers evidence of the defendant's bad character in rebuttal of evidence of good character offered by the defendant: *section 15(3)*. However, a leave requirement will ensure that good character evidence is not rebutted on a trivial or excessively technical basis and that irrelevant or minor convictions cannot be put to the defendant: *section 15(2)*.

Should evidence of the defendant's bad character offered in rebuttal by the prosecution be relevant both to the defendant's truthfulness and to whether or not the defendant committed the offence?

193 Two matters remain undecided in the area of evidence of good character. The first is whether a co-defendant – upon whom a defendant's evidence of

[108] This case relates to s 413B of the Crimes Act 1900 (NSW), which has the same import as the first two limbs of s 1(f)(ii) of the Criminal Evidence Act 1898 (Eng).

[109] This is the conclusion also arrived at provisionally by the Law Commission of England and Wales: Consultation Paper No 141, *Criminal Law: Evidence in Criminal Proceedings: Previous Misconduct of a Defendant* (HMSO, London, 1996) para 6.77.

good character might reflect adversely – should also acquire the right to offer evidence of the defendant's bad character. Secondly, if a defendant offers good character evidence about a co-defendant, there is a question as to whether the co-defendant should necessarily retain the protection of the shield as against the prosecution. The Commission seeks readers' views on both these issues.

Should a co-defendant have the right to rebut evidence of the defendant's good character by offering evidence of the defendant's bad character?

Should the prosecution be able to offer evidence of the defendant's bad character if a co-defendant offers evidence of the defendant's good character?

EVIDENCE OF BAD CHARACTER AFTER DEFENDANT ATTACKS PROSECUTION WITNESSES

194 It is rare that defendants will seek to offer bad character evidence against themselves; almost invariably defendants will want to take advantage of the shield provided by the law against the introduction of such evidence. But there may very occasionally be tactical reasons for the defence to offer bad character evidence against itself, one of which might be to forestall any prejudicial effect which may arise through having the evidence exposed later in cross-examination. Or the defence may wish to show that although the defendant has previous convictions they have no connection with the offence charged. Under the code the defendant will still be able to take advantage of this possibility: *section 15(1)*.

195 Nevertheless, it is usually the prosecution which will seek to offer bad character evidence. The general rule is that the prosecution may not cross-examine the defendant about bad character except in defined circumstances. One such circumstance is when the defendant offers good character evidence, as discussed earlier (see paras 179-193). Another relates to similar fact evidence, which is dealt with in chapter 9. This section of the paper addresses the situation of a defendant who attacks the character of a prosecution witness and also testifies. It is a situation which must be distinguished from that of the defendant who attacks the character of a prosecution witness but does *not* testify, which does not expose the defendant to cross-examination about bad character: *R v Butterwasser* [1948] 1 KB 4.

The statutory provisions

196 In New Zealand, questions about the bad character of a defendant are in general controlled by two statutory provisions, one domestic and the other English, but supplemented by the common law. The New Zealand provision, what is now s 5(4) of the Evidence Act 1908, is the less specific one:

> (4) A person charged and called as a witness . . .
>
> (a) may be asked any question in cross-examination notwithstanding that it would tend to incriminate that person as to the offence charged; and
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> (b) is liable to be cross-examined like any other witness on any matter, though not arising out of that person's examination in chief; but so far as the cross-examination relates to any previous conviction of that person, or that

person's credit, the court may limit the cross-examination as it thinks proper, although the cross-examination may be permissible in the case of any other witness.

Paragraph (a) abrogates the privilege against self-incrimination if a defendant elects to testify.[110] Paragraph (b) exposes the defendant who testifies to cross-examination *on any matter*; but it also gives the court a discretion to limit that cross-examination if it relates to previous convictions or to truthfulness in general. This was clarified to a large extent by *R v Clark* [1953] NZLR 823, 830 (CA), which held that the guidelines for exercising that discretion were to be those laid down in s 1(f) of the Criminal Evidence Act 1898 (Eng), as follows:

> (f) A person charged and called as a witness in pursuance of this Act shall not be asked, and if asked shall not be required to answer, any question tending to show that he has committed or been convicted of or been charged with any offence other than that wherewith he is then charged, or is of bad character, unless
>
> (i) the proof that he has committed or been convicted of such other offence is admissible evidence to show that he is guilty of the offence wherewith he is then charged; or
>
> (ii) he has personally or by his advocate asked questions of the witnesses for the prosecution with a view to establish his own good character, or has given evidence of his good character, or the nature or conduct of the defence is such as to involve imputations on the character of the prosecutor or the witnesses for the prosecution; or
>
> (iii) he has given evidence against any other person charged with the same offence.[111]

197 To summarise: under the English provision a defendant called as a witness may be questioned about previous convictions or bad character only if such evidence is already admissible (an example being similar fact evidence which satisfies the test of probative value); or if the defendant puts his or her character in issue by offering evidence of good character or attacking prosecution witnesses; or if the defendant offers evidence against a co-defendant.

198 Section 1(f) has resulted in a number of difficulties of interpretation and some uncertainty as to its various purposes. Many of the former have been settled by the case law. In *Jones v DPP* [1962] AC 635, for example, it was held that "tending to show" in paragraph (f) meant "tending to reveal to the jury". Thus, if the jury are already aware of the conviction or bad character evidence, the cross-examination may proceed. *Stirland v DPP* [1944] AC 315, decided that "charged with any offence" meant "'accused before a court',

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[110] For a detailed discussion of the privilege against self-incrimination, see *The Privilege Against Self-Incrimination* (NZLC PP25, Wellington, 1996).

[111] This is the version cited in New Zealand cases. However, subpara (ii) was amended by s 31 of the Criminal Justice and Public Order Act 1994 (UK) to include "the deceased victim of the alleged crime", an amendment criticised by Munday ("A sample of lawmaking" [1995] NLJ 855 (Part 1); 895 (Part 2)). Subparagraph (iii) was amended by s 1 of the Criminal Evidence Act 1979 (UK) to substitute the words "[charged] in the same proceedings" for "[charged] with the same offence" because the latter tended to exclude co-defendants in joint trials who might have been charged with different offences: *Commissioner of Police of the Metropolis v Hills* [1980] AC 26.

and not merely 'suspected or accused without prosecution'" (323), with the consequence that mere suspicion or detention without prosecution may not be put to the defendant. Finally, any previous conviction can be offered against the defendant as bad character evidence. It need not be a conviction for an offence which reflects specifically on the defendant's truthfulness, such as an offence of dishonesty; and the fact that the conviction might incidentally show a similarity to the offence charged does not automatically preclude the proposed cross-examination: *R v Powell* [1986] 1 All ER 193, 198 (CA).

199 The purposes for which evidence of bad character is offered under s 1(f) are a matter of some debate.[112] Evidence admissible under subpara (i) is clearly designed to go to guilt, but evidence admitted under subparas (ii) and (iii) seems to go to truthfulness alone.[113] This distinction is of some significance, because the consequences of allowing evidence to go to guilt are more serious for the defendant. It may be, however, that the distinction is largely academic, because to allow the introduction of evidence going to truthfulness will almost inevitably reflect on guilt.[114]

200 It may also be that in New Zealand the precise purposes of each provision are less important, as a result of the decision in *R v Fox* [1973] 1 NZLR 458. In that case the Court of Appeal held that if the prosecution is seeking to cross-examine as to credit it should follow the English guidelines, but if it is seeking to offer evidence relevant to "some matter in issue in the trial", then the court should exercise its discretion according to whether or not it is fair in the circumstances. This was confirmed by the Court of Appeal in *R v Redfearn* (1991) 7 CRNZ 548, 550, which emphasised "that the discretion to allow cross-examination about previous convictions is one to be sparingly exercised", particularly where the nature of the defence requires a challenge to the truthfulness of a prosecution witness.

201 The question which has perhaps afforded the most difficulty is: when does the defence involve "imputations" on the character of prosecution witnesses. In *Selvey v DPP* [1970] AC 304, the House of Lords formulated a series of propositions which aimed at clarifying the meaning of the term. First, and uncontroversially, *Selvey* affirmed that a mere denial of a charge does not amount to an imputation. Secondly, however, the decision established that even where the nature of the defence necessarily involves making imputations the defendant is liable to be cross-examined; furthermore, the court need not exercise its discretion to prohibit cross-examination in favour of the defendant

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[112] See Pattenden, "The Purpose of Cross-Examination Under Section 1(f) of the Criminal Evidence Act 1898" [1982] Crim LR 707.

[113] *R v Barsoum* [1994] Crim LR 194; *R v McLeod* [1994] 1 WLR 1500; [1994] 3 All ER 254 (CA). Both of these cases concern s 1(f)(ii). See also Mirfield, "Underlying Facts of Previous Convictions" (1995) 111 LQR 186.

[114] *R v McLeod* clearly recognises this ambiguity:

> The primary purpose of the cross-examination as to previous convictions and bad character of the accused is to show that he is not worthy of belief. It is not, and should not be, to show that he has a disposition to commit the type of offence with which he is charged. . . . But the mere fact that the offences are of a similar type to that charged or because of their number and type have the incidental effect of suggesting a tendency or disposition to commit the offence charged will not make them improper . . . (267)

See also Munday, "The Paradox of Cross-Examination to Credit – Simply Too Close for Comfort" [1994] CLJ 303, 308–309.

in such a situation.[115] Thus, a defendant who in order to raise a defence has to imply that the police evidence is fabricated is liable to lose the shield (*R v Britzman* [1983] 1 All ER 369 (CA)). Thirdly, there is an exception for rape cases, where the defendant may allege consent without making an imputation on the character of the complainant. The reason for this exception is that rape cases are in a category of their own ("sui generis"), and because it is the prosecution which in effect first raises the issue of consent.[116]

202 It is arguable that their Lordships' view of what constitutes an imputation on the character of a witness is too broad. It does not give adequate recognition to the fact that while some imputations are indeed gratuitous, others may be necessary to mount an effective defence. This is a distinction recognised in *Dawson v R* (1961) 106 CLR 1, 9, which refers to "matter which will have a particular or specific tendency to destroy, impair or reflect upon the prosecutor or witnesses called for the prosecution quite independently of the possibility that such matter, were it true, would in itself provide a defence". The conclusion may be that the law should not inhibit evidence of the second kind from being brought before the fact-finder.

Policy issues

203 The rule contained in s 1(f)(ii), which allows the prosecution to offer bad character evidence about a defendant if the defendant attacks the character of a prosecution witness, has two principal rationales (although there may well be others):

- It protects witnesses from gratuitous attacks and therefore encourages victims and other witnesses to come forward and give evidence.[117]
- It "sets the record straight" and prevents the distortions which come from a one-sided view of character evidence.[118]

204 The rule represents a compromise, in that it attempts to balance protection for the defendant with the need for the fact-finder to hear all relevant evidence. It aims to protect the defendant from being cross-examined about matters which are unfairly prejudicial; but it does not allow the defendant to give a misleading impression to the jury of his or her character or the comparative truthfulness of the various witnesses. This basis of the rule has been accepted historically, but it is not without difficulty.

205 There are a number of compelling arguments against the rule. These arguments have been detailed both by the Criminal Law Revision Committee of England and Wales,[119] and by the Australian Law Reform Commission.[120] They may be summarised as follows:

- The fact that the defendant does have previous convictions or is of bad

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[115] It also appears that even if the imputation is drawn from the defendant *by the prosecution during cross-examination*, and the imputation is a "voluntary and gratuitous one", the defendant's previous convictions can still be adduced by the prosecution: *R v Courtney* [1995] Crim LR 63.

[116] The right of the defendant to offer evidence pertaining to consent in rape cases is considered in ch 11.

[117] Munday, "A sample of lawmaking" [1995] NLJ 895 (Part 2).

[118] Seabrooke, "Closing the Credibility Gap: A New Approach to section 1(f)(ii) of the Criminal Evidence Act 1898" [1987] Crim LR 231, 238.

[119] Report No 11, *Evidence (General)* (Cmnd 4991, HMSO, London, 1972).

[120] Report No 26 (interim), *Evidence* (1985) 226–227.

character does not in itself mean that the challenge mounted to the prosecution evidence is unfair or unfounded. It does not follow that because A has previous convictions and alleges that B is a liar, B is not a liar.

- A general attack on the truthfulness of prosecution witnesses is not infrequently necessary to the presentation of a positive defence. The rule discourages a defendant with previous convictions from attacking the truthfulness of prosecution witnesses even though such witnesses may well be unreliable.
- Whether the truthfulness of prosecution witnesses is attacked and whether evidence prejudicial to the defendant is admissible become a matter of trial tactics rather than of relevance or probative value.
- Just because the defendant makes a false attack on prosecution witnesses should not expose him or her to the possibility of conviction through the admission of evidence of bad character. It seems to be a severe sanction, both on those who make false attacks and more particularly on those who make justified attacks.

206 In the New Zealand context, an argument may be made that the rule could be challenged on the basis of s 25(e) of the Bill of Rights Act 1990 (see also paras 354–356). This provision gives the defendant the right to present a defence. A defendant who is discouraged from mounting a defence which necessarily requires a challenge to the truthfulness of prosecution witnesses is perhaps denied that right. The rule may therefore be in breach of s 25(e). However, such an argument appears to have little substance. The rule does not actually *prevent* the defendant from offering character evidence about other witnesses, and it does not appear to allow unfairly prejudicial character evidence about the defendant to be admitted. It is significant that in Canada the Supreme Court has rejected a challenge along similar lines under s 11(d) of the Canadian Charter of Rights. The defence argued that s 12 of the Canada Evidence Act, RSC 1970, which permits cross-examination of any witness, including the defendant, on his or her criminal record, had the effect of depriving the defendant of a fair trial: *R v Corbett* (1988) 41 CCC (3d) 385.[121]

Options for reform

207 The rule exposing a defendant who attacks a prosecution witness and is called as a witness does not appear to cause particular difficulty in New Zealand. This may be because courts make greater use of their discretion.[122] A commentator has also suggested that New Zealand courts are unlikely to follow *R v Selvey* and will exercise their discretion in favour of the defendant in cases where attacks on prosecution witnesses are a necessary part of the defence.[123] However, a measure of uncertainty remains, which should if possible be removed in the drafting of a code rule.

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[121] *Corbett* did recognise, however, that the judge has a discretion to prevent the defendant's *whole* record being put to him or her in cross-examination.

[122] For a recent example of its operation, see *R v Anderson* (unreported, CA 110/94, 23 August 1994), a case involving sexual violation, in which the appellant alleged that the complainant had financial motives for giving false evidence, and as a consequence was cross-examined on his numerous convictions. The Court of Appeal held that the trial judge had not erred in his discretion to allow such cross-examination (6).

[123] Lanham, "Cross-examination under section 5(2)(d) of the Evidence Act 1908 – Imputations and Necessity" (1972) 5 NZULR 21, 34.

208 In Australia s 104 of the Evidence Act 1995 (Aust) now requires the prosecution to apply for leave to cross-examine the defendant about a matter relevant solely to credibility, except in the case of bias, inability to recall, and previous inconsistent statements. It further provides that leave must not be given unless the defendant puts his or her character in issue, and even then not if the evidence in question relates to the events surrounding the offence or the conduct of the investigation (s 104(5)).[124] This latter proviso seems to correspond with the notion of an imputation necessary to the nature of the defence. It may also be noted that if the defence suggests to a prosecution witness that he or she has a tendency to be untruthful, and the witness does not admit the suggestion, this is not sufficient to expose the defendant to cross-examination.[125]

209 The 1993 Report of the Royal Commission on Criminal Justice in England (Cm 2263) (the Runciman Report) has specifically recommended that imputations which are made by the defendant against the prosecution evidence and which are "central to the defence", should not deprive the defendant of the shield (recommendation 193). While broader than s 104(5) in the Australian Act, the recommendation is expressed negatively. That is, there is a presumption that any attack on the prosecution evidence will permit a response in kind from the prosecution, "unless the judge is satisfied" that the attack is necessary to the defence. This places a burden on the defence to show the centrality of the imputations.

210 While the Law Commission agrees in principle with s 104 of the Evidence Act 1995 (Aust) and recommendation 193 of the Runciman Report, it believes that three other approaches to the matter are possible.

211 The first – that embodied in *section 16* – is a modification of the current rule, but it focuses on truthfulness. Currently, the prosecution is prohibited from offering bad character evidence about the defendant, unless the defendant attacks the character of prosecution witnesses and testifies. A rule based on truthfulness would continue to allow the defence to seek to discredit prosecution witnesses in this way, and also continue to permit the prosecution to mount a reciprocal challenge on the defendant. However, the prosecution would be required to seek the leave of the court to make such a response, *and* it could only do so if the defendant offers evidence of bad character which is relevant *solely or mainly to the truthfulness of prosecution witnesses*: *section 16(1)*. In addition, the evidence offered in response by the prosecution would have to meet the test of substantial helpfulness as outlined in chapter 4, and such evidence would go only to truthfulness: *section 16(2)*. As part of the traditional indulgence to the defence (see para 180), however, we propose that the defendant's evidence as to the truthfulness of prosecution witnesses must simply be relevant and should not require substantial helpfulness; but we seek readers' views on this.

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[124] This is the approach also favoured by the Law Commission of England and Wales: Consultation Paper No 141, *Criminal Law: Evidence in Criminal Proceedings: Previous Misconduct of a Defendant* (HMSO, London, 1996) paras 12.71–12.79.

[125] *Commonwealth Evidence Law*, with commentary by Bellamy and Meibusch (Attorney-General's Department, Canberra, 1995) [104.6].

Should cross-examination about the bad character of defendants who have attacked prosecution witnesses be relevant to the defendants' truthfulness only?

Should there be a requirement of substantial helpfulness for cross-examination by the defendant of prosecution witnesses about bad character in relation to truthfulness?

212 If, on the other hand, the defendant offers bad character evidence about a prosecution witness *which goes principally to the issue*,[126] the defendant would not be exposed to questions about his or her bad character. *Section 16* is not intended, therefore, to deter the defendant from mounting an effective defence, only from making gratuitous attacks on prosecution witnesses.

213 The Commission recognises that the rule applying to defendants who attack prosecution witnesses is difficult to justify on a logical basis (see para 205), and that even in the modified form we propose it is open to such criticism. This is particularly true of the direction to the jury that bad character evidence should go only to truthfulness, and not to the issue – a distinction maintained simply to ensure that the rule minimises the likely unfair prejudice to the defendant. As alternatives, the Commission puts forward two further options which avoid the problem of logic.[127]

214 The second option is to maintain protection for defendants, whether their attack is relevant solely or mainly to the truthfulness of prosecution witnesses or it goes principally to the issue. This alternative has the advantage of simplicity; and the proposed truthfulness rule – that evidence challenging the truthfulness of a witness must have substantial helpfulness: *section 4* – might provide a sufficient barrier against gratuitous attacks on the truthfulness of prosecution witnesses by the defence. Thus, the policy requirement to exclude evidence which is time-wasting or misleading would be satisfied, avoiding the need for a specific rule in this context.

215 The third option is to adopt the approach of the US Federal Rules of Evidence, which treats the defendant who chooses to testify like any other witness.[128] Under the Commission's proposed code rules, a testifying defendant would then be open to challenges on truthfulness which have substantial helpfulness (whether or not the defendant had attacked the prosecution witnesses or otherwise put his or her character in issue). The requirement that any cross-examination by the prosecution be substantially helpful would afford some

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[126] As in *R v Funderburk* [1990] 1 WLR 587; [1990] 2 All ER 482 (CA), where the matter of the complainant's lack of virginity at the time of the offence was held to go to the issue.

[127] See also s 6 of the alternative rules, appendix A.

[128] There are some differences between the defendant and other witnesses in that r 609(a) provides that, in the case of the defendant, evidence of a conviction punishable by death or by imprisonment of more than one year is only admissible if the court determines that its probative value outweighs its prejudicial effect. The Canadian approach is similar to the US one, in that the Canada Evidence Act has no equivalent of s 1(f) of the Criminal Evidence Act 1898 (Eng). Under s 12 of the Canada Evidence Act a defendant who puts character in issue and testifies is liable to cross-examination on his or her criminal record: see McWilliams, *Canadian Criminal Evidence* (3rd ed, Canada Law Book Co, Aurora, Ontario, 1994) 10:10600.

protection to the defendant. That protection, however, may well be regarded as insufficient and so inhibit defendants with criminal records from testifying, thereby depriving them – at least in part – of the right to present a defence.

216 The Law Commission seeks readers' views on which of the three options they consider is the most satisfactory:

- a modified version of the current rule (para 211); or
- absolute protection for the defendant (para 214); or
- the introduction of a regime along the lines of the Federal Rules of Evidence (para 215).

217 On balance, the Commission favours the first option. A modification of the current rule based on truthfulness would meet some of the criticisms which have been levelled against the current rule. It would, for example, offer greater protection to defendants who are obliged to attack prosecution witnesses in order to pursue an effective defence, while exposing defendants to cross-examination if they testify after making gratuitous attacks on prosecution witnesses. In addition, the present rule is a practical one, and there are no grounds for concluding that it has operated unsatisfactorily in New Zealand. These considerations point towards retaining the current rule in substance, even though it is of a complicated nature.

What is the most satisfactory way of treating defendants who give evidence of the bad character of prosecution witnesses and who testify? Is it:

a) to protect defendants from cross-examination about their own bad character, provided that their attack on the prosecution witnesses does not relate solely or mainly to the truthfulness of the prosecution witnesses?
b) to protect them absolutely, but rely on the test of substantial helpfulness to ensure that the bad character evidence offered by defendants about prosecution witnesses is not gratuitous?
c) to remove all protection, apart from the requirement that any cross-examination of defendants about bad character evidence in relation to truthfulness must be likely to be substantially helpful?

218 One question remains in this area on which the Commission seeks the views of readers: whether it is anomalous to continue to follow *R v Butterwasser* (see para 195), which protects defendants who are *not* called as witnesses from being exposed to evidence of their bad character, even if they attack the character of prosecution witnesses.[129]

Should it be necessary for defendants to be called as witnesses before evidence of their bad character can be offered?

[129] This is a question also raised by the Law Commission of England and Wales, although it does not reach even a provisional conclusion on the matter: Consultation Paper No 141, *Criminal Law: Evidence in Criminal Proceedings: Previous Misconduct of a Defendant* (HMSO, London, 1996) paras 12.86–12.115. It should be noted that the Runciman Report of 1993 favoured abolition of the rule in *Butterwasser*: *Report of the Royal Commission on Criminal Justice* (Cm 2263, HSMO, London, 1993) recommendation 194.

CO-DEFENDANTS

The conflicting rights of co-defendants

219 This part of the chapter discusses the unique set of problems which arise when defendants offer evidence against each other. Conflict about the admissibility of evidence arises most commonly between the prosecution and the defendant. But when two defendants are either charged jointly or tried together on separate charges a dispute may arise as to the right of one defendant to present evidence which is prejudicial to the other defendant. This is likely to occur when one defendant attempts to impute blame to the other: the so-called "cut-throat" defence.

220 When a dispute about admission of evidence arises between the prosecution and the defendant, the conflict is between the desirability of having available all relevant and reliable evidence and the defendant's right to a fair trial. When such a dispute arises between co-defendants the conflict is between two identical and yet competing rights to a fair trial. The major issue raised by a dispute of this kind is the extent to which a defendant should be allowed greater latitude than the prosecution to offer evidence prejudicial to a co-defendant.

221 A defendant may seek, for example, to offer evidence against a co-defendant which is not admissible on behalf of the prosecution because it was improperly obtained.[130] But more commonly the disputed evidence focuses on the character of the co-defendant. It may be introduced for two reasons:

- to establish that the co-defendant was more likely to have committed the offence; or
- to attack the truthfulness of the co-defendant.

Whatever the evidence, and the reasons for offering it, courts in common law jurisdictions have agreed that a defendant has a greater freedom to offer evidence against a co-defendant than does the prosecution.

Limits on the evidence one defendant may offer against another

222 At present, there are some limitations at common law on the evidence going to the issue which the defendant can offer against a co-defendant. A line of cases, deriving largely from England and Australia, has defined these limits. In England the leading case is *R v Miller* [1952] 2 All ER 667, in which it was held that evidence offered against co-defendants must be relevant, confined to the purpose of the case, and communicated in advance to counsel for the co-defendant.[131] Amongst evidence found to be relevant has been propensity evidence involving previous convictions. A good example is *R v Douglass* (1989) 89 Cr App R 264, a case involving death by dangerous driving, in which the convictions of one of the defendants for driving offences were offered by his co-defendant and held to be relevant to the former's guilt. Yet in *R v Neale* (1977) 65 Cr App R 304, the court considered that it did not follow from the

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[130] See *Criminal Evidence: Police Questioning* (NZLC PP21, Wellington, 1992) appendix A, A5.

[131] See also *R v Rhodes & Nikara* (unreported, High Court Auckland, T 11/91, 20 June 1991) which, however, stipulated a wider rule "that when one of two or more accused propose to attack the character of another accused, notice should be given of that fact to the co-accused who is to be the target of the evidence to be called" (4).

existence of a propensity in one defendant to commit arson that his co-defendant was *not* a participant in a further act of arson; the evidence was therefore held to be irrelevant to the defence.[132]

223 The leading Australian case, *R v Lowery No. 3* [1972] VR 939, is perhaps the most controversial. The defendants had been charged with the apparently motiveless killing of a teenager. The Crown alleged that both had been involved. Each defendant, however, claimed that he was not of a character to commit such an offence and that the other had acted alone in the killing. Counsel for the defendant King offered expert evidence about the personality of each defendant which suggested that of the two the other defendant, Lowery, was the more likely to have committed the offence. The question was whether such evidence could be offered on behalf of one defendant against another.

224 The Supreme Court of Victoria held unanimously (and the Privy Council in *Lowery v The Queen* (1974) AC 85 agreed) that a co-defendant may offer any evidence relevant to a defence, even if that includes evidence not available to the prosecution. In the words of the court:

> It is one thing to say that it is unjust or unfair for the Crown to put a person in danger of conviction by leading [evidence of propensity] against him. It is, however, a very different thing to say that he is to be restricted in defending himself by excluding such evidence when it tends to rebut his guilt or to prove his innocence. The considerations applicable when such evidence is sought to be led by the Crown against an accused person are by no means the same as when it is led by an accused person to support his defence, notwithstanding that it may have a prejudicial effect on the co-accused . . . (947)

225 Subsequent Australian decisions such as *R v Darrington & McGauley* [1980] VR 385 and *R v Webb & Hay* (1992) SASR 563, however, have been at pains to stress that the admissibility of propensity evidence against a co-defendant has its limits. The former, for example, makes clear the existence of a discretion to exclude the evidence if its introduction subjects the jury to excessive "intellectual and emotional burdens" or if the probative value is "slight". The latter follows the English insistence on relevance, adding that such relevance must be "substantial . . . and clearly seen" (574).

Cross-examination of a defendant who has offered evidence against a co-defendant

226 Under s 1(f)(iii) of the Criminal Evidence Act 1898 (Eng), if a defendant offers evidence against a co-defendant charged in the same proceedings *and testifies*, then that co-defendant is free to cross-examine the defendant about convictions and other aspects of bad character. However, such cross-examination goes only to truthfulness (*Murdoch v Taylor* [1965] AC 574, 584, 593). In England, at least, there seems to be little scope for the court to exercise its discretion to limit the cross-examination.

227 The phrase "evidence against" gave the courts some difficulty until *Murdoch v Taylor* was decided. It raises once again the question of what triggers the right of the co-defendant to cross-examine. In a majority decision, the House of Lords held that it is sufficient if the evidence supports the prosecution case in a

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[132] Other examples of cases which follow *Miller* are *R v Bracewell* (1978) 68 Cr App R 304; *R v Knutton; R v England* [1993] Crim LR 208; and *R v Thompson, Sinclair and Maver* [1995] Crim LR 821.

material respect or undermines the defence of the co-defendant. The test is an objective one: it is the effect of the evidence which is critical; the court need not inquire into motive or intent. Furthermore, the court has no discretion to refuse the right to cross-examine, since the right of the co-defendant to defend him- or herself must not be fettered. A later case, *R v Varley* [1982] 2 All ER 519 (CA), added some glosses on *Murdoch v Taylor* and mitigated its severity somewhat. First, the evidence must clearly undermine the co-defendant's defence: inconvenience or inconsistency alone are not sufficient. Secondly, mere denial of participation in a joint venture is also not sufficient: it must follow from the denial that the co-defendant is guilty. But, finally, contradiction of the co-defendant's view of the joint venture might be considered as evidence against him or her.

228 The harshness of this interpretation of s 1(f)(iii) was clearly recognised in two of the judgments in *Murdoch v Taylor*. Lord Reid suggested that, on the wide meaning taken by the majority, a defendant with previous convictions, whose story contradicted that of a co-defendant in any material respect, would find it almost impossible to defend him- or herself; to do so would invite certain exposure to prejudicial cross-examination (583).

229 In relation to the court's total lack of discretion to exclude, Lord Pearce (who dissented on this point) put forward two scenarios where the discretion should be exercised in favour of exclusion: if one defendant's counsel deliberately leads another defendant into a trap, or if there is an "inevitable and trivial" clash between the stories of each defendant (587). This may not be so much of a problem in New Zealand, however, since s 5(4)(b) of the Evidence Act 1908 would probably allow the court to exercise its discretion in the face of a patently unjust result.

Proposals for reform

230 In its present state the law relating to "cut-throat" defences is both unnecessarily complex and unfair. It is difficult to extract from the amalgam of common law and statute which controls it, and in one respect at least it may hamper defendants from making a positive defence. What is required in an evidence code is one rule governing propensity evidence offered by defendants against each other, and another rule governing evidence of truthfulness offered in the same circumstances.

231 The first rule is dealt with as an exception to the propensity rule in chapter 9 (paras 281–282). For the second, the Commission proposes permitting a defendant to offer evidence about the bad character of a co-defendant which is relevant to the co-defendant's truthfulness: *section 17(1)*. However, if the evidence offered by a defendant is relevant solely or mainly to a co-defendant's truthfulness, then the co-defendant would be able to respond by cross-examining the defendant about bad character which is solely or mainly relevant to the defendant's truthfulness: *section 17(2)*.[133] The leave of the court would

[133] This contrasts with the approach of the Law Commission of England and Wales, which provisionally proposes that if a defendant 's challenge of a co-defendant's defence concerns the latter's "conduct in the incident in question or the investigation of it", then the defendant will not be exposed to evidence of his or her bad character; furthermore, it proposes that evidence of bad character admitted in this context should become relevant to guilt as well as to credibility: Consultation Paper No 141, *Criminal Law: Evidence in Criminal Proceedings: Previous Misconduct of a Defendant* (HMSO, London, 1996) paras 13.46, 13.53.

not be required under either *subsection (1)* or *(2)*, and the only controls on any bad character evidence offered would be relevance and the general exclusion. The reason is that it is desirable to allow defendants as wide a scope as possible in presenting their defence.

Under what circumstances should a defendant be able to cross-examine a co-defendant as to bad character in relation to truthfulness?

232 As with *section 16* (see paras 211–213), a question remains as to whether a defendant or co-defendant must be called as a witness before evidence of their bad character can be offered. The Commission again seeks the opinion of readers on this issue.

Should it be necessary for defendants to be called as witnesses before evidence of their bad character can be offered?

Severance of trials and editing

233 If the evidence offered by one defendant against another proves to be too prejudicial, there are at present three ways in which that prejudice can be avoided or reduced. The court can direct the jury on the use of that evidence; it can order the relevant statements to be edited; or – more drastically – it can order separate trials. Jury directions, as this paper has indicated in chapter 3, can be ineffective and even counterproductive. Severance of trials is often viewed with disfavour for two principal reasons. First, separate trials prolong judicial proceedings and are correspondingly more expensive. Secondly, there is the danger that if defendants are tried separately the court will obtain only a partial picture of the events which surrounded the offence: in a joint trial it is more likely that the full facts will be "flushed out" by a co-defendant.[134]

234 Editing is sometimes an attractive option because it may allow important evidence to come before the fact-finder without exposing a defendant to undue prejudice. But editing a defendant's statement is no simple matter because a number of interests are affected by resorting to it – not only those of the maker but also of the prosecution, and of the defendants collectively. As the court put it in *R v Hanifah* (unreported, HC Hamilton, T33/91, 31 October 1991), 4, "[i]n a joint trial there is often a complex web of relationships . . . . As a result there are competing prejudices. To edit may lessen the prejudice for one accused but have a deleterious effect for another accused or for the Crown or both".

235 The approach of the New Zealand courts to editing is that it is only to be undertaken "in rare cases" (*R v Genet* (unreported, CA 146/83, 10 April 1984) 16), in the context of "a discretionary jurisdiction to be exercised circumspectly and in cases where all-round justice clearly requires the exclusion" (*R v Hereora*

[134] See *R v Miller* [1952] 2 All ER 667, 670.

[1986] 2 NZLR 164, 169 (CA)).[135] There are a number of matters which the court must take into account before editing: these include not only the relative degrees of fairness to the other parties, but also the extent to which the sense of the statement will become distorted (*Re an Application by Clarke* (1983-1986) 1 CRNZ 683, 686 (HC); *R v Hanifah*).

236 The Law Commission considers that the New Zealand approach to editing of co-defendants' statements has been sound, and that the matter should remain part of the court's inherent discretionary jurisdiction.

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[135] Note, in contrast, the position of the Privy Council as expressed in *Lobban v R* [1995] 2 All ER 602, 613, which is that "decisions [which suggest] that a judge in a criminal trial has a discretionary power at the request of one defendant to exclude evidence tending to support the defence of another defendant . . . are contrary to well-established principles and do not reflect the law of England or Jamaica".

9
Similar fact evidence in criminal cases

THE CURRENT RULE AND ITS HISTORY

Terminology and definition

237 A frequently litigated matter in criminal law is the use by the prosecution of evidence of the defendant's behaviour other than that which is the subject of the offence charged. The phrase most commonly used in common law jurisdictions to describe such evidence is "similar fact evidence", although as noted in *Cross on Evidence* (Mathieson) this phrase is doubly misleading because

> it describes the exclusionary rule in a phrase more apt to describe one of the principal exceptions to it, and because it suggests a unifying factor between the situations in this area which they do not necessarily possess. (551)

238 One of the difficulties encountered when considering similar fact evidence, therefore, is the confusion of terminology. Other phrases used include

- propensity evidence
- evidence of criminal behaviour
- evidence of bad conduct or misconduct
- evidence of bad character
- evidence of other behaviour.

On the one hand, some of these expressions do not show the law's concern to discourage the fact-finder from inferring guilt from evidence of previous (or indeed subsequent) behaviour. On the other, none of them make clear what range of behaviour they include. Does the law on occasions permit the use of evidence of other *unlawful* behaviour; or does it also allow the use of evidence of behaviour that may be lawful but is prejudicial to the defendant because it carries suggestions of immorality?

239 Even evidence of previous behaviour which in itself is neither illegal nor necessarily immoral has been admitted, for instance in *R v Butler* (1987) 84 Cr App R 12. The appellant was convicted on counts of rape and indecent assault on two women. Each gave evidence of forced oral sex in the defendant's car at places to which they had been driven by the defendant. Evidence was admitted from a former girlfriend of the defendant who testified to consensual acts of the same nature as those described by the complainants, taking place in the defendant's car at the same venues. On appeal against conviction, the admission of the evidence of the former girlfriend was upheld.[136]

240 An early and influential statement of the similar fact rule was made in *Makin v AG* [1894] AC 57, 65:

> It is undoubtedly not competent for the prosecution to adduce evidence tending

[136] For a New Zealand case which admits "evidence of similar facts falling short of amounting to a crime", see *R v Adams* (unreported, HC Christchurch, T74/93, 3 February 1994) 2–3. However, the judgment does not make the exact nature of the evidence clear.

> to shew that the accused has been guilty of criminal acts other than those covered by the indictment, for the purpose of leading to the conclusion that the accused is a person likely from his criminal conduct or character to have committed the offence for which he is being tried.

This formulation referred only to evidence of "criminal acts other than those covered by the indictment"; but subsequently the law has been applied to a much broader range of behaviour. Consequently, no one term is readily capable of describing all the kinds of behaviour which may require application of the rule. However, the least apt phrase, "similar fact evidence", is the one most commonly used, and it is also used therefore for the purposes of discussion in this chapter.

Basis of the rule

241 The common law "similar fact rule" developed because of concern at the prejudice to the defendant that may result through the use of evidence of other behaviour. The depth of this concern is evident in Viscount Sankey's description in *Maxwell v DPP* [1935] AC 309, 317, of the rule as "one of the most deeply rooted and jealously guarded principles of our criminal law". It must be noted that the fear as to the use to which such evidence would be put by juries, which lies behind the common law rules, has been in large measure vindicated by the results of empirical research into use of character evidence.[137] This research confirms that a jury's awareness of the bad character of a defendant is likely to influence its decision as to guilt. The reason for controlling the use of this form of prejudicial evidence is still valid today,[138] and must underpin any proposal for codification. On the other hand, the rules must leave room for similar fact evidence to be admissible in appropriate cases.[139]

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[137] See ch 3 for a discussion of the relevant findings.

[138] Two other reasons may be mentioned: the concern not to confuse the jury about the basis on which to reach a verdict; and trial management – the need to limit the scope of the proceedings.

[139] The argument that strict control of similar fact evidence is not necessarily desirable, particularly in relation to sexual offences, has found favour in some overseas jurisdictions. See Spencer and Flin, *The Evidence of Children: The Law and Psychology* (2nd ed, Blackstone, London, 1993) 222–229, for a persuasive account of why the rule should not apply in paedophilia cases. See also Beale, "Prior Similar Acts in Prosecutions for Rape and Child Sex Abuse" (1993) 4 Crim Law Forum 307; Hanson, "Sexual Assault and the Similar Fact Rule" (1993) 27 UBC LR 51; "*R v B(FF)* Revisited: Possibilities for Admitting Similar Fact Evidence Via Relevance to Other Matters in Issue" (1994) 20 Queen's LJ 139; and Bryden and Park, "'Other Crimes' Evidence in Sex Offense Cases" (1994) 78 Minnesota LR 529 for arguments favouring a relaxation of the similar fact rules in cases of sexual assault and particularly of acquaintance-rape. The United States Congress, possibly influenced by such arguments, introduced new Federal Rules of Evidence (413, 414, and 415) in September 1994 which allow "evidence of the defendant's commission of another offense or offenses of sexual assault" in cases of sexual assault and child molestation. These rules have been the subject of severe criticism, not least because they are drafted in such a way as to allow prosecutors "to use even unproven (and perhaps false) allegations of sexual miscondict that may be many years old". (Duane, "The New Federal Rules of Evidence on Prior Acts of Accused Sex Offenders: A Poorly Drafted Version of a Very Bad Idea" (1994) 157 FRD 95, 109) The Judicial Conference of the United States urged Congress to reconsider the new rules (Report of the Judicial Conference on the Admission of Character Evidence in Certain Sexual Misconduct Cases, 9 February 1995), stating, amongst other things, "that the concerns expressed by Congress and embodied in new Evidence Rules 413, 414, and 415 are already adequately addressed in the existing Federal Rules of Evidence", in particular r 404(b) (52–53). Congress did not respond to this negative report; however, it is doubtful that the new rules will be routinely emulated by the state jurisdictions. The Commission is not proposing rules similar to FRE 413, 414, and 415 for New Zealand; but the position in relation to paedophilia may require further investigation.

242 As the New Zealand Court of Appeal pointed out in *R v Gaelic* (unreported, CA 22/96, 15 February 1996), "[s]imilar fact evidence inevitably involves some prejudice to the defence" (5). The question is whether the evidence prejudices the defendant in a legitimate and fair manner. The nature of the prejudice to the defendant in similar fact evidence can be characterised in a number of ways. One commentator, Palmer, distinguishes between two kinds of prejudice: *reasoning* prejudice and *moral* prejudice.[140] The first "will always arise when the jury are actually invited by the prosecution to reason from propensity to guilt; it may arise when there is a realistic prospect that the jury may do so" (170). The latter "arises when the evidence suggests that the accused has been guilty of morally repugnant conduct" (171). Palmer further considers that it is only when the two kinds of prejudice are combined that a distinct exclusionary rule for similar fact evidence can be justified (172).

243 The High Court of Australia is one of the many courts which have considered the prejudicial effect of similar fact evidence, and it has pointed out three factors which seem fundamental:[141]

- erosion of the presumption of innocence;
- the danger of propensity reasoning; and
- circularity of reasoning.

The factors are closely linked and in practice overlap.

244 The danger that each of these factors potentially presents to the fact-finding process is well illustrated by the case in which they are enumerated, *Perry v The Queen* (1982–83) 150 CLR 580. Mrs Perry was convicted on two counts of attempted murder of her third husband by arsenic poisoning. Mr Perry had suffered arsenic poisoning which could either have been accidental or due to the deliberate acts of Mrs Perry or some other person. There was no direct evidence to implicate Mrs Perry and no suggestion that she had inadvertently poisoned him.[142]

245 On appeal the prosecution conceded that there was no basis for the verdict in relation to the poisoning of Mr Perry other than the inferences that it claimed could properly be drawn from earlier events in the life of Mrs Perry. Her second husband had died from arsenic poisoning, and in the following year her brother died from arsenic poisoning. More recently, her de facto husband had died from a self-inflicted overdose of barbiturates, but it was asserted by the prosecution that, in the light of the two previous deaths, his history of illness established that he too had suffered from arsenic poisoning. Evidence relating to all three deaths was offered by the prosecution during Mrs Perry's trial for the attempted murder of her third husband. The High Court of Australia agreed that the evidence concerning the death of Mrs Perry's second husband was admissible, but held that the evidence concerning the deaths of her de facto husband and her brother was not admissible, since the links between those deaths and the offence charged were too tenuous.

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[140] "The Scope of the Similar Fact Rule" (1994) 16 Adelaide LR 161. Nair distinguishes in a not dissimilar manner between the "descriptive quality" and the "moral quality" of similar fact evidence: "Weighing Similar Fact and Avoiding Prejudice" (1996) 112 LQR 262, 273. Probative value arises out of the former, while prejudicial effect arises primarily out of the latter.

[141] *Perry v The Queen* (1982–83) 150 CLR 580, 593–595.

[142] Section 23 of the Evidence Act 1908 is concerned with similar fact evidence in poisoning cases (see paras 283–285).

246 The danger that *the presumption of innocence will be eroded* lies in predisposing the jury against the defendant. The prosecution presents evidence of behaviour or events which are similar to and yet independent of those connected with the offence charged. The jury then uses the evidence of the earlier behaviour or events to justify a finding of guilt on the offence charged. As noted by Murphy J when discussing the evidence against Mrs Perry:

> In Mrs Perry's case there is a very great temptation in weighing the evidence . . . to ignore the presumption of innocence and to replace it with a presumption of guilt. The allegation that a number of the accused's relatives died or suffered from arsenic poisoning immediately conjures up a highly suspicious prejudicial atmosphere in which the presumption of innocence tends to be replaced with a presumption of guilt. (594)

247 The second factor, *propensity reasoning*, is closely linked with the first. Such reasoning assumes that if, for example, the defendant has previously been convicted of offences similar to the offence charged, then the likelihood is that he or she will have committed the latter as well. The danger, therefore, is that the jury will too readily conclude guilt on the basis of evidence tending to establish the defendant's propensity or tendency to commit offences of the kind charged. Such a danger is acute given the general nature of the evidence frequently available in this context and its lack of probative value – without supporting evidence – as an indicator of guilt.

248 The third factor, *circularity of reasoning*, can occur where the accused denies that the other incidents relied upon by the prosecution happened at all or, more commonly, where the accused denies his or her involvement in such incidents. It is fallacious reasoning which in effect invites the jury to make a *temporary assumption* that the defendant has indeed committed the offence charged. Further, it invites the jury to use this assumed fact together with other evidence in the case to conclude that the defendant was responsible for the earlier incidents. The final step is for the prosecution to attempt to rely on the "proven" fact of the earlier conduct as similar fact evidence to prove the offence charged. But as Brennan J stated in *Perry*:

> That assumption cannot be made. . . . To seek to prove a fact in issue by a chain of reasoning which assumes the truth of that fact is, of course, a fallacy, repugnant alike to logic and the practical processes of criminal courts. (612)

249 The Law Commission believes that on the basis of these three factors, evidence of other behaviour of the defendant is frequently unfairly prejudicial to the defendant and should in general be excluded. But it also acknowledges that in certain circumstances such evidence should be available to the fact-finder if it has sufficient probative value.

250 Sometimes, for example, a series of offences has occurred which appear so closely connected as to suggest that they have all been committed by one person.[143] If there is enough evidence to convict the defendant for one offence in the series, this may in itself be sufficient to show guilt for all of the offences charged. On any one charge, the admissibility of evidence of the occurrence of the others in the purported series will depend on such factors as the degree to which the offences can be seen as a connected series, as well as the strength of the evidence connecting the defendant to any one or more of the offences.

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[143] See *Harris v DPP* [1952] AC 694. In this case, however, the House of Lords quashed a conviction which had been obtained by the admission of such evidence.

251 Alternatively, any one of the incidents in a series, when viewed in isolation, may not suggest that any criminal act at all has occurred.[144] Nevertheless, when considered together, a stage will be reached when it becomes difficult or impossible to accept that mere coincidence can account for the number of similar unusual events with which the defendant is connected. The point has been well made that in such circumstances not to admit the evidence "would be an affront to common sense" or a "nonsense".[145]

The present law

252 The foundation for the modern law on similar fact evidence is the House of Lords decision of *Boardman v DPP* [1975] AC 421. The authorities prior to *Boardman* had admitted similar fact evidence only by reference to certain categories. This approach can be traced to statements by Lord Herschell in *Makin v Attorney-General for NSW* [1894] AC 57 (PC), who, after setting out the general rule of exclusion, stated:

> On the other hand, the mere fact that the evidence adduced tends to shew the commission of other crimes does not render it inadmissible if it be relevant to an issue before the jury, and it may be so relevant if it bears upon the question whether the acts alleged to constitute the crime charged in the indictment were designed or accidental, or to rebut a defence which would otherwise be open to the accused. (65)

These examples of relevance came to be seen as establishing the categories of admissible evidence. Commonly, they included evidence offered to establish motive, opportunity, intent, preparation, plan or knowledge, or to rebut a defence of accident or mistake. However, there seems little doubt that the categories approach was taken to excessive lengths.[146]

253 In *Boardman*, it was clear that their Lordships continued to regard the similar fact rule as fundamental to the common law. However, in a significant shift from the earlier authorities, the "categories approach" was replaced with a balancing rule: similar fact evidence is admissible only when its *probative value* sufficiently outweighs its *prejudicial effect* on the defendant. Although this test is based on the assumption that it is possible to accurately assess both the probative value and prejudicial effect of the evidence, none of the judgments provided definitive guidelines for assessing either. Perhaps in recognition of the difficulty of establishing such guidelines, their Lordships warned against attempting to formulate rules and stressed instead the role of the experience and commonsense of the judge in making that assessment. The judgments did, nonetheless, discuss the ways in which evidence could acquire the level of probative value necessary to allow admission. From these discussions a list of terms and phrases, the most notable of which is "striking similarity",[147] emerged as the basis of a test to gauge the level of probative value.

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[144] Examples are *Makin v AG* [1894] AC 57 (PC), and *R v Smith* (1915) 11 Cr App R 229 (the "Brides in the Bath" case).

[145] The phrase derives from *R v Kilbourne* [1973] AC 729, 759. But see *Boardman v DPP* [1975] AC 421, 455, 456; also the commentary to *R v Sokialiois* [1993] Crim LR 872.

[146] For example, in *R v Sims* [1946] KB 531, the court accepted that the offence of sodomy constituted an admissible category of its own.

[147] Others were "underlying unity" (441), "system", "pattern", "course of criminal conduct", and "nexus" (452–453).

254 After the *Boardman* decision, the English Court of Appeal gave considerable attention to the meaning of "striking similarity" and the ways in which facts could come within its ambit. In the context of the policy considerations discussed by the House of Lords in *Boardman*, the Court came to require a high level of correlation between the behaviour which was the subject of the similar fact evidence and the behaviour forming the basis of the charge. In particular, it held that the similarity had to go beyond features regarded as the mere "stock-in-trade" of the offence charged. Such a stock-in-trade in a case of incest, for example, might consist of a domination of the complainants by means of threats.

255 It was the Court of Appeal's statement of the rule that led once again to the referral of the question of similar fact evidence to the House of Lords in 1991. In *DPP v P* [1991] 2 AC 447, the House of Lords held that the Court of Appeal's view was too restrictive an application of the rule, because it had elevated the phrase "striking similarity" – merely an aspect of the test – to the status of the test itself. In essence *DPP v P* was a restatement of the *Boardman* principle;[148] but, again, no guidelines were given as to the ways in which evidence could acquire probative value. Instead, Lord Mackay LC, when delivering the judgment of the Court, concluded that "there is no single manner in which this can be achieved. Whether the evidence has sufficient probative value to outweigh its prejudicial effect must in each case be a question of degree"(346).

256 The House of Lords further held that with a different set of facts other factors would contribute to the requisite level of probative value, and that the issue in dispute at trial would affect what factors contributed to probative value. For example, a dispute as to identity requires consideration of different factors from a dispute as to whether an offence actually happened (which was the issue in both *Boardman* and *DPP v P*). In the former, "striking similarity" is more relevant than in the latter.[149]

257 This refinement of the discussion in *Boardman* is the feature of *DPP v P* which most advanced the law in relation to similar fact evidence. It highlights the significance of the context in which the assessment of the probative value of the similar fact evidence is made. In recognising that the issue in dispute at trial can determine the utility of the evidence sought to be admitted, the decision establishes a reference point against which the prejudicial effect of the evidence can be judged. If the similar fact evidence is relevant merely to the general subject matter of the trial and not to the actual issue in dispute, such probative value as it may have can never outweigh the prejudicial effect. Indeed, the nature of the dispute may be such that similar fact evidence is not able to assist in its resolution and should not be admissible, given that it has

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[148] Tapper, however, regards *DPP v P* as the beginning of a process of erosion of the *Boardman* principles, a process exacerbated by the recent House of Lords decision in *R v H* [1995] 2 AC 596; [1995] 2 WLR 737; [1995] 2 All ER 865: "The erosion of *Boardman v DPP*" [1995] NLJ 1223 (Part 1); 1263 (Part 2).

[149] For examples of cases in which the similar fact evidence went to identity – on the basis of only two incidents – see *R v Straffen* [1952] 2 QB 911 and *R v Julian* [1981] 1 NZLR 743 (CA). See also the commentary to *R v Mills* [1992] Crim LR 802, and Pattenden ("Similar Fact Evidence and Proof of Identity" (1996) 112 LQR 456, 470), who does not consider that striking similarity is a prerequisite for proof of identity, and concludes:

> the test for admitting similar fact evidence in proof of identity should be whether in all the circumstances the evidence has sufficient probative force to justify exposing the defendant to the prejudice that an awareness of his criminal record may entail.

no substantial probative value. As an illustration, it is the Commission's view that this would be so if the defendant is charged with possession of a prohibited drug and admits possession but denies knowledge of the nature of the substance. If evidence were available that the defendant had previously been convicted of possession of a *different* prohibited substance, it could not be admitted, because it would not relate to the issue in dispute and would only be prejudicial propensity evidence.

258 If on the other hand the previous conviction in the above example were for possession of the *same* substance, that would clearly relate to the defendant's knowledge of the nature of the substance and so could be admissible.[150] This approach to admission of similar fact evidence requires a clear understanding of what is really in dispute between the parties. It will on occasion require the defendant to reveal the nature of the defence – for example, a denial of possession but not of knowledge – when admissibility is being determined.

259 *DPP v P* has not finally resolved the problem of similar fact evidence. Recently, the English courts have had to examine it again in connection with the possibility of collusion and the resulting risk of contamination of the evidence. The issue frequently arises in cases involving sexual offences when there are a number of complainants who are linked by being members of the same family or by belonging to the same institution. Collusion can occur deliberately, through conspiracy, or innocently, through unconscious influence.

260 The question in such cases has been whether the evidence of another complainant raises an issue of admissibility to be decided by the judge, or whether the use of such evidence is simply a matter of weight to be left to the jury. In *R v Ananthanarayanan* (1994) 98 Cr App R 267, the court held that if there is a real risk that the evidence is not independent, a judge has "no discretion to let the evidence go to the jury"; that is, it is a matter of admissibility. The House of Lords, on the other hand, in the recent decision of *R v H* [1995] 2 AC 596, established that such evidence was a matter for the jury, unless "circumstances are adduced in the course of the trial which indicate that no reasonable jury could accept the evidence as free from collusion" (749). However, in leaving the matter to the jury, the judge may still draw its attention to "the importance of collusion".

261 *R v H* is a difficult decision because it is also concerned with the issue of corroboration, but it does appear to have created a further relaxation of the similar fact rule as stated in *Boardman*.[151] This state of affairs is summed up by Tapper, who is critical of the decisions in both *DPP v P* and *R v H*:

> The result in *H* was to remove the last vestiges of the breakthrough made by *Boardman* in relation to the admissibility of similar fact evidence. After *P* it seems that the relevance of evidence of allegations of other offences is to be assumed without explanation of the reasoning process involved, and after *H* the evidence is to be assumed to be true.[152]

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[150] As for example in *R v Caceres-Moreira* [1995] Crim LR 489. Compare also *R v Ollis* [1900] 2 QB 758, which related to identical methods of obtaining cheques by false pretences.

[151] See the commentary in [1995] Crim LR 717, 720.

[152] "The erosion of *Boardman v DPP*" [1995] NLJ 1264. See also Munday, "Similar Fact Evidence and the Risk of Contaminated Testimony" [1995] CLJ 522, 524.

Australian decisions

262 In the course of the last 10 years or so, the High Court of Australia has devised its own, rather stricter, test for similar fact evidence. *Hoch v R* (1988) 165 CLR 292, adopted a test suggested by Dawson J in *Sutton v R* (1984) 152 CLR 528, 563–564, to require that the evidence be such that "it bears no reasonable explanation other than the inculpation of the accused" (294). Further, the trial judge must apply the same test as a jury must apply in dealing with circumstantial evidence and ask whether there is a rational view of the evidence that is inconsistent with the guilt of the accused. In the more recent decision of *Pfennig v R* (1995) 127 ALR 99, the High Court concluded that this test was the only safe way to determine whether the probative force of the evidence outweighs its prejudicial effect.

263 What is debatable about *Pfennig*, however, is that the High Court dismissed the defendant's appeal on the basis of facts which arguably did not meet the test of "no reasonable explanation other than the inculpation of the accused". The defendant had been convicted of the murder of a 10-year-old boy whose body was never found; evidence of an abduction and rape (but not the murder) of another boy 12 months *after* the disappearance of the murder victim had been used to secure the conviction.

264 McHugh J disagreed with the test favoured by the majority in *Pfennig*, arguing that a corollary to the test is that the judge must "[apply] to the admissibility of a class of evidence . . . the same test that the jury must apply to the question of guilt if the evidence is admitted" (139). This would suggest that the test applied by the jury is redundant. He went on to propose an approach comparable to that in *DPP v P*:

> If the risk of an unfair trial is very high, the probative value of the evidence disclosing criminal propensity may need to be so cogent that it makes the guilt of the accused a virtual certainty. In cases where the risk of an unfair trial is very small, however, the evidence may be admitted although it is merely probative of the accused's guilt. Each case turns on its own facts . . . (148)

Pfennig, as one commentator observes, "is unlikely to be the last word" on similar fact evidence in Australia.[153]

New Zealand decisions

265 Lord Mackay's judgment in *DPP v P* referred favourably to decisions of the New Zealand Court of Appeal as reflecting the appropriate development of the law. Unlike the English Court of Appeal, the New Zealand Court of Appeal had not interpreted *Boardman* restrictively, but had consistently applied the principle that only evidence having the requisite level of probative value (however acquired) is admissible. Rather than adopting "striking similarity" as the definitive test, the New Zealand Court of Appeal regarded it as an "expression of convenience rather than precision",[154] the value of which was to act as a reminder that the evidence must do more than merely establish propensity.[155] In *R v Julian* [1981] 1 NZLR 743, an early post-*Boardman* decision, the Court

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[153] Odgers (1995) 19 Crim LJ 229, 231.

[154] *R v McIntosh* (unreported, CA 352/91, 13 November 1991) 6.

[155] *R v Hsi En Feng* [1985] 1 NZLR 222, 225.

held that the requisite level of similarity could be attained not only by the presence of one singular striking feature of the evidence, but also by a combination of matters. This view has been consistently applied in subsequent decisions.[156] In *Crime Appeal* (unreported, CA 202/91, 13 August 1991), the Court of Appeal endorsed *DPP v P* as accurately reflecting the New Zealand law.[157]

266 More recently, the Court of Appeal has commented that "[u]ndoubtedly the present atmosphere towards the admission of similar fact evidence is more relaxed than before the mid-1980's" (*R v Horne* (unreported, CA 80/94, 18 July 1994) 3). In two subsequent cases (*R v Fissenden* (unreported, CA 227/94, 28 March 1995) 5; *R v J* (unreported, CA 525/94, 24 April 1995) 4), it has placed such a relaxation in the context of the attempt by the criminal law "to keep in touch with common sense and responsible community opinion".[158]

267 In *Fissenden*, the Court of Appeal also acknowledged the Australian case of *Pfennig*, but intimated that *Pfennig* "pose[s] a stricter test than is applied in New Zealand," (6) adding that "[i]t is difficult to imagine that there could ever be a case where similar fact evidence of itself could conclusively prove the accused's guilt" (7). In *R v S* (unreported, CA 201/95, 22 September 1995), by contrast, the Court of Appeal appears to have approved of the decision of the House of Lords in *R v H*. It seems possible to conclude, therefore, that its approach to the question of similar fact evidence remains reasonably close to that taken by the English courts.

DEVISING A CODE RULE

268 In spite of the New Zealand Court of Appeal's view that the law is settled,[159] the admission or exclusion of similar fact evidence is often the subject of litigation, and is frequently taken to appeal. This reflects the significance attached to such evidence by both prosecution and defence. As the common law now stands, the admission of similar fact evidence is based on the judge's assessment of the balance between the probative value and the prejudicial effect of the evidence. But each case presents unique factors, and the imprecise nature of the "test" applied in considering admission means that it can be difficult for counsel to assess in advance whether the evidence will be admitted.

269 Indeed, there is some doubt about the meaningfulness of the common law test. In *Pfennig*, McHugh J pointed out that the test attempts to balance two "incommensurables" against each other (147): probative value, which, in Tapper's description, "operate[s] in the logical world of relevance" and goes to the proof of an issue, and prejudical effect, which operates "more in the emotional

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[156] So consistent was the approach of the Court that it noted that since it regarded the law as sufficiently settled, it did not require either counsel or the court to go over the ground: see *R v Accused* [1988] 1 NZLR 573, 574.

[157] *R v Gaelic* (unreported, CA 22/96, 15 February 1996) is a more recent example of a New Zealand decision which applies *DPP v P*.

[158] *R v Guy* (unreported, CA 19/96, 29 March 1996), however, demonstrates the limits of such relaxation. Here, the similar fact evidence arose out of proceedings before the Medical Council which were subject to intense media publicity. The prejudicial effect of the evidence was said to be exacerbated by the publicity, as well as by the lower standard of proof applied in Medical Council proceedings.

[159] See Mahoney, [1994] NZ Rec LR, Part I, 82, 86.

world of moral attitude" and goes to the fairness of the trial.[160] However, McHugh J recognised that ultimately the judge must make "a value judgment, not a mathematical calculation"; and this will always be fundamental to the test's imprecise nature.[161]

270 It is therefore a significant challenge to codify a rule which has defeated precise expression. Nevertheless, the Commission considers that guidelines to the admission of similar fact evidence can usefully be developed, which will help parties and judges to better anticipate the admissibility or otherwise of similar fact evidence. Such guidelines must be flexible enough to cope with the wide variety of factual circumstances in which they operate. At the same time it is important to recognise that there will always be cases which will not readily fit the guidelines.

271 When considering the form that a code rule might take, two questions must be addressed:

- What is the scope of the exclusionary rule; that is, what sort of behaviour should it govern?
- What should be the extent of the exception to the exclusionary rule?

Which behaviour should the rule govern?

272 The existing common law rules do not make clear the extent to which the similar fact rule is confined in operation to other behaviour which is criminal in nature. Nor do they specify the extent to which it includes behaviour which is neither criminal nor necessarily immoral, such as that admitted in *Butler* (see para 239). The essential feature of such behaviour, however, is its capacity to generate unfair prejudice towards the defendant in the course of the trial.

What range of behaviour should similar fact or propensity evidence encompass?

273 The character rule already excludes much evidence that is unfairly prejudicial towards the defendant (see paras 176-178). However, the character rule is designed, as far as the prosecution is concerned, to work *reactively*. That is, it allows the prosecution to offer evidence of bad character about the defendant only if the defendant adopts a particular mode of defence. It does not accommodate the situation where the prosecution might wish to operate *proactively*; that is, to offer bad character evidence that might be unfairly prejudicial to the defendant as part of its case. Nor does the character rule capture all kinds of propensity evidence.

274 Another general code rule is required, therefore, which excludes evidence – whatever its source – which might establish the defendant's propensity to behave in the manner of the offence charged: *section 18*. Such evidence will include

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[160] "Trends and Techniques in the Law of Evidence" in Birks (ed), *Pressing Problems in the Law*, vol 1 (Oxford University Press, Oxford, 1995) 29.

[161] There is the further problem that the balancing test is the same as the judge's general discretion to exclude evidence whose probative value is outweighed by its prejudicial effect. This may seem to require that the judge applies the same test twice to similar fact evidence: *Cross on Evidence* (Tapper) (7th ed, Butterworths, London, 1990) 29.

both character traits of the defendant – for example, violence or dishonesty – and acts, omissions, events, or circumstances of a similar nature with which the defendant is alleged to have been involved. This means that the prohibition will encompass not only conduct which can be specifically attributed to the defendant, but also coincidental events with which he or she becomes associated. There would be no need, therefore, to draft separate rules as in ss 97 and 98 of the Evidence Act 1995 (Aust) (a tendency rule and a coincidence rule): one suffices.[162] Indeed, there is now some doubt whether "a hard and fast division can be maintained" between tendency and coincidence.[163] Because its focus is on prohibiting propensity reasoning, the Law Commission's proposed code provision is referred to as the *propensity rule*.

The extent of the exception

275 The code must, however, allow evidence to be offered by way of exception to the propensity rule. Propensity evidence should become admissible if its probative value in relation to an issue in dispute in the proceeding sufficiently outweighs the danger that it may have a prejudicial effect on the defendant: *section 19(1)*. This requires a clear understanding of those factors that contribute to probative value and of what constitutes prejudicial effect, as well as the recognition that those factors are not constant but influenced by circumstances. They may on appropriate occasions relate to behaviour which, as in *Butler*, is neither necessarily criminal nor immoral.

Is the test which balances probative value against prejudicial effect an adequate basis on which to decide the admissibility of propensity evidence?

276 In deciding whether to admit similar fact evidence, the court would be required to take into account *the nature of the issue in dispute*: *section 19(2)*. If the issue in dispute relates to identity, for example, then the similar fact evidence might require a higher level of probative value than if the dispute relates simply to whether an offence was committed.

277 The code provision contained in *section 19(3)* would also list the following factors to assist a court in assessing the probative value of the particular evidence:

- the frequency with which the acts which are the subject of the similar fact evidence have occurred;
- the connection in time between the acts which are the subject of the evidence and those which are the subject of the offence;
- the extent of similarity between the acts which are the subject of the evidence and those which are the subject of the offence;
- the number of persons making an allegation against the defendant similar to that which is the subject of the offence, and whether those allegations may be the result of collusion; and
- the degree to which the acts are unusual.

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[162] Nor would a New Zealand code need to include a notice provision corresponding to that in the Australian provisions (ss 97(1) and 98(1)), because in New Zealand there is generally a high degree of disclosure of the prosecution's case.

[163] Roberts, "The truth, the whole truth, and similar facts" (1996) 31 Australian Lawyer, 34, 35.

It must be emphasised that these factors are not exhaustive. Moreover, the court will not be obliged to consider all of them, because not all of the factors will apply in every case, and because it is important to inhibit unmeritorious appeals resulting from judges' failure to mention one or other factor.

Can any other factors be added to those listed in *sections 19(2)* and *19(3)* of the proposed code rules to assist the court in assessing the probative value of propensity evidence?

278 The Commission seeks readers' views on whether the factors should include the issue of *collusion*, which has been of such concern to English courts recently (see paras 259–260). The question is whether collusion is a matter of admissibility – in which case it should appear amongst the factors in *section 19(3)* – or whether it is a matter of weight to be decided by the jury.

Is it meaningful to include the possibility of collusion amongst the factors; or is it more a question of weight for the jury to decide?

279 Assessing the similar fact evidence against the factors in *section 19(2)* and *(3)* should provide guidance to the court. It should also help the court to consider whether there are other explanations (such as coincidence) which are consistent with the defendant's innocence.

280 It is more difficult to codify guidelines for assessing prejudicial effect. But it may be desirable to require the court to take into account two matters relating to prejudicial effect: *section 19(4).* First, the extent to which the evidence is likely to unfairly predispose the fact-finder against the defendant (which amounts to erosion of the presumption of innocence); secondly, the extent to which the fact-finder is likely to give disproportionate weight in reaching a verdict to the evidence of other acts, events or circumstances (which amounts to propensity reasoning). The Commission seeks readers' views on whether a provision relating to prejudicial effect would be helpful, and whether the two guidelines which it offers are sufficient to achieve that end.[164]

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[164] Note that, as Nair ("Weighing Similar Fact and Avoiding Prejudice" (1996) 112 LQR 262, 263) points out:

> The risk of undue prejudice exists over and above any probative force the evidence may have. If an item of similar fact evidence gives rise to undue prejudice, the danger of the evidence being overestimated does not "disappear" merely because the cogency of the evidence is very strong. This danger is greatest where, even though the evidence may be highly prejudicial . . . , the judge decides that its probative force outweighs its prejudicial effect.

He suggests, therefore, that the judge when summing up should guide the jury in assessing the weight of admitted similar fact evidence (262). Such a conclusion appears to be echoed in a recent New Zealand case, *R v H* (unreported, CA 8/96, 16 May 1996):

> In the course of summing up the case the trial Judge will need to give a careful direction to the jury on similar fact evidence with emphasis on the point that if such similar facts are proved to the jury's satisfaction, such proof does not, of itself, lead to a verdict. Whether the accused is guilty or not guilty depends upon the strength or weakness of the evidence relevant to the charge. (7)

Is it helpful to codify guidelines for assessing prejudicial effect, and if so, are the two guidelines featured in *section 19(4)* of the proposed code rules adequate?

Propensity evidence and co-defendants

281 A second major exception to the propensity rule would apply where one defendant wishes to conduct a "cut-throat" defence and does so by offering propensity evidence about another defendant (see paras 219–236). Currently, one of the common law limits imposed on the evidence which a defendant can offer against a co-defendant is relevance. Of course, all evidence must also be relevant under the Law Commission's evidence code;[165] nevertheless, it is still useful for the court to focus specifically on relevance in relation to evidence offered by co-defendants.

282 One commentator has proposed that where relevance to the defendant's defence is shown, the defendant's right to offer evidence against the co-defendant should be unlimited; but that where such relevance is not shown, the defendant's freedom to prejudice a co-defendant should be restricted.[166] The Law Commission believes that this is a useful basis on which to formulate a rule for propensity evidence offered by one defendant against another. Accordingly, the Commission's proposed code provision (*section 20*) will require that evidence of propensity offered by a defendant against a co-defendant be relevant to the defendant's defence. Because the Commission considers that a court should interfere as little as possible with the right of defendants to present a full defence, there will no requirement for a defendant to seek the leave of the court or – in contrast with the existing law (see para 222) – to give notice before offering propensity evidence against another defendant.

Is it appropriate to permit a defendant to offer propensity evidence against a co-defendant wherever it is relevant to the former's defence; and is it desirable to require in addition the leave of the court or notice to the co-defendant?

Effect of proposed rules on existing New Zealand legislation

283 Two sections address the admissibility of similar fact evidence in relation to specific offences. Section 23 of the Evidence Act 1908 deals with poisoning cases and provides:

> Where in any criminal proceeding there is a question whether poison was administered or attempted to be administered by or by the procurement of the accused person, evidence tending to prove the administration or attempted administration by or by the procurement of the accused, whether to the same or to another person, and whether at the same time as the time when the offence charged was committed or at any other time or times, shall be deemed to be relevant to the general issue of "Guilty" or "Not Guilty", and shall be admissible at any stage of

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165 See s 2 of the draft early sections for an evidence code in *Evidence Law: Codification* (NZLC PP 14, Wellington, 1991) 19.

166 Elliott, "Cut Throat Tactics: the freedom of an accused to prejudice a co-accused" [1991] Crim LR 5.

the proceedings, as well for the purpose of proving the administration or attempted administration by or by the procurement of the accused as for the purpose of proving intent.

284 Section 23 was enacted in response to *R v Hall* (1887) 5 NZLR 93 (CA), where the Court ruled that evidence that the defendant had subsequently poisoned his wife was inadmissible, on the grounds that it could not be used to help prove the actus reus of administering poison to the deceased.

285 Although it is not clear that the current common law position reflects the substance of s 23, the Commission believes that its proposed general rules on propensity evidence are adequate to deal with poisoning cases, and it therefore proposes the repeal of s 23.

Will the propensity rule and its exceptions be adequate to deal with poisoning cases?

286 Section 258(2) and (3) of the Crimes Act 1961 deals with the offence of receiving. They provide:

(2) Except as provided in subsection (3) of this section, where any one is being proceeded against for an offence against this section, the following matters may be given in evidence to prove guilty knowledge, that is to say:

(a) the fact that other property obtained by means of any such crime or act as aforesaid was in the possession of the accused within the period of 12 months before the date on which he was first charged with the offence for which he is being tried;

(b) the fact that, within the period of 5 years before the date on which he was first charged with the offence for which he is being tried, he was convicted of the crime of receiving;

provided that the last mentioned fact may not be proved unless there has been given to the accused, either before or after an indictment has been presented, 7 days' notice in writing of the intention to prove the previous conviction, nor until evidence has been given that the property in respect of which the accused is being tried was in his possession.

(3) Nothing in subsection (2) of this section shall apply in any case where the accused is at the same time being tried on a charge of any offence other than receiving.

287 This provision has been considered recently in *R v Smith* (unreported, CA 246/93, 4 August 1993), where the Court of Appeal confirmed that one of its limits is that the evidence of previous convictions admitted under s 258(2) can only assist in the determination of guilty knowledge, and cannot be used to assess credibility or as a form of propensity evidence. A prerequisite for admissibility is that there must be evidence of possession by the defendant of the material property; and there is a notice requirement which is not found at common law. In *R v Rogers* [1979] 1 NZLR 307 (CA), the court also confirmed a discretion to exclude, on the grounds of unfairness, evidence admissible under the legislation.[167]

[167] For example, when the defendant's guilty knowledge is not a live issue.

288 The Commission believes that the situations dealt with by these subsections are also adequately addressed by the proposed rules, but recognises that they remove some limitations on admissibility which are of benefit to a defendant. Although there seems to be no convincing reason for treating the offence of receiving as a special case – given the general reform in the area – the Commission seeks the views of readers on this matter.

Will the propensity rule and its exceptions provide sufficient protection for defendants charged with the offence of receiving?

Part IV

CHARACTER IN CIVIL PROCEEDINGS

10
Evidence of truthfulness, character and propensity in civil proceedings

289 THE LAW COMMISSION considers that in evidential matters certain fundamental concepts are common to both civil and criminal proceedings, and it therefore favours a "congruence of approach".[168] Indeed, in the areas of truthfulness, character and propensity, the distinction is often of little significance, since a civil court has as much need to inquire into them as a criminal court. The perceived truthfulness of a key witness in an action for negligence, for example, will be as decisive as that of a key witness in a trial for manslaughter. However, although the stakes for the parties in a civil action can be high – in terms of the level of damages awarded – the Commission recognises that, because civil proceedings do not result in the more severe sanction of loss of liberty, and because the parties are on a more equal footing, the rules need not be as protective as those for defendants in criminal proceedings.

Truthfulness

290 Under the Commission's proposed rules, evidence relevant to truthfulness will therefore be subject in both criminal and civil proceedings to the same requirements, except when it bears on the character of defendants in criminal proceedings, in which case special rules apply (see paras 65–67). The rules pertaining to evidence relevant to truthfulness are aimed primarily at controlling the quality of the evidence which comes before the court, since such evidence may be of only marginal assistance to the fact-finder. Thus in both civil and criminal proceedings the basic rule is that evidence relevant to truthfulness is not admissible unless it relates to an ingredient of the offence or claim, or is initially offered in cross-examination and considered by the court to be likely to have substantial helpfulness (see ch 4). Other exceptions to the basic rule – concerned with expert opinion evidence about truthfulness, evidence about the truthfulness of makers of hearsay statements, evidence offered by a party in contradiction of a witness's evidence about truthfulness, and evidence supporting truthfulness – will also apply in civil proceedings (see chs 4–7).

Character and propensity

291 On the other hand, while evidence of bad character about a defendant in a criminal case will continue to be strictly limited by the character rule (paras 176–178), evidence of parties' bad character in civil proceedings will be subject only to relevance and the general exclusion – although, where such character evidence relates to truthfulness, it must also be substantially helpful

[168] See *Evidence Law: Principles for Reform* (NZLC PP13, Wellington, 1991) 8.

under *section 4*. Questions aimed at eliciting such evidence will also be controlled by the general rule prohibiting improper questions (which is to feature amongst the code's trial process rules). Subject to the same restraints of relevance and the general exclusion, evidence of parties' *good* character will likewise be admissible in civil proceedings (see para 174).

292 It appears that in civil proceedings the courts have encountered specific difficulty in only two of the areas associated with character: propensity evidence and evidence of the plaintiff's bad reputation in mitigation of damages in defamation cases. In respect of propensity evidence the courts have had to grapple with much the same issues as in criminal proceedings, and over a very broad range of fact situations. But although the courts in principle take a common approach in both kinds of proceeding, they have tended to take into account different considerations in each. The question is whether this difference needs to be encapsulated in new code provisions.

Reputation in defamation cases

293 By the late 19th century the common law had developed a very technical rule to govern the admission of evidence of the plaintiff's bad reputation in mitigation of damages in defamation cases. The rule laid down in *Scott v Sampson* (1881-1882) 8 QBD 491, stipulated that only general evidence of reputation was admissible; and that evidence of rumours and suspicions or specific facts tending to show the plaintiff's disposition was inadmissible (634–635). It therefore complemented the rule in *R v Rowton* (1865) Le & Ca 520 (see paras 170–173).

294 The courts followed the rule in *Scott v Sampson* with increasing reluctance. In *Plato Films v Speidel* [1961] AC 1090 (HL), for instance, considerable doubt was thrown on whether it was at all possible to make a meaningful distinction between evidence of general reputation, rumour and "particular incidents . . . of sufficient notoriety to be likely to contribute to [the plaintiff's] current reputation". It was further pointed out that "[s]uch incidents are, after all, the basic material upon which the reputation rests" (1131).

295 Until recently, New Zealand courts also followed the rule in *Scott v Sampson*. But the Defamation Act 1992 has finally removed it, putting in its place two provisions (ss 30 and 42), which allow the defendant to prove specific instances of misconduct by the plaintiff, but require that notice be given if such evidence is to be offered.[169] These provisions have as yet been little tested,[170] and the Commission considers that it is too early to review them at this stage.

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[169] 30 Misconduct of plaintiff in mitigation of damages
In any proceedings for defamation, the defendant may prove, in mitigation of damages, specific instances of misconduct by the plaintiff in order to establish that the plaintiff is a person whose reputation is generally bad in the aspect to which the proceedings relate.

42 Notice of evidence of bad reputation
In any proceedings for defamation, where the defendant intends to adduce evidence of specific instances of misconduct by the plaintiff in order to establish that the plaintiff is a person whose reputation is generally bad in the aspect to which the proceedings relate, the defendant shall include in the defendant's statement of defence a statement that the defendant intends to adduce that evidence.

[170] The Commission has been able to locate only one decision in which ss 30 and 42 are considered: *Brown v TV3 Network Holdings Ltd* (unreported, HC Auckland, CP 146/94, 22 May 1995).

PROPENSITY EVIDENCE

296 Courts and commentators alike have long accepted that civil courts and criminal courts must take into account different considerations before allowing propensity evidence to be offered. While criminal courts consider the degree of prejudice to the defendant weighed against the probative value of the evidence, civil courts are more concerned with questions of trial management, including convenience, delay, expense, collateral inquiry and procedural fairness. At least two good reasons can be identified as to why this is so:[171]

- In the vast majority of civil trials there is no jury, and judges as fact-finders are considered less prone – because of their experience – to prejudicial propensity reasoning than a jury.
- In a criminal trial there is an imbalance of power between the defendant and the prosecution (which represents the state and its superior resources). In order to redress this imbalance it is necessary to offer added protections to the defendant, one of which is the restriction on propensity evidence. In civil trials, the parties are likely to be on a more equal footing, and there is less need to protect one party against another.

297 Because prejudice is less of a consideration, civil courts have in the main "not been so chary in admitting"[172] propensity evidence as their criminal counterparts.[173] But in spite of this more relaxed approach, civil courts have also evinced a degree of uncertainty in their handling of propensity evidence, and there has been some divergence between common law jurisdictions as to when it is admissible.

When is the evidence likely to be offered?

298 As in criminal proceedings, there is less difficulty with adducing propensity evidence in civil proceedings in order to rebut defences such as accident or coincidence. It is when a party wishes to lead such evidence in chief in order to prove a fact in dispute that objections may arise.[174]

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[171] See Gething, "Propensity Evidence in Civil Trials" (1994) 1 Aust Bar Rev 203, 215–216.

[172] *Mood Music Publishing v De Wolfe Ltd* [1976] 1 All ER 763, 766 (CA).

[173] Indeed, Gething concludes that "there is no justification for a general rule excluding propensity evidence in a civil trial". He believes instead "that the law relating to the admission of propensity evidence in a civil trial has effectively been subsumed into the law governing the admission of circumstantial evidence generally in a civil trial", the test for its admissibility being "where the party leading it can demonstrate that it raises a more probable inference in favour of what is alleged". (217)

[174] The production of propensity evidence in chief is less likely to be problematic in custody and guardianship cases where a person's record of child abuse is at issue. One reason is that the court's paramount concern is with the welfare of the child, not with prejudice to the position of the other parties, so that any evidence must be made available which suggests that the child's welfare will be at risk: see Spencer & Flin, *The Evidence of Children: The Law and the Psychology* (2nd ed, Blackstone, London, 1993) 229–230; *Re G (A Minor)(Child Abuse: Standard of Proof)* [1987] 1 WLR 1461. In New Zealand, s 28 of the Guardianship Act 1968 and s 195 of the Children, Young Persons and Their Families Act 1989 allow the Family Court to receive any evidence which it thinks fit, regardless of whether it is otherwise admissible or not. However, the Court of Appeal has indicated that where sexual abuse or sexually inappropriate behaviour is alleged, there must be "actual evidence" which is "more than mere conjecture": *S v S* [1994] 1 NZLR 540, 546.

299 Fraudulent misrepresentation provides one situation in which a party to a civil proceeding is likely to seek to offer propensity evidence.[175] An example is where one party induces another to take out an insurance policy with a specified company or to obtain a valuation from a specified valuer in order to qualify for a loan. Once that condition has been satisfied, it transpires that the loan is not forthcoming. The plaintiff then brings an action to recover the unnecessary outlay. The plaintiff may seek to do so by adducing evidence of a history of such fraudulent dealings on the part of the defendant and showing that the dealing which is the subject of the action conforms to a pattern.

300 Unless the party is able to prove that the particular instance of misrepresentation is part of a series of similar acts (which might well have affected a series of different parties), then it may be impossible to establish the fact in issue at all. If, however, a party can show evidence of a "course of conduct"[176] or a "system of business"[177] or that the "subject of the inquiry is one of a class",[178] the case may be established. As the court summarised the rule in *Blake v Albion* (1878) 4 CPD 94, 254, "[w]here the act itself does not *per se* show its nature, the law permits other acts to be given in evidence for the purpose of showing the nature of the particular act" (253).

301 The range of situations in which parties seek to lead propensity evidence is very wide. Other cases have been concerned, for example, with establishing breach of copyright;[179] forgery;[180] breach of fiduciary duty;[181] the malfunction of signalling equipment;[182] and even with attempting to show that irrelevant considerations were taken into account in refusing an application for legal aid.[183]

Negligence

302 In the area of negligence, however, courts have been reluctant to find a system.[184] This stems from the belief that evidence of other negligent acts does not increase the probability of the act in question being negligent – although this belief is difficult to reconcile with either experience or logic. Indeed, it

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[175] See for example *Blake v Albion Life Assurance Society* (1878) 4 CPD 94; *Parker v Wachner* [1917] NZLR 440 (CA); *Mister Figgins v Centrepoint* (1981) 36 ALR 23 (FCA); *MacDonald v Canada Kelp* (1973) 39 DLR (3d) 617 (BCCA).

[176] *Hales v Kerr* [1908] 2 KB 601, 604.

[177] *Parker v Wachner* [1917] NZLR 440, 444 (CA).

[178] *Blake v Albion Life Assurance Society* (1878) 4 CPD 94, 254.

[179] *Mood Music v De Wolfe* [1976] 1 All ER 763 (CA).

[180] *Berger v Raymond Sun Ltd* [1984] 1 WLR 625.

[181] *Cook v Evatt* [1992] 1 NZLR 673 (HC).

[182] *R v Westfield Freezing Co* [1951] NZLR 456 (CA).

[183] *Cuneen v Bate* (1989) 5 CRNZ 170 (HC). In addition, *Phipson on Evidence* (14th ed, Sweet & Maxwell, London, 1990) 410–414, identifies agency, adultery, title to property, the action of physical and natural agencies, the action of mechanical agents and instruments, and market values as further situations in which "a sufficient nexus" has been found for the admission of propensity evidence.

[184] See *Reddecliffe v North Canterbury Hospital Board (No 2)* [1946] NZLR 368, 371, 373 (SC); *Thorpe v Chief Constable of the Greater Manchester Police* [1989] 1 WLR 665; [1989] 2 All ER 827, 830 (CA).

has not been unknown for courts to find that a series of previous acts can establish negligence. In *Hales v Kerr* [1908] 2 KB 601, the court was prepared to accept that a barber's failure to sterilise shaving equipment on two previous occasions was sufficient to establish a "dangerous course of conduct", as a result of which the plaintiff suffered a skin rash.[185]

Discovery

303 In civil proceedings, propensity evidence can also become an issue at the pre-trial stage. Parties may seek discovery of documents which they believe are relevant to establishing a system of conduct. In *West Midlands Passenger Executive v Singh* [1988] 2 All ER 873 (CA), for instance, the respondent, who wished to show racial discrimination, sought discovery of statistical material showing the ethnic origins of applicants for, and appointees to, certain positions with the appellant employer. The court ordered discovery not only because such evidence might help rebut the appellants' contention that they operated an equal opportunities policy, but also – and significantly – because it might help the respondent establish a positive case. It seems then that the test for whether documents relating to propensity evidence are discoverable is that the evidence *may* have relevance to the issue.[186] The court will not grant discovery if there is a likelihood of oppression or delaying proceedings through inquiry into what the court considers to be collateral matters, such as the credibility of a party.[187]

The test for admissibility

304 As cases like *Blake v Albion* (1878) 4 CPD 94 show (see para 300), courts will require systematic conduct on the part of the defendant before admitting propensity evidence. The conduct must compel the observer towards discerning a pattern. The modern common law test for admitting propensity evidence in civil proceedings is articulated in *Mood Music Publishing v De Wolfe Ltd* [1976] 1 All ER 763, 766 (CA). The evidence must, first, be "logically relevant in determining the matter which is in issue". Secondly, the evidence must not be "oppressive or unfair to the other side", and the other side must have "fair notice of it and [be] able to deal with it".[188] In practice, courts have dealt with oppression as a factor to take into account in exercising their discretion to exclude the evidence. The exercise of this discretion has not been without difficulty.

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[185] See also *Manenti v Melbourne and Metropolitan Tramways Board* [1954] VLR 115; *Mao-che v Armstrong Murray* (1992) 6 PRNZ 371 (HC).

[186] See *Yves St Laurent Parfums v Louden Cosmetics Ltd* (unreported, HC Auckland, CL 55/93, 26 July 1995) 7.

[187] *Kennedy v Dodson* [1895] 1 Ch 334, 338, 341 (CA).

[188] New Zealand courts have followed the English approach in the very few decisions which the Commission has been able to locate. Thus *Cook v Evatt* [1992] 1 NZLR 673 (HC), cites no decision other than *Mood Music*; and *Cuneen v Bate* (1989) 5 CRNZ 170, 173 (HC), similarly follows *Mood Music*, but questions whether there is "a sufficient rationale" for excluding relevant propensity evidence "in the context of a modern Judge alone civil trial, particularly one conducted . . . under known New Zealand conditions".

The court's discretion to exclude

305 In criminal proceedings the court may exercise two separate discretions in excluding evidence: the first relates to unfairly obtained evidence; and the second to evidence whose probative value is outweighed by its prejudicial effect. In New Zealand, it appears that there is a more flexible exercise of the former discretion than in England.[189] In civil proceedings, the position is less clear, although a number of decisions have operated on the basis that there is a residual discretion to exclude evidence whose prejudicial effect outweighs its probative value.

306 *Mood Music* does not expressly mention a discretion, but focuses instead on oppression. It would seem that oppression is something less than unfair prejudice, although *Mood Music* elaborates only to the extent of specifying "fair notice" and the ability "to deal with" the evidence. *Berger v Raymond Sun Ltd* [1984] 1 WLR 625, distinguishes more precisely between the test of admissibility and the discretion, detailing further factors going to the discretion, including "the probable probative value" and "complication and delay of the trial" (632). *Cook v Evatt* requires a balancing "between probative value on the one hand and competing policy considerations" (675), which, over and above those already mentioned, include "expense" and "emotive distractions". Thus, probative value is an important factor relevant to the exercise of the discretion to exclude. The question is whether the level of probative value required in civil proceedings must be equated with that required in criminal proceedings.

307 It would appear that in England a lower standard is acceptable, and *Mood Music* intimates as much. As one commentator has pointed out, the notion of "striking similarity" – coined in *Boardman v DPP* [1975] AC 421, and which until the decision in *DPP v P* [1991] 2 AC 447, has played such an important role in considering propensity evidence – has not been a feature of civil proceedings.[190] In Australia, on the other hand, some courts have been less willing to endorse the liberal approach of *Mood Music*.[191] In *Taylor v Harvey* [1983] 2 Qd R 137, 141 (SC), for example, the court affirmed that there was "no logical basis for a submission that the rule [as to admissibility of propensity evidence] is to be applied differently in a civil case to that in a criminal case".[192] However, two more recent Australian decisions, *Sheldon v Sun Alliance Australia* (1989) 53 SASR 97, and *Polycarpou v Australian Wire Industries* (1995) 36 NSWLR 49, have taken a different view.

308 *Sheldon* held that the rules governing the admission of propensity evidence in criminal trials do not apply to civil trials, and it is sufficient for such evidence to be logically probative to be admissible (144–5, 148, 155). *Polycarpou* held that the discretion of the court in criminal trials to exclude evidence whose prejudicial effect outweighs its probative value does not apply in civil trials (64–67). *Polycarpou* is particularly detailed in its discussion of the history and

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[189] *Cross on Evidence* (Mathieson) (Looseleaf edition, Butterworths, Wellington, 1996) para 1.67.

[190] Peysner, "Similar Facts in Civil Cases" (1993) 12 Civil Justice Quarterly 188, 193.

[191] There is some dispute about this: see Gillies, "Propensity Evidence" (1986) 2 Aust Bar Rev 55, 76; Smith and Odgers, "Propensity Evidence – The Continuing Debate" (1987) 3 Aust Bar Rev 77, 83.

[192] This also seems to have been the approach of the court in *D F Lyons v Commonwealth Bank of Australia* (1991) 28 FCR 597; (1991) 100 ALR 468.

conceptual basis for such a discretion. It concludes, amongst other things, that:

- "it is preferable that decisions in contested litigation should be arrived at after the evaluation of all available relevant testimony" (65);
- there is less justification in this context for distinguishing between criminal and civil proceedings than between jury and judge-alone trials (65); and
- the tendency in modern evidence law is "to reduce the ambit of exclusionary rules and to bend the rigidities of evidence law developed for the time of jury trials" (66).

The Commission is in broad agreement with the approach adopted in *Sheldon* and *Polycarpou*.

Propensity evidence in civil proceedings and the evidence code

309 The test for admissibility of propensity evidence in civil proceedings is relevance. There is no need to apply a stricter test because the admission of such evidence, even if prejudicial, has less severe consequences for the parties in civil proceedings than for the defendant in a criminal trial. However, admissibility is qualified by the judge's discretion. The exercise of this discretion turns on three things: first, the propensity evidence must have probative value; secondly, it must not unfairly surprise or oppress the opposing party;[193] and, thirdly, it must not result in inquiries which are likely to unjustifiably prolong proceedings. Relevance is already fundamental to the admissibility of evidence under the Commission's proposed evidence code. The court will also have a general power to exclude evidence whose probative value is outweighed by the danger that the evidence may confuse the issues or mislead the court or jury or result in unjustifiable expense or consumption of time.

310 Only the third factor influencing the exercise of the discretion, the matter of unfair surprise or oppression, needs to be further addressed. The Commission considers that it is best dealt with in procedural terms through the introduction of a requirement that reasonable notice be given to the party against which propensity evidence is sought to be offered.[194] Such a procedural rule should be located not in an evidence code, but in an appropriate part of the High Court Rules and District Court Rules.

Is it sufficient to have the admissibility of propensity evidence in civil proceedings governed by the general code rules, together with a notice requirement provided for in the High Court Rules and the District Court Rules?

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[193] Note that *Polycarpou*, in an obiter statement, agrees that lack of "fair notice" is a public policy ground for exclusion of evidence in civil trials (67).

[194] This notice requirement is consistent with ss 97 and 98 of the Evidence Act 1995 (Aust), which stipulate notice for adducing what is termed "tendency" or "coincidence evidence". This is not considered necessary for criminal proceedings in New Zealand (see f 156).

Part V

CHARACTER AND CREDIBILITY IN SEXUAL CASES

11
Complainants in sexual cases

311 SPECIAL RULES HAVE BEEN DEVELOPED concerning evidence of the character, and particularly the truthfulness, of complainants in cases involving sexual offences. Such rules, which apply in a number of jurisdictions including New Zealand's, have the effect of limiting the ability of a party to offer evidence about the complainant.

312 At the outset it is useful to note that complainants in sexual cases may be women, children or men. The special rules developed to protect complainants cover all three groups. Nevertheless, the great majority of complainants in sexual cases are women and girls;[195] historically, the law has been concerned with women and girls; and the feminist critique of law in this area has highlighted problems with the treatment of women and girls as complainants and witnesses. It is true to say that the special rules are designed, in the first instance, to ensure women are treated fairly. This chapter therefore focuses mainly on women as complainants.

THE HISTORICAL APPROACH

313 In the past the character of the complainant played a crucial role in cases involving allegations of sexual violation. The character of the complainant was believed to reflect on her truthfulness, and often evidence relevant to truthfulness crossed the ill-defined borderline to evidence relevant to the issue, particularly where that issue was consent. Because a lack of consent was – and still is – difficult to establish, there was frequently a contest of credibility between the complainant and the defendant. Defendants often sought to show, on the basis of evidence of the complainant's sexual behaviour on other occasions, that the complainant was more likely to have consented. This was a form of propensity evidence, directed not at the defendant but at a witness.

314 The character of the complainant could therefore become as much the focus of a trial as the character of the defendant, and the common law allowed considerable latitude in cross-examination of complainants. The defence was permitted, for example, to question complainants about acts of intercourse with persons other than the defendant (although any denials had to be treated as

[195] In New Zealand in 1992, for instance, some 89% of the complainants over the age of 16 whose age and gender were known were females: Spier and Norris, *Conviction and Sentencing of Offenders in New Zealand: 1983 to 1992* (Department of Justice, 1993) 39.

final). One way in which the defence could pursue this line of questioning, in spite of a denial, was if it was able to offer evidence of prostitution, and a tendency arose to interpret evidence of promiscuity as evidence of prostitution.[196] The reason for this can probably be traced to a scepticism which has been harboured towards the truthfulness of women giving testimony.

THE CREDIBILITY OF WOMEN

315 Not only are women much more likely than men to be victims of sexual assault, some overseas studies suggest that in court proceedings women do not have their credibility judged on the same criteria as men. One reason is that women do not seem to fulfil the "general social expectations about how a credible speaker is supposed to sound: like a man".[197] For instance, they tend to speak less confidently than men, using language features which show hesitancy, such as fillers ("you know"), or questions with rising intonation, and are therefore less persuasive.

316 In cases involving sexual offences the problem is exacerbated by the existence of certain myths,[198] premised on men's fear of false accusations of rape. These have ensured that the complainant's credibility has traditionally received particular scrutiny. The myths may be summarised as follows:

- that women are prone to fabricate complaints of sexual assault;
- that promiscuous women or female sex workers deliberately provoke sexual assault ("they ask for it") and are therefore less deserving of protection; and
- that women are prone to fantasise about rape to the extent of actually desiring it.

Parallel to all three of these myths is another which has been lent greater emphasis in recent years, as a consequence of the fact that in many jurisdictions courts have been discouraged from considering evidence of the complainant's sexual history.[199] This is the belief that a woman with a psychiatric history is more likely to make a false allegation of rape.[200]

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[196] See, for example, *R v Krausz* (1973) Cr App Rep 466, 474: "Evidence which proves that a woman is in the habit of submitting her body to different men without discrimination, whether for pay or not, would seem to be admissible."

[197] See Kathy Mack, "Continuing Barriers to Women's Credibility: A Feminist Perspective on the Proof Process" (1993) 4 Crim Law Forum 327, 330–331. Bronstein ("The rape complainant in court: an analysis of legal discourse" (1994) Acta juridica 202), on the other hand, in an analysis of the transcripts of two date-rape trials in South Africa, finds evidence of "resistance" in the discourse of complainants towards the versions of rape put to them by the cross-examining lawyers (203).

[198] See, for example, Bond, "Psychiatric Evidence of Sexual Assault Victims: The Need for Fundamental Change in the Determination of Relevance" (1993) 16 Dalhousie LJ 416, 422–427; McDonald, "Her Sexuality as Indicative of His Innocence: The Operation of New Zealand's 'Rape Shield' Provision" (1994) 18 Crim LJ 321, 323 (fn 9).

[199] See *R v Osolin* (1993) 19 CRR (2d), 93 (SCC); (1994) 109 DLR (4th) 478.

[200] Bond, 427–430; Goodyear-Smith,"Was Eve Framed or was she Merely Forsaken: Reply to Justice Thomas" [1995] NZLJ 230, 231. Helena Kennedy, in *Eve Was Framed: Women and British Justice* (Vintage, London, 1993) also makes a pertinent comment in this regard:

> On the one hand psychiatry is mistrusted in the courtroom as hocus pocus which distracts jurors from the main issues, but on the other it can prove very useful in undermining the value of testimony. The slightest hint of anything which might affect the mind, particularly of a female witness, can jeopardise a case. (115)

317 A recent example of a New Zealand case in which that connection has been made is *R v Sheridan* (unreported, High Court, Christchurch, T 3/95, 25 October 1995), where the defence was permitted to cross-examine a psychologist who had counselled the complainant. Not only did the defence wish to reveal inconsistencies in the complainant's evidence by such cross-examination, it also wanted to "suggest that the complainant may have been prompted, consciously or subconsciously, to fabricate the allegations of sexual abuse by virtue of the counselling process" (8).

318 All of the myths referred to in para 316 have been discredited. First, there is no evidence that complaints of sexual assault are fabricated more often than complaints of other kinds of offence. Indeed, in view of the indignities which the victims must often endure after making a complaint, they may have less reason than other kinds of complainant to fabricate. Secondly, promiscuous women and female sex workers are entitled, in the same way as promiscuous men, to select their partners or clients and do not lose – by virtue of their promiscuity or the fact that they are sex workers – their right to protection. Thirdly, studies suggest that although women do fantasise, they fantasise seduction and subsequent consensual sexual intercourse rather than rape, which they contemplate only with fear.[201] Finally, some schools of psychiatry tend to be gender-biased, to the extent even of characterising the normal behaviour of women as pathological.[202]

319 In spite of the discrediting of the rape myths, adherence to them persists. One means of attempting to neutralise the myths has been to enact legislation which restricts evidence or questions relating to a complainant's sexual history. But some research suggests that in deciding whether to admit such evidence or allow such questions, judges may still be influenced by rape mythology.[203] Perhaps the best means of addressing this problem is to educate the legal profession and the judiciary on an ongoing basis to be alert to gender bias in themselves and others, as well as to the existence of rape myths and to the trauma caused by rape and the subsequent legal proceedings.[204]

RAPE SHIELD LEGISLATION

320 Concern at the practice of, in effect, subjecting the complainant to a "second rape" during the subsequent proceedings led New Zealand, along with many other jurisdictions, to introduce legislation intended to control the extent to which the complainant could be questioned about previous sexual experience. This is generally described as "rape-shield legislation"[205] and was "designed to

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[201] See Torrey, "When Will We Be Believed? Rape Myths and the Idea of a Fair Trial in Rape Prosecutions" (1991) 24 UC Davis LR 1013.

[202] See Russell, "Psychiatric Diagnosis and the Oppression of Women" (1985) 31 Int J of Soc Psychol 298.

[203] McDonald, "An(other) Explanation: the Exclusion of Women's Stories in Sexual Offence Trials" in *Challenging Law and Legal Processes – the development of a feminist legal analysis*, New Zealand Law Society Seminar, August 1993, 45, 54. For this reason at least one commentator has expressed pessimism about the efficacy of rape shield legislation: see Bond, 447.

[204] Mack, 350; McDonald, 67.

[205] Examples are Sexual Offences (Amendment) Act 1976, s 2 (Eng); Evidence Act, 1929–1976, s 34i (S Aust); Evidence Act 1958, s 37A (Vic); Evidence Act 1908, s 23A (NZ); Federal Rules of Evidence r 412 (USA); Criminal Code, R.S.C. 1985, ss 276, 277 (Canada).

make the giving of evidence in trials for sexual crimes less of an ordeal and less embarrassing for complainants" (*R v McClintock* [1986] 2 NZLR 99, 103 (CA)).[206]

New Zealand

321 In New Zealand the relevant legislation is s 23A of the Evidence Act 1908. Before the enactment of s 23A, the complainant would have been protected by ss 13 and 14 of the same statute and the common law collateral issues rule. Sections 13 and 14, which restrict improper or unfair questions, reflected the general protection to witnesses afforded by the common law (see chapter 4). However, as interpreted they did not offer adequate specific protection to complainants in sexual offences. Section 23A, as it was enacted in 1977, applied only to the offence of rape. In 1985 it was re-enacted with a much broader application to "cases of a sexual nature".

322 Section 23A operates primarily to exclude evidence but has exceptions which allow otherwise prohibited evidence to be admitted. The basis of these exceptions is the relevance of the evidence:

> 23A Evidence of complainant in cases involving sexual violation
>
> . . .
>
> (2) In any case of a sexual nature, no evidence shall be given, and no question shall be put to a witness, relating directly or indirectly to
>
> (a) the sexual experience of the complainant with any person other than the accused; or
>
> (b) the reputation of the complainant in sexual matters,
>
> except by leave of the Judge.
>
> (3) The Judge shall not grant leave under subsection (2) of this section unless the Judge is satisfied that the evidence to be given or the question to be put is of such direct relevance to
>
> (a) facts in issue in the proceeding; or
>
> (b) the issue of the appropriate sentence,
>
> as the case may require, that to exclude it would be contrary to the interests of justice.
>
> Provided that any such evidence or question shall not be regarded as being of such direct relevance by reason only of any inference it may raise as to the general disposition or propensity of the complainant in sexual matters.

323 This provision does not exclude the evidence absolutely. Rather there is a limited ability for the judge to admit the evidence, if it is directly relevant and if "to exclude it would be contrary to the interests of justice". But its proviso makes clear that "inferences [raised] as to the general disposition or propensity

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[206] Protection in this context includes reducing trauma and preventing juries drawing an inappropriate link between sexuality and credibility. T Brettel Dawson in "Sexual Assault Law and Past Sexual Conduct of the Primary Witness: The Construction of Relevance" (1987) 2 Canadian J of Women and the Law 310, 328, makes the following point:

> Information made available to a jury concerning the primary witness's past sexual activity or non-conformity to sex-role norms increases the responsibility for the assault that is attributed to her at the same time that it decreases perceptions of the accused's guilt.

of the complainant in sexual matters" will not make such evidence directly relevant. The section would therefore exclude evidence of promiscuity and prostitution, although it does not control evidence of the sexual experience of the complainant with the defendant.

324 The New Zealand courts have for the most part interpreted the section according to its intention to protect a complainant from unnecessarily intrusive questioning about previous sexual history. They have recognised that the section limits the ability of a defendant to question the complainant: see *R v Bills* [1981] 1 NZLR 760, 765 (CA). The courts have also sought to "strike a just balance between protecting the complainant from undue harassment and unduly hampering the defence" (*R v McClintock* [1986] 2 NZLR 99, 103).

325 The significance of the focus on the relevance of the evidence was underlined in *R v McClintock*:

> [I]t is implicit in the section that a question or evidence is not to be permitted merely because it is in some way relevant. At a trial it must have *such direct relevance to facts in issue that to exclude it would be contrary to justice.* This is a strong test . . . many questions going only to credit will be excluded because only of indirect relevance to facts in issue . . . (104)[207] [original emphasis]

The final words of this passage seem to indicate that questioning and evidence relevant solely to credibility can be allowed under s 23A provided that the questions and evidence have "direct relevance to the facts in issue".[208] However, this will seldom be the case, and many questions going merely to credibility will be excluded. This is the interpretation of the section preferred by the Commission.

326 An example of the kind of case in which evidence of the complainant's prior sexual activity with a third party can have "direct relevance to the facts in issue" is *R v Phillips* (1989) 5 CRNZ 405 (HC). In this instance the evidence provided an explanation other than the guilt of the defendant for the presence of semen in the complainant's vagina shortly after the alleged offence. Such evidence can also be relevant in situations where the complainant alleges to have suffered injury during the sexual assault.

327 Notwithstanding the statements in *R v McClintock*, the New Zealand courts have occasionally granted leave to ask questions which do not appear to meet the "strong test" of the section. For example, in *R v Taria* (1993) 10 CRNZ 14 (HC), defence counsel, in support of the defence of consent, wanted to cross-examine the complainant about "love-bites" given to her a week before the alleged rape, which she had shown to other people. The prosecution argued that if the complainant denied that the defendant had given her the love bites then leave needed to be granted under s 23A. The judge granted leave concluding that the cross-examination met the test of direct relevance to the facts in issue. However, it is difficult to see how the fact that another person gave the complainant love bites can be directly relevant to the question of her consent to the defendant a week later.

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[207] An earlier gloss on what is relevant in terms of s 23A was provided in *R v Uiti* [1983] NZLR 532, 535, in which the Court of Appeal required a specific "foundation" – giving details of time, place and circumstance – to accompany any application for leave to offer evidence or put questions governed by the section.

[208] Mahoney, [1994] NZ Rec LR 82, 99.

328 The Court of Appeal's statements in *R v Daniels* [1986] 2 NZLR 106, concerning the relevance of sexual history evidence to the accused's belief in consent, are more in keeping with the policy of the provision. At trial, the judge had refused leave to question the complainant about her sexual relations with another man. One of the defendants stated:

> On the night that I had intercourse with [the complainant], I thought that she wanted [us] to have sex with her because that is what she is like. I had been staying there three nights earlier with a mate called Mac . . . and he had had intercourse with her that night. Although I did not see them have intercourse, Mac told me afterwards that he had done so. (113)

The trial judge held that questions about that incident "would do no more than at best establish that she was the sort of young woman who would bestow her favours on her brothers' friends even though she had no more than met them" (114). The Court of Appeal held that the judge was wrong to hold that the questions were not relevant to the defendant's belief in consent, but went on to find that leave should not have been granted:

> The material fact in issue at the trial was whether Tihi believed . . . that the girl consented to intercourse with him . . . . At the most belief by him in intercourse between the girl and [Mac] in quite different circumstances would have some indirect relevance to whether he genuinely believed that she was consenting on the night of the alleged rapes . . .
>
> [I]n our opinion, the questions ruled out were not of such direct relevance to facts in issue at the trial that to exclude them was contrary to the interests of justice. The judge's ruling was in its result in accordance with the statute.[209] (115)

329 The indications from the defence bar are that s 23A has greatly inhibited objectionable cross-examination of complainants. Certainly, the provision has not attracted a level of dissatisfaction comparable to its English equivalent, s 2 of the Sexual Offences (Amendment) Act 1976, amongst those who promote complainants' interests. But there do appear to be isolated cases in New Zealand in which marginal cross-examination has been permitted, in some instances due to inadequate weight being given to the proviso in s 23A.

Other jurisdictions

330 In *McClintock*, s 23A is described as "a New Zealand manifestation of a legislative wave in the latter 1970s", which was concerned to offer greater protection to complainants in sexual cases (103). As one commentator points out, all the provisions have in common "their broad form", which "impose[s] a prohibition on the tender of certain kinds of evidence as to the sexual history of the complainant and then create[s] a judicial discretion to relax that prohibition".[210]

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[209] *R v Padlie, Carrington and Bristow* (unreported, CA 209/95; CA 232/95; CA 237/95, 28 November 1995) is a more recent case in which the Court of Appeal took a similar approach:

> As counsel accepted, the fact that on a previous occasion the complainant consented to sexual acts with several men successively cannot be relevant to the issue of consent in relation to the present case. (3)

[210] McNamara, "Cross-examination of the Complainant in a Trial for Rape" (1981) 5 Crim LJ 25, 34.

England

331 In England the relevant provision, s 2 of the Sexual Offences (Amendment) Act 1976, which was enacted as a result of the Heilbron Report on the Law of Rape (Cmnd 6352, HMSO, London, 1975), applies only to "rape offences".[211] Its test for admission of evidence of the complainant's sexual experience with a person other than the defendant puts the accent on "fairness" to the defendant. This test would appear to be more favourable to the defendant than the broader New Zealand one of exclusion unless contrary to the interests of justice. Subsequent case law has determined that, normally, evidence should only be admitted under s 2 if it is relevant to the issue;[212] however, the operation of the provision has been criticised for its very limited scope[213] and for leaving too much to the discretion of the judge.[214] The 1984 report of the Criminal Law Revision Committee on sexual offences rejected this criticism, but did recommend extending s 2 to apply to the complainant's previous sexual experience with the defendant.[215]

Australia

332 All Australian States have rape shield provisions, although the Evidence Act 1995 (Aust) does not, because the matter is outside its jurisdiction. Both Victoria and South Australia, for instance, have had such provisions since 1976, which in each case have been the subject of some amendment. The Victorian rules have always forbidden questions and evidence about

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[211] (1) If at a trial any person is for the time being charged with a rape offence to which he pleads not guilty, then, except with the leave of the judge, no evidence and no question in cross-examination shall be adduced or asked at the trial, by or on behalf of any defendant at the trial, about any sexual experience of a complainant with a person other than that defendant.

(2) The judge shall not give leave in pursuance of the preceding subsection for any evidence or question except on an application made to him in the absence of the jury by or on behalf of a defendant; and on such an application the judge shall give leave if and only if he is satisfied that it would be unfair to that defendant to refuse to allow the evidence to be adduced or the question to be asked.

(3) In subsection (1) of this section "complainant" means a woman upon whom, in a charge for a rape offence to which the trial in question relates, it is alleged that rape was committed, attempted or proposed.

(4) Nothing in this section authorises evidence to be adduced or a question to be asked which cannot be adduced or asked apart from this section.

Section 7(2) of the same enactment provides that such offences include participation in rape, inchoate offences the object of which is rape, and burglary with intent to rape. In *R v C* [1992] Crim LR 648, it was established that the provision applies even where other charges in addition to rape are alleged. Section 2 does not, however, cover buggery (*R v Ahmed and Khan* [1994] Crim LR 669) or indecent assault (*R v Walker* [1994] Crim LR 763).

[212] See *R v Viola* [1982] 1 WLR 1138; [1982] 2 All ER 827 (CA). *R v S.M.S.* [1992] Crim LR 310, provides what the commentary calls "an attractive test for giving leave" under s 2; namely, might the exclusion of the evidence lead the jury to convict when otherwise they would acquit?

[213] *Cross on Evidence* (Tapper) (7th ed, Butterworths, London, 1990) 324 comments:

> It applies only to "rape offences", and more importantly it makes no attempt to regulate evidence relating to the complainant's sexual activities with the accused himself, nor does it apply at all to evidence of anything other than "sexual experience".

[214] See Adler, "The Relevance of Sexual History Evidence in Rape: Problems of Subjective Interpretation" [1985] Crim LR 769, 770; McColgan, "Common Law and the Relevance of Sexual History Evidence" (1996) 16 Oxford J of Legal Studies 275.

[215] (Cmnd 9213, HMSO, London, 1984) para 2.90.

the "general reputation of the complainant with respect to chastity" (s 37A(1), Rule (1) of the Evidence Act 1958); but in 1991 the further step was taken to extend the prohibition on questions and evidence about the sexual activities of the complainant to those relating to the defendant (Rules (2)(a), (2)(b), and (4)).[216]

333 Section 34i of the South Australian Evidence Act 1929-1976 suffered considerable judicial criticism before it was amended in 1984, particularly in *R v Gun; ex parte Stephenson* (1977) 17 SASR 165. In this case it became apparent that deficiences in the drafting meant that the provision could be interpreted to allow the defendant greater scope to offer evidence about the complainant's sexual history than might have been intended.[217] Section 34i now prohibits questions and evidence about the "sexual reputation of the alleged victim of the offence" (subs (1)(a)). There is still no restriction on questions or evidence about "recent sexual activities with the accused" (subs (1)(b)), but the leave of the judge is required for questions or evidence about "the alleged victim's sexual activities before or after the events of and surrounding the alleged offence"; and subs (2) now sets out some factors to assist in deciding whether or not leave should be granted. These include the "substantial probative value" of the evidence, whether the evidence would "be likely materially to impair confidence in the reliability of the evidence of the alleged victim", and "the interests of justice". Significantly, the judge must also "give effect to the principle that alleged victims of sexual offences should not be subjected to unnecessary distress, humiliation or embarrassment".

USA and Canada

334 Both the United States and Canada seem to have gone further than many other jurisdictions in offering protection to the complainant, although this has not been without some controversy. In the United States, r 412 of the Federal Rules of Evidence (see appendix C), which applies in cases of rape or assault with intent to commit rape, prohibits "reputation or opinion evidence of the past sexual behaviour of an alleged victim". In addition, it allows evidence of a complainant's "past sexual behaviour other than reputation or opinion evidence" only under certain strict procedural conditions, and if it is constitutionally required to be admitted, or

- it is evidence of past sexual behaviour with persons other than the defendant which goes to the issue of whether the defendant was the source of semen or injury, or
- evidence of past sexual behaviour with the defendant which goes to the issue of consent.

Problems which have developed in applying this rule are, first, that judges interpret the exceptions generously, and, secondly, that they resort to "expansive definitions" of the constitutional rights to confront the witness or to present evidence in order to admit such evidence.[218]

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[216] It should also be noted that Victoria's Crimes (Rape) Act 1991 now clarifies the notion of consent to mean "free agreement" and lists some of the situations which do not count as consent (s 36).

[217] McNamara, (1981) 37-38.

[218] See Althouse, "Thelma and Louise and the Law: Do Rape Shield Rules Matter?" (1992) 25 Loyola of Los Angeles LR 757, 765.

335 In Canada, the original rape shield provisions, ss 276(1) and 277 of the Criminal Code, placed severe restrictions on adducing evidence of the complainant's sexual experience. In *R v Seaboyer* (1991) 83 DLR (4th) 193, a challenge was made to them, based on rights accorded to the defendant by the Charter of Rights and Freedoms. It was argued that the rape shield provisions denied the defendant the right to offer relevant and probative evidence which could be critical to a defence. This, it was submitted, was contrary to the principles of fundamental justice and the right to a fair hearing which were protected by the Charter (sections 7 and 11(d)).

336 The Supreme Court held that s 277 did not breach Charter rights because it excluded only evidence of sexual reputation offered to support or challenge the credibility of the complainant, such evidence being considered to have no relevance to the issue (264). But s 276(1) amounted to a general exclusion of evidence of previous sexual activity with persons other than the defendant. This "ha[d] the potential to exclude otherwise admissible evidence which may in certain cases be relevant to the defence" (270). As a result, the defendant was deprived of the opportunity to adequately present a defence, as guaranteed under the Charter, and the section therefore had no legal force.

337 As a result of *Seaboyer* a number of amendments were made to the Criminal Code, one being the enactment of a new s 276 (see appendix D). It no longer incorporates a general exclusion of evidence of previous sexual activity with persons other than the defendant. The new section now provides, first, that evidence that the complainant has engaged in sexual activity with either the defendant or any other person "is not admissible to support an inference that, by reason of the sexual nature of that activity", the complainant is

- more likely to have consented to the act in question, or
- less truthful.

The phrase "the sexual nature of that activity" emphasises that the mere fact that sexual activity has taken place will not *of itself* be relevant to issues of consent or credibility.

338 Secondly, the section provides that no evidence that the complainant had engaged in sexual activity with the defendant or any other person may be admitted, unless the court determines that it is

- evidence of specific instances of sexual activity,
- relevant to an issue at trial, and
- has significant probative value which is not outweighed by the danger of prejudice to the proper administration of justice.

339 In making such a determination the judge is expressly directed to take into account a number of factors, including the interests of justice; society's interest in encouraging the reporting of sexual assault offences; the risk that the evidence might unduly arouse prejudice, hostility or sympathy in the jury; and the potential prejudice to the complainant's personal dignity and right of privacy. The judge is also required to provide reasons for the decision reached by reference to such criteria (s 276.2(3)).

SECTION 23A AND AN EVIDENCE CODE

340 The New Zealand legislation, unlike much comparable legislation enacted at the same time elsewhere, appears to have avoided serious problems in operation.

But this is not to suggest that it is without flaws.[219] In considering the place of an equivalent to s 23A in an evidence code, two questions arise:

- is it necessary to include one at all?
- can it be improved?

341 As chapter 4 of this paper outlines, the Law Commission proposes to make all evidence of truthfulness and questions relating to truthfulness subject to a new code provision. This will prohibit evidence relevant only to truthfulness unless it is likely to be of substantial helpfulness. It could be argued that such a provision would be sufficient to encompass evidence or questions relating to the complainant's sexual experience, and that a specific provision is redundant. However, similar statutory and common law protection – such as s 13 of the Evidence Act 1908 and the general discretion to exclude – has in the past proved inadequate. It is therefore desirable to remind those arguing or hearing cases of a sexual nature of the extremely sensitive nature of the evidence and the need to limit its admission as much as possible, without compromising fairness. At a time when policy encourages the reporting of sexual offences and does so by endeavouring to make any resulting criminal proceedings less of an ordeal for the complainant, the Commission believes it would be counter-productive to dispense with a specific provision.

342 Moreover, it seems that rape shield provisions still offer only limited relief to complainants. Feminist critics claim, for example, that rape law reforms "remain essentially negative rather than positive in their approach to change. At best they are attempts at damage control. They fight the negative construction of women but they do not advance a positive view of female sexuality".[220] More concretely perhaps, Thomas J has pointed out that while there have been "real advances . . . in protecting the rape victim when giving evidence", such "reforms have not removed the brutality of the victim's experience in the Courtroom. It remains a traumatic ordeal".[221] In this context, it can be argued not only that a specific code provision is necessary, but also that the protection offered by s 23A should be clarified and extended (where that is consistent with fairness to the defendant).

343 There are at least two respects in which that protection might be clarified and extended. First, there is no absolute prohibition of evidence of the complainant's *reputation* in sexual matters for the purpose of challenging (or indeed bolstering) the complainant's credibility, as in s 37A of the Evidence Act 1958 (Vic), s 34i of the Evidence Act 1929 (S Aust), s 277 of the Canadian Criminal Code and FRE r 412(a). Although s 23A(2)(b) specifically excludes such evidence of reputation, leave can still be sought from the judge to offer it. Secondly, unlike the Victorian, Canadian and US provisions, the current New Zealand provision restricts evidence of the complainant's sexual experience only with persons other than the defendant, but not with the defendant. The Commission believes that these gaps in protection can be remedied within the framework of the present s 23A.

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[219] See McDonald, citing Young, *Rape Study: A Discussion of Law and Practice,* vol 1 (Institute of Criminology/Department of Justice, Wellington, 1983) 54.

[220] Heath and Naffine, "Men's Needs and Women's Desires: Feminist Dilemmas about Rape Law Reform" (1994) 3 The Aust Fem LJ 30, 44.

[221] "Was Eve merely framed; or was she forsaken?"(Part I) [1994] NZLJ 368, 371.

Reputation in sexual matters

344 The Commission has concluded earlier in this paper that reputation evidence is of minimal probative value (see paras 106-108). In *Seaboyer*, the majority, while it struck down s 276, was in no doubt about the validity of s 277. In the words of McLachlin J:

> The idea that a complainant's credibility might be affected by whether she has had other sexual experience is today universally discredited. There is no logical or practical link between a woman's sexual reputation and whether she is a truthful witness. It follows that the evidence excluded by s 277 can serve no legitimate purpose in the trial. (264)

These sentiments have been echoed elsewhere.[222] The Commission proposes that New Zealand follow other jurisdictions and prohibit evidence of or questions about the complainant's sexual reputation merely for the purpose of supporting or challenging the truthfulness of the complainant. This kind of reputation evidence will also not be admissible as an exception to the general truthfulness rule, because the Commission considers that *sexual* reputation evidence is not an appropriate basis on which to make a finding of truthfulness.

345 Further, the Commission believes that the reputation of a complainant has limited relevance to the issue of consent, as referred to in the Canadian legislation. The fact that complainants have previously had consensual sex in particular circumstances, or with particular people, cannot be used to meaningfully predict their behaviour on a different occasion. The Commission considers that the rules of evidence, and their operation, should support the right of individuals to have control over their sexuality and to validate the notion that consent is given to a person, not to a set of circumstances.

346 Disallowing reputation evidence which is aimed at establishing consent is one way of preventing an illegitimate connection between past and present sexual behaviour. There may well be cases where evidence of specific instances of sexual activity may legitimately support an inference of consent, but a distinction must be drawn between this kind of evidence and reputation evidence. That appears to be the distinction drawn by s 276(1) and 276(2) of the Canadian Criminal Code.

347 We therefore propose that subsection 23A(2) be redrafted to state a prohibition on reputation evidence, where it is relevant only to the truthfulness of the complainant or the consent of the complainant: *section 21(2)*.

> Should s 23A of the Evidence Act 1908 be extended to include an absolute prohibition on questions about or evidence of the complainant's reputation in sexual matters, in relation to:
> - the complainant's truthfulness; and
> - the complainant's consent?

348 Because a prohibition on reputation evidence in relation to consent represents a departure from the current law, the Commission is particularly

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[222] See Adler, "The Relevance of Sexual History Evidence in Rape: Problems of Subjective Interpretation" [1985] Crim LJ 769, 772-774.

keen to obtain readers' views on this proposal. It should be added that if reputation evidence has direct relevance to some other fact in issue, leave may still be sought: *section 21(3)*.

The complainant's sexual experience with the defendant

349 Evidence of the complainant's sexual experience with the defendant may be relevant to the question of a reasonable belief in the complainant's consent. It might be both difficult and artificial to exclude such evidence, since it often provides a context without which the fact-finder may be unable to reach a well-founded verdict. It might also be argued that because there is usually less trauma associated with admitting such evidence as compared with admitting evidence of the complainant's sexual experience with other parties, there is less need to protect the complainant by excluding it.

350 The Commission recognises that in many cases evidence of the complainant's sexual experience with the defendant *will* be relevant, particularly if the defendant is the partner of the complainant. But there will also be occasions when the relationship has been of a more fleeting nature and therefore of little relevance to, for example, belief in consent. As to the argument that admitting such evidence has less traumatic impact on the complainant, it must be pointed out that while the reduction of trauma is a major policy reason for excluding evidence of the complainant's sexual history, it is not the only one. Another is the disproportionate adverse impact such evidence may have on the complainant's credibility. The Commission therefore raises the question whether it is desirable to restrict evidence of the complainant's sexual experience with the defendant and bring it under the control of a code.

351 The Canadian legislation places evidence of the complainant's prior sexual relations with the defendant and with third parties on the same footing. This can be achieved in New Zealand simply by deleting the words "with any person other than the accused" from s 23A(2)(a): *section 21(1)*.

Should questions about or evidence of the complainant's sexual experience with the defendant be subject to the same restrictions as evidence of the complainant's sexual experience with third parties?

The proviso

352 As with the Canadian legislation, the prohibition will not be absolute: evidence of prior sexual activity with either the defendant or third parties will still become admissible if it is of such direct relevance to the facts in issue that to exclude it would be contrary to the interests of justice: *section 21(3)*.[223] Thus, evidence of fabrication by the complainant based on an earlier false complaint, for example, would not be excluded. Currently, in assessing the degree of relevance, the court may refer to the proviso in s 23A(3)(b), which states that no evidence or question is of direct relevance if it raises only an "inference

[223] If sexual history evidence is admissible under the section then it cannot be classed as collateral. It will be directly relevant and the inferences raised by such evidence may be rebutted by other evidence, contrary to the Court of Appeal approach in *R v Accused* (*CA 92/92)* [1993] 1 NZLR 553.

as to the general disposition or propensity of the complainant in sexual matters". While the Commission is of the view that the proviso has a very important function in the present legislation, it does not consider that an equivalent will be necessary in an evidence code. The reason is that the proposed *section 21(2)* is sufficiently explicit as to what evidence of and questions about a complainant's sexual history will be admissible.

353 Although the Canadian provision requires the judge to give written reasons, we do not think that this is necessary. New Zealand judges commonly give reasons for interlocutory rulings. We also anticipate that the Court of Appeal will make it clear that these rulings must contain adequate reasoning.

The proposed code provision and the New Zealand Bill of Rights Act 1990

354 Rape shield laws were enacted in order to provide protection for the complainant where previously there was very little. As the Court of Appeal acknowledged in *R v McClintock*, protection for the complainant was increased at the cost of limiting the ability of the defendant to question complainants. The Canadian case of *Seaboyer* demonstrates, however, that the defendant's ability to question cannot be unfairly restricted, and that rape shield laws must strike the correct balance between the two competing interests.

355 In this context reference should be made to the relationship between the proposed code provision and the relevant provisions of the New Zealand Bill of Rights Act 1990. Section 25 of the latter establishes minimum standards of criminal procedure:

> 25 Minimum standards of criminal procedure
>
> Everyone who is charged with an offence has, in relation to the determination of the charge, the following minimum rights:
>
> . . .
>
> (e) the right to be present at the trial and to present a defence;
>
> (f) The right to examine the witnesses for the prosecution . . .

356 These provisions declare the common law rights of a defendant which the courts have acknowledged when considering the application of s 23A. Section 23A already avoids the rigidity of the original Canadian s 276 and deals with evidence of the complainant's sexual history in terms recommended by the majority in *Seaboyer*. The Commission's proposed amendments to s 23A – which extend the prohibition to prior sexual activity with the defendant and to reputation evidence relevant only to consent – will continue to protect the complainant and to exclude evidence which is now generally agreed to be irrelevant or of very low probative value. However, they will not exclude evidence of the complainant's prior sexual activity if it is manifestly unjust to the defendant not to admit such evidence.[224] That is, sexual history evidence with the defendant or third persons may still be admitted if it meets the existing test. Thus, the Commission is of the view that neither the defendant's right to present a defence, nor the defendant's right to examine the complainant on the complainant's sexual history, is unreasonably restricted by the proposed amendments.

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[224] Evidence of the kind adduced, for example, in *R v Phillips* (1989) 5 CRNZ 405 (see para 326).

DRAFT TRUTHFULNESS, CHARACTER AND PROPENSITY SECTIONS FOR AN EVIDENCE CODE, WITH COMMENTARY

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PART 3
ADMISSIBILITY RULES

Division 4 – Truthfulness, Character and Propensity

1 Definitions

In this Division

character in relation to a person, means the reputation of the person in the public estimation and the disposition and propensity of that person founded on his or her personality and habitual behaviour;

character rule means the rule in *section 13*;

offer evidence in relation to a party, means

(a) offer evidence, either personally or by another person called as a witness by the party, in examination-in-chief and re-examination; and

(b) obtain evidence by cross-examining another party or a witness called by another party;

propensity rule means the rule in *section 18*;

sexual case means a criminal proceeding in which a person is charged with or is to be sentenced for

(a) an offence against any of the provisions of sections 128 to 142A of the *Crimes Act 1961*; or

(b) any other offence against the person of a sexual nature; or

(c) being a party to the commission of an offence referred to in paragraph (a) or (b); or

(d) conspiring with any person to commit any such offence;

truthfulness depends only on an intention of a person to tell the truth;

truthfulness rule means the rule in *section 3*.

C1 This division of the draft code contains provisions relating to evidence about the character and credibility of witnesses, including defendants and persons making a hearsay statement. It also includes provisions governing the kind of questions which may be asked and the evidence which may be offered about complainants in sexual cases. The rules in this division apply to both criminal and civil proceedings, unless the contrary is stated.

C2 The provisions in this division are arranged according to the following scheme:

- definitions and application;
- evidence of truthfulness;
- evidence of character or propensity; and
- complainants in proceedings for sexual offences.

Definitions and application
Section 1

C3 Section 1 lists the definitions used in Division 4 of the admissibility rules.

- The term **character** is traditionally used with a variety of meanings. In order to reduce confusion a definition is provided which encompasses the distinct concepts of character as the reputation of a person in the public estimation, and character as the disposition and propensity of a person arising out of personality and habitual behaviour.
- The **character rule** is the rule stated in *section 13* which prohibits evidence about the character of a defendant in a criminal proceeding.
- **Offer evidence** is an omnibus term which expresses the ways in which the *questioning* party can elicit evidence: through examination-in-chief, cross-examination and re-examination of a witness.
- The **propensity rule** is the rule stated in *section 18* which prohibits evidence of a character trait of the defendant or evidence of acts, omissions, events, or circumstances with which the defendant is alleged to have been involved, if the evidence tends to show a propensity on the part of the defendant to behave in the manner alleged in the offence charged. It is a codification of the current common law rule limiting the introduction of so-called "similar fact" evidence. *Sections 19* and *20* set out certain exceptions to the propensity rule.
- **Sexual case** has essentially the same definition as "cases of a sexual nature" in s 23A(1) of the Evidence Act 1908. The definition is of particular application to *section 21* of this division.
- **Truthfulness** is an aspect of credibility which is concerned with a person's intention to tell the truth. It has a narrower focus than credibility, which may also encompass the possibility of genuine error through being mistaken, or unaware of or unable to recall a matter. However, it should be noted that a witness might *claim*, untruthfully, to have been mistaken about a fact, in which case the claim would be relevant to truthfulness.
- The **truthfulness rule** is the rule stated in *section 3* which prohibits evidence relevant only to a person's truthfulness. It is subject to a number of exceptions, namely those set out in *sections 4* to *9*.

2 Application of Division

(1) This Division does not apply to evidence of the truthfulness of a person if that truthfulness is an ingredient of the claim in a civil proceeding or an ingredient of the offence in a criminal proceeding.

(2) This Division, except for *section 21* and the definition of "sexual case" in *section 1*, does not apply so far as a proceeding relates to bail or sentencing.

Evidence of truthfulness

3 Truthfulness rule

(1) Evidence that is relevant only to the truthfulness of a person is not admissible except as provided by *sections 4* to *9*.

(2) In a criminal proceeding, evidence that is relevant to the truthfulness of a defendant and shows the defendant's bad character may be offered only in accordance with *section 13* (the character rule).

Section 2

C4 *Section 2* makes it clear in *subsection (1)* that the rules in Division 4 do not apply to evidence of the truthfulness of a person on a particular occasion if that truthfulness is an ingredient of a claim in a civil proceeding (which will occur only rarely; eg, in cases of malicious falsehood) or an ingredient of an offence in a criminal proceeding, an example being perjury. In these situations, truthfulness goes to the issue and not merely to credit. Nor – as *subsection (2)* affirms – do the rules in Division 4 apply in bail or sentencing proceedings, since neither raises the possibility of unfair prejudice to the defendant in relation to an ultimate finding of guilt; and many of the rules in Division 4 are designed to minimise such a possibility. The exception concerns sexual cases, for the reason that in bail and sentencing proceedings it may still be necessary to protect complainants by controlling questions and evidence about their sexual experience and reputation in sexual matters.

Evidence of truthfulness

C5 *Sections 3* to *10* comprise the rules relating to evidence of truthfulness. The Commission distinguishes between two concepts which contribute to an assessment of credibility: *error* and *truthfulness*. The first is a function of the witness's ability to recall, and the second of the witness's intention to tell the truth. The concern in Division 4 is not with evidence of error, the admissibility of which is limited only by relevance and the general exclusionary rule: see *Evidence Law: Codification* (NZLC PP14, Wellington, 1991) 19. The concern is with evidence of truthfulness – or, more usually, a lack of truthfulness – which may be of marginal relevance or unfairly prejudicial to the defendant. It should be noted that unfair, improper or overbearing questions will be prohibited by a general rule located amongst the trial process rules.

Section 3

C6 *Section 3(1)* states the truthfulness rule, which prohibits evidence relevant only to the truthfulness of a person except in the circumstances provided for in *sections 4* to *9*.

C7 Since an inquiry into the truthfulness of a defendant in criminal proceedings may well reveal aspects of that defendant's bad character, the truthfulness rules overlap to some extent with the rules concerning the character of the criminal defendant. *Section 3(2)* clarifies the operation of the truthfulness rule in relation to defendants in criminal proceedings. Evidence relevant to the truthfulness and character of a defendant in a criminal case is admissible only if it is admissible under the character rule: see *section 13*.

4 Exception for cross-examination relevant only to truthfulness

(1) A party may cross-examine a witness called by another party for the purpose of obtaining evidence that is relevant only to challenge the truthfulness of the witness if that evidence is likely to be substantially helpful in assessing the witness's truthfulness.

(2) This section does not apply in a criminal proceeding to cross-examination by a defendant of a witness called by the prosecution or to cross-examination by a defendant of a co-defendant.

Note: Questioning as though it were cross-examination of a party's own witnesses is dealt with in *section 7*.

5 Exception for expert opinion evidence about truthfulness

A party may offer evidence about the truthfulness of a person if that evidence is expert opinion evidence admissible under [*section 4* of the opinion rules] or is otherwise admissible factual evidence relied on by the expert in giving the opinion and supporting it.

Section 4

C8 *Section 4* states the principal exception to the prohibition on evidence relevant only to truthfulness in *section 3*: namely that it is admissible in cross-examination for the purpose of challenging the truthfulness of a witness called by another party – but only if that evidence *is likely to have substantial helpfulness*. The reason for limiting such evidence, even in cross-examination, is that evidence about truthfulness may be of marginal relevance or unfairly prejudicial to defendants and other persons.

C9 *Subsection (2)* explains that *section 4* does not apply to cross-examination by the defendant of a witness called by the prosecution or to cross-examination by a defendant of a co-defendant. The reason is that neither evidence given by the defendant about the truthfulness of a prosecution witness, nor evidence given by a defendant about the truthfulness of a co-defendant, is required to be substantially helpful: see *sections 16* and *17*.

C10 Note that positive evidence of truthfulness can only be offered once a witness has been cross-examined as to truthfulness (see *section 9*), and that *section 4* applies only to cross-examination of witnesses called by another party: the situation where a party might want to cross-examine its own witness is addressed in *section 7*.

Section 5

C11 *Section 5* states a second exception which allows evidence about the truthfulness of a person if that evidence is expert opinion evidence. However, such evidence must be admissible under s 4 of the opinion rules as proposed in *Evidence Law: Expert Evidence and Opinion Evidence* (NZLC PP18, Wellington, 1991) 52; or it must be otherwise admissible factual evidence actually relied on by the expert to support the opinion. It must not be additional evidence produced at a later stage to support the opinion retrospectively. The Commission is of the view, however, that on the present state of knowledge expert opinion evidence which is relevant solely to truthfulness is likely to be admitted only on rare occasions.

C12 The opinion rule itself is to be strengthened and aligned with the truthfulness rule by requiring *substantial* helpfulness where before it required only helpfulness.

6 Exception for evidence about truthfulness of maker of hearsay statement

A party may offer evidence to challenge the truthfulness of the maker of a statement that is hearsay and has been admitted under Division 1 if that evidence is likely to be substantially helpful in assessing the truthfulness of the maker of the statement.

7 Cross-examination by party of own witness

(1) A party who called a witness may, with the leave of the court, question the witness as though the party were cross-examining the witness about

(a) evidence given in examination-in-chief by the witness that is unfavourable to that party; or

(b) a matter of which the witness may reasonably be supposed to have knowledge and about which the evidence in examination-in-chief of the witness exhibits a lack of truthfulness.

(2) A party who has leave under subsection (1) to question a witness about the matters mentioned in that subsection may also question the witness about matters that are relevant only to the truthfulness of the witness if those matters are likely to be substantially helpful in assessing the witness's truthfulness.

(3) Questioning a witness under this section is taken to be cross-examination for the purposes of this Act.

Section 6

C13 *Section 6* creates a third exception to the truthfulness rule: it relates to evidence about the truthfulness of makers of hearsay statements which have been admitted under the Commission's proposed hearsay rules (see *Evidence Law: Hearsay* (NZLC PP15, Wellington, 1991) 32-35), and who have not been called to give evidence. *Section 6* is comparable to s 107 of the Evidence Act 1995 (Aust) which allows evidence relevant only to truthfulness about matters on which the person could have been cross-examined if that person had given evidence. As with witnesses, however, evidence about the truthfulness of makers of hearsay statements will have to meet the requirement of substantial helpfulness. It should be noted that defendants in criminal cases who offer evidence through another witness of their own exculpatory or other statements are themselves exposed to cross-examination under s 4(2) of the Commission's hearsay rules. That situation is not affected by *section 6* of the truthfulness rules.

Section 7

C14 *Section 7* will not be located amongst the rules dealing with evidence of character and credibility in the completed evidence code. The reason is that it relates more to trial procedure. It will therefore be located amongst the trial process rules, which are still under development.

C15 *Section 7(1)* relaxes the common law and statutory rules which strictly limit cross-examination of a party's own witness. It allows a party to question – as though it were cross-examining – a witness whom it has called about

- evidence offered in examination-in-chief which is unfavourable to the party calling the witness (*paragraph (a)*), and
- a matter of which the witness has knowledge and about which the witness appears to be giving untruthful evidence in examination-in-chief (*paragraph (b)*).

C16 "Unfavourable" evidence in *paragraph (a)* may be defined as evidence which, while not necessarily untruthful, does not accord with the expectations of the party calling the witness because the evidence does not assist that party's case. This is a lower threshold than the current law, which requires hostility; however, the behaviour of the witness described in *paragraph (b)* would usually be construed as hostility.

C17 In every case, it will be necessary for a party to seek the leave of the court before cross-examining its own witness who, in this section, can include a party.

C18 A party which has leave to question its own witness may question that witness, amongst other matters, about those matters relevant only to the truthfulness of the witness: *section 7(2)*. However, in this situation the evidence must be likely to have substantial helpfulness. The Commission considers that this requirement, together with the leave requirement, will prevent unnecessary or unhelpful cross-examination and adequately protect a witness subject to cross-examination by the party who called him or her.

C19 *Section 7(3)* removes any doubt that questioning by a party of its own witness under *section 7* is equivalent to cross-examination.

8 Exception for challenging evidence of truthfulness

If a party cross-examines a witness about matters that are relevant only to the truthfulness of the witness, that party may offer evidence challenging the evidence concerning truthfulness given by that witness if that evidence is likely to be substantially helpful in assessing the witness's truthfulness.

9 Exception to support truthfulness

If the truthfulness of a person is challenged under *section 4, 5, 6, 7* or *8*, a party may offer evidence for the purpose of supporting the truthfulness of the person if that evidence is likely to be substantially helpful.

10 Substantial helpfulness of evidence relevant to truthfulness

(1) When determining whether evidence that is relevant to the truthfulness of a person is likely to be substantially helpful in assessing the person's truthfulness, a court may consider, among other matters, whether the evidence would tend to show

(a) that the person has been untruthful when under a legal obligation to tell the truth; or

(b) that the person has been convicted of one or more offences and the number and nature of those offences; or

(c) that the person has made a statement previously that is inconsistent with the evidence given by that person in the proceeding; or

(d) that the person is biased; or

(e) that the person has a motive to be untruthful.

(2) When determining whether evidence that is relevant to the truthfulness of a person is likely to be substantially helpful in assessing the person's truthfulness, a court may consider the time which has elapsed since the occurrence of the acts or events to which the evidence relates.

Section 8

C20 *Section 8* in effect abolishes the collateral issues rule, which currently prohibits a party from offering evidence intended to challenge a witness's answers to questions concerning his or her truthfulness. A party will now be able to offer evidence – over and above that falling into the traditional exceptions to the rule – challenging any answer concerning truthfulness given by a witness, provided that the evidence offered to challenge the answer is likely to be substantially helpful. An answer given by the witness may include one which denies all knowledge of the matter.

Section 9

C21 Conversely, *section 9* allows a party to offer evidence supporting the truthfulness of a person if that person's truthfulness has been challenged in terms of *sections 4*, *5*, *6*, *7*, and *8*. A "person" includes not only a witness, but also the maker of a hearsay statement: see *section 6*. Note that it will be possible under *section 5* for a party to use expert evidence to bolster a witness's truthfulness without there having been a prior challenge to the truthfulness of that witness.

Section 10

C22 *Section 10(1)* gives guidance to the court in deciding whether evidence relevant only to a person's truthfulness is likely to be substantially helpful. The court may consider, among other matters, whether the evidence tends to show that:

- the person has been untruthful when under a legal obligation to tell the truth, such as in earlier court proceedings or a signed declaration;
- the person has been convicted of one or more offences, and the nature and number of the offences (although convictions for some offences, such as perjury or fraud, may appear to be more relevant to truthfulness than others, the Commission has concluded that it is preferable not to specify the type of offences which are relevant to truthfulness since the relevance of a previous conviction will depend on the circumstances of each case);
- the person has made a previous inconsistent statement;
- the person is biased;
- the person has a motive to be untruthful.

C23 *Subsection (2)* introduces relative remoteness in time – that is, the amount of time which has passed since the acts or events which are the subject of the evidence about truthfulness – as another factor to assist the court in deciding whether evidence about truthfulness is substantially helpful. This provision will have the effect of preventing evidence of "ancient" convictions or lies coming before the court.

Evidence of character or propensity

11 Character evidence

Evidence of character that is admissible under this Division in civil or criminal proceedings may be of a general nature or may refer to particular incidents or matters.

12 General admissibility of character evidence

Evidence about the character of a person is admissible in civil or criminal proceedings except evidence about the character of a defendant in criminal proceedings.

13 Character rule

(1) Evidence about the character of a defendant in a criminal proceeding is not admissible except as provided by *sections 14* to *17*.

(2) The character rule in *subsection (1)* and the exceptions to it in *sections 14* to *17* apply only to criminal proceedings.

Evidence of character or propensity

C24 *Sections 11* to *20* comprise rules about evidence of character or propensity (as defined in s 1). With the exception of *sections 11* and *12*, they relate solely to evidence offered about the defendant in criminal proceedings. The propensity rule is included with the rules on character because evidence of propensity, like evidence of bad character, is considered to be prejudicial to a defendant.

Section 11

C25 *Sections 11* and *12* are general character rules applying in any proceeding, whether civil or criminal. The purpose of *section 11* is to abolish the common law rule (the rule in *R v Rowton*) which probably applied only in criminal cases and which restricted character evidence to general evidence of character. It specifically allows both general evidence and evidence of particular incidents or matters, and it could include evidence of reputation.

Section 12

C26 *Section 12* makes character evidence generally admissible except when it relates to the defendant in criminal proceedings, in which case the rules in *sections 13* to *17* apply. All other character evidence is controlled by relevance and by the general exclusionary provision and is not subject to special rules (see para 174). This includes evidence of character which supports the character of a witness. However, since such evidence is most likely to be evidence of truthfulness, it is in any case controlled by *section 9*, which allows a party to offer evidence supporting the truthfulness of a person only if the truthfulness of that person has been challenged. One situation where evidence specifically supporting the character of a witness might be offered would be when complainants in sexual cases wish to offer evidence of their good character.

Section 13

C27 *Section 13(1)* states the character rule, which prohibits evidence about the character of the defendant in a criminal proceeding except in the circumstances arising in *sections 13* to *17*. *Subsection (2)* affirms that these sections apply only in criminal proceedings.

14 Exception for evidence of defendant's good character

(1) A defendant may offer evidence as to the defendant's good character.

(2) Evidence of the good character of a defendant may be considered by the finder of fact in relation to
   (a) the defendant's truthfulness; and
   (b) whether the defendant committed the offence for which he or she is being prosecuted.

(3) The hearsay rule and the opinion rule do not apply to evidence of good character that relates to the defendant's reputation.

Note: The hearsay rule is in section [xx] and the opinion rule is in section [xx].

15 Exception for evidence of defendant's bad character

(1) A defendant may offer evidence as to the defendant's bad character.

(2) If a defendant offers evidence as to that defendant's good character, another party may, with the leave of the court, offer evidence of that defendant's bad character.

(3) Evidence of a defendant's bad character offered under *subsection (2)*,
   (a) if relevant to a defendant's truthfulness, need not be substantially helpful in assessing that truthfulness; and
   (b) if relevant to a defendant's propensity, need not comply with *sections 18* to *20.*

(4) Evidence of the bad character of a defendant admitted under this section may be considered by the finder of fact in relation to
   (a) the defendant's truthfulness; and
   (b) whether the defendant committed the offence for which he or she is being prosecuted.

Section 14

C28 *Section 14(1)* codifies the common law acceptance of the ability of defendants to offer evidence of good character about themselves. *Subsection (2)* establishes that such evidence may be relevant to the defendant's truthfulness and to whether the defendant committed the offence charged. *Subsection (3)* removes the effect of the hearsay and opinion rules in connection with evidence of the defendant's good reputation (which would normally comprise both hearsay and opinion evidence). If unrepresented defendants seek to offer evidence of their good character, the judge would be expected to warn them of the consequences arising under *section 15*.

Section 15

C29 *Section 15* is the first of three sections detailing situations where evidence of the defendant's bad character may be offered. *Subsection (1)* allows defendants to offer bad character evidence about themselves on the rare occasions that they may choose to do so (see para 194). *Subsection (2)* allows other parties (who may be either the prosecution or co-defendants) to rebut evidence offered by the defendant of his or her good character by offering evidence of the defendant's bad character. This reduces the possibility of the court having to rely on what may be a misleading view of the defendant, as well as of evidence of one defendant's good character reflecting badly on another defendant. Because bad character evidence can be both of little relevance and unfairly prejudicial to the defendant, the leave of the court is required before another party can offer such evidence. Defendants who offer evidence of good character which misleads the court not only expose themselves to evidence of their bad character but also lose the protection of the truthfulness rule and the propensity rule. Thus, under *subsection (3)*, evidence of the defendant's bad character offered in rebuttal does not have to be substantially helpful in assessing the defendant's truthfulness nor does it have to comply with the rules relating to propensity. Evidence of the defendant's bad character may be considered in relation to both the defendant's lack of truthfulness and whether the defendant committed the offence (*subsection (4)*). *Section 15(3)* is an exception not only to the character rule but also to the propensity rule.

16 Exception where defendant attacks truthfulness of prosecution witness

(1) If a defendant who is called as a witness gives evidence, either in examination-in-chief or cross-examination, as to bad character which is relevant solely or mainly to the truthfulness of a prosecution witness, the prosecution may, with the leave of the court, offer evidence as to bad character of the defendant which is relevant solely or mainly to the truthfulness of the defendant.

(2) The prosecution may offer evidence under *subsection (1)* only if that evidence is likely to be substantially helpful in assessing the defendant's truthfulness.

Section 16

C30 A defendant in criminal cases is not prohibited from giving evidence of the bad character of prosecution witnesses, either in examination-in-chief or in cross-examination. *Section 16* is a modified version of the current rule which applies when a defendant who is called as a witness gives such evidence. The prosecution in response may offer evidence – whether by way of cross-examination or in rebuttal – of the bad character of the defendant: *section 16(1)*. However, there are three conditions attached to the prosecution's ability to do so under *section 16*:

- First, the defendant must have given evidence which is relevant *solely or mainly to the truthfulness of a prosecution witness*. If, therefore, the defendant gives evidence of the bad character of a prosecution witness that is relevant to the issue, the prosecution may not offer evidence of bad character in response. The policy behind this rule is deter the defendant from giving misleading character evidence, not to hamper the conduct of his or her defence.
- Secondly, the prosecution must obtain the leave of the court before offering evidence of the bad character of the defendant.
- Thirdly, the evidence of the bad character of the defendant offered by the prosecution must be relevant solely or mainly to the defendant's truthfulness, and it must be substantially helpful: *section 16(2)*). (But note that there is no requirement that the evidence given by the defendant about a prosecution witness's lack of truthfulness be substantially helpful (see *section 4(2)*): the reason is the "indulgence" traditionally accorded to the defence.)

C31 Because of the highly prejudicial nature of evidence of the defendant's bad character, the judge will have to direct the jury that the evidence is relevant only to the defendant's truthfulness. If unrepresented defendants seek to give evidence challenging the truthfulness of a prosecution witness, the judge would be expected to warn them of the consequences under this section. Like *section 15*, *section 16* is also an exception to the character rule.

C32 *Section 16* retains much of the complexity of the current rule, being based on the distinction between evidence going to truthfulness and evidence going to the issue. For this reason, two alternative options are suggested in the main body of the text (paras 214–215). The first relies solely on the truthfulness rule and its requirement of substantial helpfulness; the second is a regime akin to the Federal Rules of Evidence, which treats the defendant who chooses to testify much like any other witness: FRE rr 607–609. The Commission has a preference, however, for the rule embodied in *section 16* (see para 217).

17 Exception for bad character evidence offered by defendant about co-defendant

(1) A defendant may offer evidence about the bad character of a co-defendant that is relevant to the truthfulness of the co-defendant.

(2) If a defendant who is called as a witness offers evidence as to bad character relevant solely or mainly to the truthfulness of a co-defendant, the co-defendant may cross-examine the defendant as to the bad character of that defendant which is solely or mainly relevant to that defendant's truthfulness.

18 Propensity rule

(1) Evidence of

(a) a character trait of a defendant; or

(b) acts, omissions, events, or circumstances with which the defendant is alleged to have been involved,

is not admissible if it tends to show a propensity on the part of the defendant to behave in the manner alleged in the offence for which the defendant is being prosecuted except as provided in *sections 19* and *20*.

(2) The propensity rule in *subsection (1)* does not apply to *section 15(3)*.

Section 17

C33 *Section 17(1)* allows one defendant to offer evidence relevant to truthfulness about the bad character of another defendant. However, under *subsection (2)*, if a defendant does offer bad character evidence about a co-defendant, and

- the evidence is relevant solely or mainly to the truthfulness of the co-defendant, and
- the defendant testifies,

then the co-defendant can cross-examine the defendant about aspects of the defendant's bad character which are relevant solely or mainly to the defendant's truthfulness. In neither situation is the leave of the court or substantial helpfulness required; and defendants would be able, by virtue of *section 9*, to call evidence supporting truthfulness in rebuttal.

C34 *Section 17* is intended to ensure that the cross-examination is embarked upon appropriately, not to obstruct defendants in presenting their defence. If unrepresented defendants seek to offer bad character evidence about co-defendants, the judge would be expected to warn them of the consequences under this section. Note that *section 20* allows defendants to offer propensity evidence against each other.

Section 18

C35 *Section 18(1)* is the propensity rule, which codifies the common law on the use of similar fact evidence in criminal proceedings. It prohibits evidence which shows a propensity on the part of the defendant to behave in the manner alleged in the offence charged. It covers not only the disposition and reputation of the defendant – expressed in *section 18(1)(a)* as a "character trait" – but also what in s 98 of the Evidence Act 1995 (Aust) is called "coincidence" – expressed here in *paragraph (b)* as "acts, omissions, events, or circumstances with which the defendant is alleged to have been involved". The latter is intended to encompass the circumstances in a case like *Perry v The Queen* (1982–83) 150 CLR 580. A notice provision corresponding to that required by ss 97(1) and 98(1) of the Evidence Act 1995 (Aust) is not included because in New Zealand there is generally a high degree of disclosure of the prosecution's case.

C36 *Subsection (2)* states that the propensity rule does not apply to *section 15(3)*, which allows bad character evidence offered by the prosecution in order to rebut evidence of the defendant's good character to go to both truthfulness and the issue.

C37 The Commission does not consider that a code rule is required for propensity (or coincidence) evidence in civil proceedings, because the admission of such evidence has less serious consequences for the parties. It does recommend, however, that there be a notice requirement, which should be included in the High Court Rules and the District Court Rules (see para 310).

19 Exception to propensity rule for prosecution evidence

(1) The propensity rule does not apply in respect of evidence offered by the prosecution against a defendant if the probative value of the evidence in relation to an issue in dispute in the proceeding substantially outweighs the danger that the evidence may have an unfairly prejudicial effect on the defendant.

(2) When assessing the probative value of evidence in relation to an issue in dispute in the proceeding, the court must take into account the nature of the issue in dispute.

(3) When assessing the probative value of evidence in relation to an issue in dispute in the proceeding, the court may consider, among other matters, the following:

(a) the frequency with which acts, omissions, events, or circumstances which are the subject of the evidence have occurred;

(b) the connection in time between the acts, omissions, events, or circumstances which are the subject of the evidence and the acts, omissions, events, or circumstances which are the subject of the offence for which the defendant is being prosecuted;

(c) the extent of the similarity between the acts, omissions, events, or circumstances which are the subject of the evidence and the acts, omissions, events, or circumstances which are the subject of the offence for which the defendant is being prosecuted;

(d) the number of persons making the same or a similar allegation against the defendant as that which is the subject of the offence for which the defendant is being prosecuted and whether those allegations may be the result of collusion;

(e) the extent to which the acts, omissions, events, or circumstances which are the subject of the evidence and the acts, omissions, events, or circumstances which are the subject of the offence for which the defendant is being prosecuted are unusual.

(4) When assessing the prejudicial effect of evidence on the defendant for the purposes of subsection (1), the court must consider, among other matters:

(a) whether the evidence is likely to unfairly predispose the finder of fact against the defendant; and

(b) whether the finder of fact will tend to give disproportionate weight in reaching a verdict to evidence of other acts, omissions, events, or circumstances.

Section 19

C38 *Section 19(1)* states the first major exception to the propensity rule for evidence offered by the prosecution. The evidence must relate to an issue in dispute – not to credibility, for example – and its probative value must *substantially* outweigh the risk of being unfairly prejudicial to the defendant.

C39 *Subsection (2)* makes it mandatory for the court to take into account the nature of the issue in dispute when deciding whether or not to admit propensity evidence. This is a consequence of the decision in *DPP v P* [1991] 2 AC 447. The court may be more likely to admit the evidence if the issue in dispute relates to whether an offence was actually committed, for example, than if it relates to identity. The reason is that the former is likely to be less unfairly prejudicial to the defendant. Note, however, that the overriding factor will always be the test in *section 19(1)*, and the Commission does not intend to re-introduce the "category" approach of *Makin v Attorney-General for NSW* [1894] AC 57 (PC).

C40 *Subsection (3)* provides a non-exhaustive list of five factors to guide the court in assessing the probative value of the evidence. The court is not, however, obliged to consider each and every one of them, since they will not always be either present or relevant. The factors cover the frequency of the acts, omissions, events, or circumstances which are the subject of the evidence, their connection in time, the extent of similarity, the number of persons making the same or a similar allegation, and the extent to which the evidence is unusual.

C41 *Subsection (4)* sets out two factors which the court is obliged to consider in assessing the prejudicial effect of propensity evidence. The emphasis is upon evidence which *unfairly* predisposes the fact-finder against the defendant and upon the fact-finder giving *disproportionate* weight to the evidence.

20 Exception for propensity evidence and bad character evidence offered by defendant about co-defendant

A defendant may offer evidence as to the propensity or bad character of a co-defendant if the evidence offered is relevant to the defence presented by the defendant.

Complainants in sexual cases

21 Evidence of complainants in sexual cases

(1) In a sexual case, no evidence may be given and no question may be put to a witness relating directly or indirectly to the sexual experience of the complainant [? other than with the defendant], except with the leave of the court.

(2) In a sexual case, no evidence may be given and no question may be put to a witness relating directly or indirectly to the reputation of the complainant in sexual matters

(a) for the purpose of supporting or challenging the general truthfulness of the complainant; or

(b) for the purpose of establishing the complainant's consent; or

(c) for any other purpose except with the leave of the court.

(3) In an application for leave under subsection (1) or (2)

(a) the court must not grant leave unless satisfied that the evidence or question is of such direct relevance to facts in issue in the proceeding or the issue of the appropriate sentence that it would be contrary to the interests of justice to exclude it; and

(b) if the application is made in the course of a hearing before a jury, it must be made and dealt with in the absence of the jury.

(4) This section does not authorise evidence to be given or any question to be put that could not be given or put apart from this section.

Section 20

C42 *Section 20* modifies somewhat the common law rule applied in *R v Lowery No.3* [1972] VR 939, which allows a defendant considerable freedom to offer evidence of propensity about a co-defendant in the same proceeding. *Section 20* limits the evidence to that relevant to the defendant's defence. It operates whether or not the defendant gives evidence in person, but the evidence offered would have to satisfy both the opinion and hearsay rules. The purpose of *section 20* is not to fetter the defendant's right to present a defence, but to ensure that in exercising that right the defendant does not engage in irrelevant attacks on co-defendants.

Complainants in sexual cases
Section 21

C43 *Section 21* modifies the current New Zealand rape shield provision, s 23A of the Evidence Act 1908. It aims to restrict the kind of questions and evidence which may be put to or offered about the complainant in proceedings for sexual offences, and to ensure that such questions or evidence are of *direct relevance* to the facts in issue. It alters s 23A by prohibiting absolutely questions or evidence about the complainant's reputation in sexual matters, if the purpose of such questions or evidence is to challenge the complainant's general truthfulness or to establish the complainant's consent (*section 21(2)*). It also raises the question whether evidence of the complainant's sexual history with the defendant should be placed on the same footing as evidence of sexual history with third parties. It therefore tentatively omits specific reference to "any person other than the accused", as in the present law (s 23A(2)(a) and (4)(a)(i)) of the Evidence Act 1908, and refers simply in *section 21(1)* to the complainant's "sexual experience". In practice, evidence of the complainant's sexual history with the defendant will often be relevant, particularly if the defendant is a partner (or former partner) of the complainant.

C44 These proposed amendments should reinforce the thrust of the current law, which is that evidence of the complainant's sexual experience or general reputation in sexual matters is not generally of direct relevance. It should also prevent such evidence from being admitted and then ruled to be collateral, with the result that the prosecution is unable to offer evidence in response. However, evidence of false complaint, for example, would still be admissible. *Section 21(3)(a)* continues to ensure that evidence of the complainant's sexual experience or reputation in sexual matters will be admitted if it is of such direct relevance to the issue or to sentence that to exclude it would be contrary to the interests of justice. *Section 21(3)(b)* excludes the jury during discussion of an application for leave to offer evidence or ask questions relating to the complainant's sexual history, if the application is made during a jury trial. This prevents the jury from being exposed to evidence which may be subsequently ruled irrelevant under *subsection (1)* or *(2)*.

C45 The final provision, *subsection (4)*, is a "backstop" provision carried over from the current legislation (s 23A(6)), which retains the common law restrictions on evidence or questioning about a complainant's sexual history, over and above those provided by *section 21*.

APPENDICES

APPENDIX A

Character and Credibility: the alternative rules

INTRODUCTION

A1 The Law Commission's goal in developing an evidence code is to facilitate the admissibility of all relevant and reliable evidence, subject to important competing interests such as the rights of a defendant in a criminal case. As the evidence reference specifies, our aim is also "to make the law of evidence as clear, simple and accessible as practicable".[1]

A2 The existing law concerning evidence of character and credibility is extremely complicated. In the main body of this discussion paper we codify (with some modifications) the rules which constitute the existing law but do not simplify them to a significant degree. For the purpose of comparison, we consider that it is a useful exercise to return to first principles and develop in addition an alternative, simpler set of rules. These alternative rules and their commentary follow this discussion. Readers are invited to compare these with the scheme in the main body of this discussion paper, and comment on which they prefer.

OVERVIEW

A3 Much of the complexity of the existing law lies in the retaliatory nature of the rules governing when evidence of bad character may be offered about a defendant in a criminal case, and when a defendant's credibility may be challenged. In the alternative version, we have removed the retaliatory nature of the existing law but retained the principles governing admissibility outlined in the main body of this paper.

A4 The Commission is concerned in its draft code rules with a particular aspect of credibility: namely truthfulness, which relates to the witness's intention to tell the truth. Evidence relevant solely or mainly to the truthfulness (credibility) of any person, whether it operates to bolster or challenge, will be admissible if it is relevant and "substantially helpful" in assessing that person's truthfulness.

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1 The English Law Commission in Consultation Paper No 141, *Evidence in Criminal Proceedings: Previous Misconduct of a Defendant* (HMSO, London, 1996) stated that "the following principles should underlie any reform of this branch of the law:

(1) The law should be simplified to the greatest degree consistent with the proper functioning of the law of evidence.

(2) As a general rule all *relevant* evidence should be admissible unless there is a *good reason* for it to be treated as inadmissible . . .".

For all people other than defendants in criminal cases, evidence about character and propensity will be admissible if it is relevant and is not disallowed under the general exclusion[2] because it is, for example, unfairly prejudicial or misleading.

A5 The admission of evidence about a defendant's truthfulness, character or propensity will no longer depend on what evidence the defendant offers, but on whether the evidence meets the admissibility criteria. For example, in the alternative rules, the prosecution may offer evidence of the defendant's propensity only if the probative value of the evidence *substantially* outweighs its prejudicial effect on the defendant. The same limitation will not apply to evidence defendants may wish to offer about themselves, which only needs to be relevant, nor to evidence of character that a defendant offers about a co-defendant, which only needs to be relevant to the defendant's defence.

RELEVANCE AND THE GENERAL EXCLUSION

A6 The alternative rules are considerably briefer. As with the scheme in the main body of the discussion paper, they rely on the use of the relevance requirement and the general exclusion. The relevance requirement and the general exclusion will apply as the only regulators of admissibility unless there are other specific rules. The proposed definition of relevance is as follows:

> Evidence is relevant for the purpose of this Code if it has a tendency to prove or disprove a fact that is of consequence to the determination of a proceeding.

A7 The distinction between evidence that goes to a fact in issue and that which goes to credit has never been an easy one to draw.[3] Evidence about character may affect the fact-finder's assessment of whether a witness is a person to be believed and is "relevant" in that sense. But the law has preferred to limit the use of the term "relevant" to the more specific context of proof of a specific issue. We use "relevant" in the latter sense. The difference between the two senses may be one of degree. Evidence which goes solely to credit is not always relevant in the second sense. The Commission's view is that for credibility (truthfulness) to be relevant it must have "a tendency to prove or disprove [any] fact that is of consequence to the determination of [the] proceeding". Whether credibility is relevant will depend on the circumstances of the case and the context in which the character evidence is introduced.

A8 The general exclusion provides that:

> In any proceeding, the court shall exclude evidence if its probative value is outweighed by the danger that the evidence will:
> (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.

A9 Even when there are no specific standards of admissibility it remains open to a court to disallow relevant evidence under the general exclusion if, for instance, its probative value is outweighed by its prejudicial effect. For example,

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2 See *Evidence Law: Codification* (NZLC PP14, 1991) 19.

3 For discussion see Zuckerman, *The Principles of the Law of Evidence* (Clarendon Press, Oxford, 1989) 94–104.

there are no specific rules dealing with "propensity" evidence about witnesses other than defendants in criminal cases. In the rare cases where this evidence is relevant, it may be ruled inadmissible by reference to the general exclusion. The alternative rules also allow bolstering of a witness's credibility (truthfulness) where such evidence is substantially helpful, but the use of such evidence will be limited by the general exclusion concerned with unjustifiable consumption of time.

CHARACTER EVIDENCE: TRUTHFULNESS AND PROPENSITY

A10 Character evidence is defined in this paper, and in the draft rules, as meaning "the reputation of the person in the public estimation and the disposition and propensity of that person founded on his or her personality and habitual behaviour". This definition makes specific reference to the notion of "propensity" with which the current law relating to similar fact evidence is concerned. Propensity evidence is defined to include "character traits", and, in the case of defendants in criminal cases, it may be inadmissible if it tends to show that the defendant has a habit of behaving in a manner consistent with the particular offence.

A11 The interrelated nature of the concepts of character and propensity has made it difficult to simplify the law in this area. In the alternative rules, we have dealt with this difficulty by referring in the rules to either "truthfulness" (is the witness telling the truth?) or "propensity" (does the evidence tend to show that the defendant committed the offence?). Evidence that is solely or mainly relevant to either truthfulness or propensity will be dealt with under either the truthfulness or the propensity rules. We are inclined to the view that there are no other general aspects of character, outside the concepts of truthfulness and propensity, which are of relevance in civil or criminal proceedings. We are keen to have readers' views on this matter. In the meantime, and perhaps through an excess of caution, we have included a general admissibility rule for relevant evidence of this nature, which may be particularly important for defendants in criminal cases who wish to introduce evidence of good character.

Are there aspects of character other than truthfulness and propensity which are relevant in civil or criminal proceedings?

Defendants in criminal cases

A12 In the alternative rules, bad character or propensity evidence about the defendant *offered by the prosecution* is admissible only if the evidence has a probative value that substantially outweighs its prejudicial effect. Propensity evidence offered by the prosecution about a defendant in a criminal case cannot concern a character trait, but may only relate to acts or behaviour.

A13 The rules relating to evidence that may be offered by the prosecution about a defendant do not apply when defendants offer evidence about each other. Where a defendant wishes to offer evidence *relevant to his or her defence* that concerns the propensity or bad character of a co-defendant, the evidence

does not need to meet the same standard of substantial probative value. Evidence offered by a defendant which is relevant to the truthfulness of a co-defendant will, however, be subject to the usual "substantial helpfulness" test.

Putting character in issue

A14 The alternative rules do not require that the defendant offer evidence of their own good character or challenge the character of a prosecution witness ("put character in issue") before evidence of their bad character may be introduced. Under these rules, evidence of the defendant's propensity or truthfulness may be introduced at any time, provided it meets the admissibility requirements. We believe that this approach is consistent with the aim of allowing the fact-finder to hear all relevant and reliable evidence. The rules however require a high standard of probative value for this kind of evidence when introduced by the prosecution.

A15 Under the existing law and the scheme in the main body of this discussion paper, defendants who put character in issue may lose protection against the introduction of evidence of their bad character. Under the alternative rules, even if they put their character in issue, the prosecution will still only be able to introduce evidence of bad character if it has a probative value that "substantially outweighs its prejudicial effect on the defendant." This approach is, however, a departure from the current position, and we welcome comment on this point.

CONCLUSION

A16 We believe that the alternative rules that follow reduce the complexity of the current law by subjecting many of the decisions on admissibility to only a few requirements. The alternative rules do, however, rely on the exercise of judicial discretion. We seek comment on whether the guidance given by the rules and the commentary will be sufficient to achieve consistency and predictability.

ALTERNATIVE RULES

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Division 4
Truthfulness, Character and Propensity

1 Definitions
2 Application of Division
3 Truthfulness rule
4 Character evidence
5 Character rule
6 Evidence about the bad character of a defendant in a criminal proceeding
7 Propensity rule
8 Evidence offered by a defendant about a co-defendant's bad character or propensity
9 Evidence of complainants in sexual cases

Division 4 – Truthfulness, Character and Propensity

1 Definitions

In this Division

character in relation to a person, means the reputation of the person in the public estimation and the disposition and propensity of that person founded on his or her personality and habitual behaviour;

offer evidence in relation to a party, means

(a) offer evidence, either personally or by another person called as a witness by the party, in examination-in-chief and re-examination; and

(b) obtain evidence by cross-examining another party or a witness called by another party;

propensity evidence means evidence of

(a) a character trait of a person; or

(b) acts, omissions, events, or circumstances with which the person is alleged to have been involved,

which tends to show a propensity on the part of the person to behave in the manner alleged by the party offering the evidence;

sexual case means a criminal proceeding in which a person is charged with or is to be sentenced for

(a) an offence against any of the provisions of sections 128 to 142A of the *Crimes Act 1961*; or

(b) any other offence against the person of a sexual nature; or

(c) being a party to the commission of an offence referred to in paragraph (a) or (b); or

(d) conspiring with any person to commit any such offence;

truthfulness depends only on an intention of a person to tell the truth.

2 Application of Division

(1) This Division does not apply to evidence of the truthfulness of a person if that truthfulness is an ingredient of the claim in a civil proceeding or an ingredient of the offence in a criminal proceeding.

(2) This Division, except for section 9 and the definition of "sexual case" in section 1, does not apply so far as a proceeding relates to bail or sentencing.

A17 This division of the draft code contains provisions relating to evidence about the character and credibility of witnesses, including defendants, persons making a hearsay statement, and complainants in sexual cases. The rules in this division apply to both criminal and civil proceedings unless the contrary is stated.

Section 1

A18 Section 1 lists the definitions used in this division.

- The term **character** is traditionally used with a variety of meanings. In order to reduce confusion a definition is provided which encompasses the distinct concepts of character as the reputation of a person in the public estimation and character as the disposition and propensity of a person arising out of personality and habitual behaviour.
- **Offer evidence** is an omnibus term which expresses the way in which a party can elicit evidence: through examination-in-chief and re-examination of the party and the witnesses called by that party, and by cross-examining witnesses called by other parties.
- The term **propensity** is generally used to refer to a tendency to behave in a particular way. The tendency may be a manifestation of a character trait or may be simply a way of doing certain things which is distinctive of a particular person. The definition includes both aspects. The definition also covers what is called "coincidence" in s 98 of the Evidence Act 1995 (Aust).
- **Sexual case** has essentially the same definition as "cases of a sexual nature" in s 23A(1) of the Evidence Act 1908. The definition is of particular application to section 9 of this Division.
- **Truthfulness** is an aspect of credibility which is concerned with a person's intention to tell the truth. It has a narrower focus than credibility, which may also encompass the possibility of genuine error through being mistaken, or unaware of or unable to recall a matter. However, it should be noted that a witness might claim, untruthfully, to have been mistaken about a fact, in which case the claim would be relevant to truthfulness.

Section 2

A19 Section 2 makes it clear that this Division does not apply to evidence of the truthfulness of a person on a particular occasion, where that truthfulness is an ingredient of a claim in a civil proceeding or an ingredient of the offence in a criminal proceeding. In that situation, truthfulness is itself "a fact that is of consequence to the determination of a proceeding" and the test for admissibility is relevance, subject to the general exclusion provision. Nor does this Division apply in bail or sentencing proceedings, since neither raises the possibility of unfair prejudice to the defendant in relation to an ultimate finding of guilt. The exception concerns sexual cases, where, even in bail and sentencing proceedings, it may still be necessary to protect complainants by controlling questions and evidence about their sexual experience and reputation in sexual matters.

3 Truthfulness rule

Evidence that is relevant solely or mainly to the truthfulness of a person is not admissible unless the evidence is substantially helpful in assessing the person's truthfulness.

A20 The Commission distinguishes between two concepts which contribute to an assessment of credibility: error and truthfulness. The first is a function of the witness's ability to recall, and the second of the witness's intention to tell the truth. The concern in this rule is not with evidence of error, the admissibility of which is limited only by relevance and the general exclusion rule. The concern is with evidence of truthfulness – or, more usually, a lack of truthfulness – which may be of marginal relevance or unfairly prejudicial to a defendant.

Section 3

A21 Section 3 deals with situations where truthfulness is a collateral or side issue. That is, truthfulness is not itself an ingredient of a claim or an offence, but a finding on truthfulness will affect whether evidence on facts which do constitute ingredients will be accepted by the fact finder and how much weight the fact finder will give to that evidence. In these situations, section 3 provides that evidence about the truthfulness of any person must be *substantially helpful* in assessing that person's truthfulness before it will be admitted. This is to avoid an unhelpful volume of evidence which may only be marginally relevant in deciding what is itself a side issue. Thus, evidence that a witness has one conviction for making a false customs declaration in an unrelated matter may be marginally relevant to the question whether he is telling the truth when he describes what he saw of an armed robbery. But it would not be substantially helpful, as opposed to evidence that the witness has been known to lie on oath on a number of occasions.

A22 Section 3 applies to evidence about the truthfulness of any person. This includes any witness who gives evidence (including a defendant in a criminal proceeding), a defendant in a criminal proceeding who does not give evidence but whose prior statement is admitted into evidence, as well as a person whose only evidence is a prior statement admitted into evidence under the hearsay rule. It should be noted that the cross-examination of a party's own witnesses on credibility, and unfair, improper or overbearing questions will be covered in another part of the evidence code dealing with witness questioning rules.

A23 When deciding whether evidence relevant to a person's truthfulness is likely to be substantially helpful, a court may consider whether the evidence tends to show that:

- the person has been untruthful when under a legal obligation to tell the truth, such as in an earlier court proceeding or a signed declaration;
- the person has been convicted of one or more offences, and the nature and number of the offences (although convictions for some offences, such as perjury or fraud, may appear to be more relevant to truthfulness than others, the Commission has concluded that it is preferable not to specify the type of offences which are relevant to truthfulness, since the relevance of a previous conviction will depend on the circumstances of the case);
- the person has made a previous inconsistent statement;
- the person is biased;
- the person has a motive to be untruthful.

It would also be appropriate for the court to consider the time which has elapsed since the occurrence of the acts or events to which the evidence of truthfulness relates. The latter would prevent evidence of "ancient" convictions or lies coming before the court.

A24 Evidence about the bad character of a defendant in a criminal proceeding which is solely or mainly relevant to the defendant's truthfulness is admissible only under section 3.

4 Character evidence

(1) Evidence of character may be of a general nature or may refer to particular incidents or matters.

(2) The hearsay rule and the opinion rule do not apply to evidence of character about a person's reputation.

5 Character rule

Evidence about the character of a person is admissible in civil or criminal proceedings, except that evidence of the bad character of a defendant in a criminal proceeding is admissible only in accordance with section 6.

6 Evidence about the bad character of a defendant in a criminal proceeding

(1) Evidence about the bad character of a defendant offered by the prosecution in a criminal proceeding is admissible only if its probative value substantially outweighs its prejudicial effect on the defendant.

(2) Evidence about the bad character of a defendant in a criminal proceeding which is solely or mainly relevant to the defendant's truthfulness is admissible only under the truthfulness rule.

(3) Evidence about the bad character of a defendant offered by the prosecution in a criminal proceeding which is solely or mainly relevant to the defendant's propensity to commit the offence with which the defendant is charged is admissible only under the propensity rule.

(4) Subsections (1) and (3) do not apply to bad character evidence offered by a defendant in a criminal proceeding about that defendant or to evidence about the character of a co-defendant offered by that defendant.

Section 4

A25 The purpose of section 4(1) is to abolish the common law rule which restricted character evidence to general evidence of character (the rule in *R v Rowton* which probably applied only in criminal cases). Section 4(1) specifically allows both general evidence and evidence of particular incidents or matters, and it could include evidence of reputation. Section 4(2) removes the effect of the hearsay and opinion rules in connection with evidence about a person's reputation.

Section 5

A26 Generally, evidence about a person's character or propensity will be admissible if it is relevant, unless it is excluded under the general exclusion rule for being unfairly prejudicial, confusing, misleading, time-wasting or unjustifiably costly. However, an exception is made in the case of defendants in criminal proceedings in recognition of the potential damage such evidence can do to their case, and special rules apply for their protection.

Section 6

A27 Section 6(1) protects defendants in criminal proceedings by preventing the prosecution from offering evidence of bad character about them unless the probative value of that evidence substantially outweighs its prejudicial effect on the defendant. In the case of all other witnesses or persons, the test of admissibility is relevance.

A28 However, different rules apply if the evidence about the bad character of a defendant is solely or mainly relevant to his or her truthfulness. Under section 6(2) such evidence will only be admissible if it is substantially helpful in assessing the defendant's truthfulness. This rule applies irrespective of whether the evidence is offered by the prosecution, a co-defendant or the defendant himself or herself. In the case of witnesses who are not defendants, evidence of character will almost always be offered for the purpose of attacking or bolstering truthfulness, and the same test of substantial helpfulness applies: section 3.

A29 Section 6(3) covers the situation where the prosecution in a criminal proceeding wishes to offer evidence about a defendant's bad character in order to show the defendant's propensity to commit the offence with which he or he is charged. Such evidence will only be admissible if it complies with section 7.

A30 Section 6(4) states that the defendant is not subject to the same constraints as the prosecution where he or she offers bad character evidence about himself or herself or about a co-defendant. A defendant may offer evidence about his or her own character if the evidence is relevant. A defendant may offer evidence about the character of a co-defendant if the evidence is relevant to the defendant's defence: section 8.

7 Propensity rule

Propensity evidence offered by the prosecution about a defendant in a criminal proceeding is not admissible unless the evidence

(a) is of acts, omissions, events, or circumstances with which the defendant is alleged to have been involved; and

(b) has a probative value which substantially outweighs its prejudicial effect on the defendant.

Section 7

A31 Section 7 recognises the prejudicial nature of propensity evidence for defendants in criminal proceedings and provides additional protection. Propensity evidence offered by the prosecution about a defendant in a criminal proceeding must be about acts, omissions, events or circumstances (and may not be about character traits) and in addition must have a probative value which substantially outweighs its prejudicial effect.

A32 By contrast, propensity evidence about any other person may, as indicated in the definition in section 1, be about a character trait, or about acts, omissions, events or circumstances which show a propensity to behave in a particular way. Such evidence is admissible if it is relevant.

A33 Propensity evidence about a defendant in a criminal proceeding offered by another defendant in the same proceeding must be relevant to the defence of the defendant offering the evidence: section 8.

A34 Factors which the court might consider in assessing the probative value of evidence include:

- the nature of the fact which the evidence is introduced to prove or disprove;
- the frequency with which the acts, omissions, events or circumstances which are the subject of the evidence have occurred;
- the connection in time between the acts, omissions, events or circumstances which are the subject of the evidence and those which are the subject of the offence for which the defendant is being prosecuted;
- the extent of the similarity between the acts, omissions, events or circumstances which are the subject of the evidence and those which are the subject of the offence;
- the extent to which the acts, omissions, events or circumstances which are the subject of the evidence and those which are the subject of the offence are unusual;
- the number of persons making the same or a similar allegation against the defendant as that which is the subject of the offence, and whether those allegations may be the result of collusion; and
- whether the acts, omissions, events or circumstances which are the subject of the evidence may be the result of coincidence.

It is important to note that each and every one of these factors will not always be either present or relevant, and that the list is non-exhaustive.

A35 Two factors, amongst others, which a court should have regard to in assessing the prejudicial effect of evidence on the defendant, are:

- whether the evidence is likely to unfairly predispose the fact-finder against the defendant; and
- whether in reaching a verdict the fact-finder will tend to give disproportionate weight to the evidence.

8 Evidence offered by a defendant about a co-defendant's bad character or propensity

A defendant may offer evidence about the bad character or propensity of a co-defendant if the evidence offered is relevant to the defence presented by the defendant offering the evidence.

Section 8

A36 Section 8 modifies somewhat the common law rule applied in *R v Lowery No.3* [1972] VR 939 which allows a defendant considerable freedom to offer evidence of propensity about a co-defendant in the same proceeding. Section 8 limits the evidence to that relevant to the defendant's defence. The rule operates whether or not the co-defendant gives evidence in person, but the evidence offered would have to satisfy both the opinion and the hearsay rules.

A37 Section 8 also applies to evidence of bad character offered by one defendant about another defendant. Section 8 is much less restrictive than the rules governing evidence offered by the prosecution about the bad character or propensity of a defendant (which must have a probative value which substantially outweighs its prejudicial effect on the defendant).

A38 Section 8 is not concerned with evidence about the truthfulness or untruthfulness of the co-defendant. Such evidence must be substantially helpful in assessing truthfulness: section 3.

9 Evidence of complainants in sexual cases

(1) In a sexual case, no evidence may be given and no question may be put to a witness relating directly or indirectly to the sexual experience of the complainant [? other than with the defendant], except with the leave of the court.

(2) In a sexual case, no evidence may be given and no question may be put to a witness relating directly or indirectly to the reputation of the complainant in sexual matters

(a) for the purpose of supporting or challenging the general truthfulness of the complainant; or

(b) for the purpose of establishing the complainant's consent; or

(c) for any other purpose except with the leave of the court.

(3) In an application for leave under subsection (1) or (2),

(a) the court must not grant leave unless satisfied that the evidence or question is of such direct relevance to facts in issue in the proceeding or the issue of the appropriate sentence that it would be contrary to the interests of justice to exclude it; and

(b) if the application is made in the course of a hearing before a jury, it must be made and dealt with in the absence of the jury.

(4) This section does not authorise evidence to be given or any question to be put that could not be given or put apart from this section.

Section 9

A39 Section 9 modifies the current New Zealand rape shield provision, s 23A of the Evidence Act 1908. It aims to restrict the kind of questions and evidence which may be put to or offered about the complainant in proceedings for sexual offences, and to ensure that such questions or evidence are of *direct relevance* to the facts in issue. It alters s 23A by prohibiting absolutely questions or evidence about the complainant's reputation in sexual matters, if the purpose of such questions or evidence is to challenge the complainant's general truthfulness or to establish the complainant's consent (section 9(2)). It also raises the question whether evidence of the complainant's sexual history with the defendant should be placed on the same footing as evidence of sexual history with third parties. It therefore tentatively omits specific reference to "any person other than the accused", as in the present law (s 23A(2)(a) and (4)(a)(i)), and refers simply in section 9(1) to the complainant's "sexual experience". In practice, evidence of the complainant's sexual history with the defendant will often be relevant, particularly if the defendant is a partner (or former partner) of the complainant.

A40 These proposed amendments should reinforce the thrust of the current law, which is that evidence of the complainant's sexual experience or general reputation in sexual matters is not generally of direct relevance. It should also prevent such evidence from being admitted and then ruled to be collateral, with the result that the prosecution is unable to offer evidence in response. However, evidence of false complaint, for example, would still be admissible. Section 9(3)(a) continues to ensure that evidence of the complainant's sexual experience or reputation in sexual matters will be admitted if it is of such direct relevance to the issue or to sentence that to exclude it would be contrary to the interests of justice. Section 9(3)(b) excludes the jury during discussion of an application for leave to offer evidence or ask questions relating to the complainant's sexual history, if the application is made during a jury trial. This prevents the jury from being exposed to evidence which may be subsequently ruled irrelevant under subsection (1) or (2).

A41 The final provision, subsection (4), is a "backstop" provision carried over from the current legislation (s 23A(6)), which retains the common law restrictions on evidence or questioning about a complainant's sexual history, over and above those provided by section 9.

APPENDIX B

Extracts from the Evidence Act 1995 (Aust)

PART 2.1 – WITNESSES

38 Unfavourable witnesses

(1) A party who called a witness may, with the leave of the court, question the witness, as though the party were cross-examining the witness, about:
   (a) evidence given by the witness that is unfavourable to the party; or
   (b) a matter of which the witness may reasonably be supposed to have knowledge and about which it appears to the court the witness is not, in examination in chief, making a genuine attempt to give evidence; or
   (c) whether the witness has, at any time, made a prior inconsistent statement.

(2) Questioning a witness under this section is taken to be cross-examination for the purposes of this Act (other than section 39).

(3) The party questioning the witness under this section may, with the leave of the court, question the witness about matters relevant only to the witness's credibility.

(4) Questioning under this section is to take place before the other parties cross-examine the witness, unless the court otherwise directs.

(5) If the court so directs, the order in which the parties question the witness is to be as the court directs.

(6) Without limiting the matters that the court may take into account in determining whether to give leave or a direction under this section, it is to take into account:
   (a) whether the party gave notice at the earliest opportunity of his or her intention to seek leave; and
   (b) the matters on which, and the extent to which, the witness has been, or is likely to be, questioned by another party.

(7) A party is subject to the same liability to be cross-examined under this section as any other witness if:
   (a) a proceeding is being conducted in the name of the party by or on behalf of an insurer or other person; and
   (b) the party is a witness in the proceeding.

PART 3.6 – TENDENCY AND COINCIDENCE

97 The tendency rule

(1) Evidence of the character, reputation or conduct of a person, or a tendency that a person has or had, is not admissible to prove that a person has or had a tendency (whether because of the person's character or otherwise) to act in a particular way, or to have a particular state of mind, if:

(a) the party adducing the evidence has not given reasonable notice in writing to each other party of the party's intention to adduce the evidence; or

(b) the court thinks that the evidence would not, either by itself or having regard to other evidence adduced or to be adduced by the party seeking to adduce the evidence, have significant probative value.

(2) Paragraph 1(a) does not apply if:

(a) the evidence is adduced in accordance with any directions made by the court under section 100; or

(b) the evidence is adduced to explain or contradict tendency evidence adduced by another party.

Note: The tendency rule is subject to specific exceptions concerning character of and expert opinion about accused persons (sections 110 and 111). Other provisions of this Act, or of other laws, may operate as further exceptions.

98 The coincidence rule

(1) Evidence that 2 or more related events occurred is not admissible to prove that, because of the improbability of the events occurring coincidentally, a person did a particular act or had a particular state of mind if:

(a) the party adducing the evidence has not given reasonable notice in writing to each other party of the party's intention to adduce the evidence; or

(b) the court thinks that the evidence would not, either by itself or having regard to other evidence adduced or to be adduced by the party seeking to adduce the evidence, have significant probative value.

(2) For the purposes of subsection (1), 2 or more events are taken to be related events if and only if:

(a) they are substantially and relevantly similar; and

(b) the circumstances in which they occurred are substantially similar.

(3) Paragraph (1)(a) does not apply if:

(a) the evidence is adduced in accordance with any directions made by the court under section 100; or

(b) the evidence is adduced to explain or contradict coincidence evidence adduced by another party.

Note: Other provisions of this Act, or of other laws, may operate as exceptions to the coincidence rule.

PART 3.7 – CREDIBILITY

102 The credibility rule

Evidence that is relevant only to a witness's credibility is not admissible.

Note: Specific exceptions to the credibility rule are as follows:

- evidence adduced in cross-examination (sections 103, 104 and 107);
- evidence in response to unsworn statements (section 105);
- evidence in rebuttal or denials (section 106);
- evidence to re-establish credibility (section 108);
- character of accused persons (section 110).

Other provisions of this Act, or of other laws, may operate as further exceptions.

103 Exception: cross-examination as to credibility

(1) The credibility rule does not apply to evidence adduced in cross-examination of a witness if the evidence has substantial probative value.

(2) Without limiting the matters to which the court may have regard in deciding whether the evidence has substantial probative value, it is to have regard to:

(a) whether the evidence tends to prove that the witness knowingly or recklessly made a false representation when the witness was under an obligation to tell the truth; and

(b) the period that has elapsed since the acts or events to which the evidence relates were done or occurred.

104 Further protections: cross-examination of accused

(1) This section applies only in a criminal proceeding and so applies in addition to section 103.

(2) A defendant must not be cross-examined about a matter that is relevant only because it is relevant to the defendant's credibility, unless the court gives leave.

(3) Despite subsection (2), leave is not required for cross-examination by the prosecutor about whether the defendant:

(a) is biased or has a motive to be untruthful; or

(b) is, or was, unable to be aware of or recall matters to which his or her evidence relates; or

(c) has made a prior inconsistent statement.

(4) Leave must not be given for cross-examination by the prosecutor about any matter that is relevant only because it is relevant to the defendant's credibility unless:

(a) evidence has been adduced by the defendant that tends to prove that the defendant is, either generally or in a particular respect, a person of good character; or

(b) evidence adduced by the defendant has been admitted that tends to prove that a witness called by the prosecutor has a tendency to be untruthful, and that is relevant solely or mainly to the witness's credibility.

(5) A reference in paragraph (4)(b) to evidence does not include a reference to evidence of conduct in relation to:

(a) the events in relation to which the defendant is being prosecuted; or

(b) the investigation of the offence for which the defendant is being prosecuted.

(6) Leave is not to be given for cross-examination by another defendant unless:
   (a) the evidence that the defendant to be cross-examined has given includes evidence adverse to the defendant seeking leave to cross-examine; and
   (b) that evidence has been admitted.

106 Exception: rebutting denials by other evidence

The credibility rule does not apply to evidence that tends to prove that a witness:
   (a) is biased or has a motive for being untruthful; or
   (b) has been convicted of an offence, including an offence against the law of a foreign country; or
   (c) has made a prior inconsistent statement; or
   (d) is, or was, unable to be aware of matters to which his or her evidence relates; or
   (e) has knowingly or recklessly made a false representation while under an obligation, imposed by or under an Australian law or a law of a foreign country, to tell the truth;

if the evidence is adduced otherwise than from the witness and the witness has denied the substance of the evidence.

107 Exception: application of certain provisions to makers of representations

If:
   (a) because of a provision of Part 3.2, the hearsay rule does not apply to evidence of a previous representation; and
   (b) evidence of the representation has been admitted; and
   (c) the person who made the representation has not been called to give evidence;

the credibility rule does not apply to evidence about matters as to which the person could have been cross-examined if he or she had given evidence.

108 Exception: re-establishing credibility

(1) The credibility rule does not apply to evidence adduced in re-examination of a witness.

(2) The credibility rule does not apply to evidence that explains or contradicts evidence adduced as referred to in section 105 or 107, if the court gives leave to adduce that evidence.

(3) The credibility rule does not apply to evidence of a prior consistent statement of a witness if:
   (a) evidence of a prior inconsistent statement of the witness has been admitted; or
   (b) it is or will be suggested (either expressly or by implication) that evidence given by the witness has been fabricated or re-constructed (whether deliberately or otherwise) or is the result of a suggestion;

and the court gives leave to adduce the evidence of the prior consistent statement.

PART 3.8 – CHARACTER

109 Application

This Part applies only in a criminal proceeding.

110 Evidence about character of accused persons

(1) The hearsay rule, the opinion rule, the tendency rule and the credibility rule do not apply to evidence adduced by a defendant to prove (directly or by implication) that the defendant is, either generally or in a particular respect, a person of good character.

(2) If evidence adduced to prove (directly or by implication) that a defendant is generally a person of good character has been admitted, the hearsay rule, the opinion rule, the tendency rule and the credibility rule do not apply to evidence adduced to prove (directly or by implication) that the defendant is not generally a person of good character.

(3) If evidence adduced to prove (directly or by implication) that a defendant is a person of good character in a particular respect has been admitted, the hearsay rule, the opinion rule, the tendency rule and the credibility rule do not apply to evidence adduced to prove (directly or by implication) that the defendant is not a person of good character in that respect.

(4) A reference in this section to adducing evidence to prove a matter includes a reference to a defendant making an unsworn statement, under a law of a State or Territory, in which that matter is raised.

111 Evidence about character of co-accused

(1) The hearsay rule and the tendency rule do not apply to evidence of a defendant's character if:
   (a) the evidence is evidence of an opinion about the defendant adduced by another defendant; and
   (b) the person whose opinion it is has specialised knowledge based on the person's training, study or experience; and
   (c) the opinion is wholly or substantially based on that knowledge.

(2) If such evidence has been admitted, the hearsay rule, the opinion rule and the tendency rule do not apply to evidence adduced to prove that that evidence should not be accepted.

112 Leave required to cross-examine about character of accused or co-accused

A defendant is not to be cross-examined about matters arising out of evidence of a kind referred to in this Part unless the court gives leave.

PART 4.5 – WARNINGS

165 Unreliable evidence

(1) This section applies to evidence of a kind that may be unreliable, including the following kinds of evidence:
   (a) evidence in relation to which Part 3.2 (hearsay evidence) or 3.4 (admissions) applies;
   (b) identification evidence;
   (c) evidence the reliability of which may be affected by age, ill health (whether physical or mental), injury or the like;
   (d) evidence given in a criminal proceeding by a witness, being a witness who might reasonably be supposed to have been criminally concerned in the events giving rise to the proceeding;
   (e) evidence given in a criminal proceeding by a witness who is a prison informer;
   (f) oral evidence of official questioning of a defendant that is questioning recorded in writing that has not been signed, or otherwise acknowledged in writing, by the defendant;
   (g) in a proceeding against the estate of a deceased person – evidence adduced by or on behalf of a person seeking relief in the proceeding that is evidence about a matter about which the deceased person could have given evidence if he or she were alive.

(2) If there is a jury and a party so requests, the judge is to:
   (a) warn the jury that the evidence may be unreliable; and
   (b) inform the jury of matters that may cause it to be unreliable; and
   (c) warn the jury of the need for caution in determining whether to accept the evidence and the weight to be given to it.

(3) The judge need not comply with subsection (2) if there are good reasons for not doing so.

(4) It is not necessary that a particular form of words be used in giving the warning or information.

(5) This section does not affect any other power of the judge to give a warning to, or to inform, the jury.

APPENDIX C

Extracts from the Federal Rules of Evidence (USA)

Rule 404. Character Evidence Not Admissible to Prove Conduct; Exceptions; Other Crimes

(a) *Character evidence generally*. Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion, except:

(1) *Character of accused*. Evidence of a pertinent trait of character offered by an accused, or by the prosecution to rebut the same;

(2) *Character of victim*. Evidence of a pertinent trait of character of the victim of the crime offered by an accused, or by the prosecution to rebut the same, or evidence of a character trait of peacefulness of the victim offered by the prosecution in a homicide case to rebut the evidence that the victim was the first aggressor;

(3) *Character of witness*. Evidence of the character of a witness, as provided in rules 607, 608, and 609.

(b) *Other crimes, wrongs, or acts*. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

Rule 412. Sex Offense Cases; Relevance of Victim's Past Behaviour

(a) Notwithstanding any other provision of law, in a criminal case in which a person is accused of an offense under chapter 109A of title 18, United States Code, reputation or opinion evidence of the past sexual behaviour of an alleged victim of such offense is not admissible.

(b) Notwithstanding any other provision of law, in a criminal case in which a person is accused of an offense under chapter 109A of title 18, United States Code, evidence of a victim's past sexual behaviour other than reputation or opinion evidence is also not admissible, unless such evidence other than reputation or opinion evidence is –

(1) admitted in accordance with subdivisions (c)(1) and (c)(2) and is constitutionally required to be admitted; or

(2) admitted in accordance with subdivision (c) and is evidence of –

(A) past sexual behaviour with persons other than the accused, offered by the accused upon the issue of whether the accused was or was not, with respect to the alleged victim, the source of semen or injury; or

(B) Past sexual behaviour with the accused and is offered by the accused upon the issue of whether the alleged victim consented to the sexual behaviour with respect to which such offense is alleged.

(c) (1) If the person accused of committing an offense under chapter 109A of title 18, United States Code intends to offer under subdivision (b) evidence of specific instances of the alleged victim's past sexual behaviour, the accused shall make a written motion to offer such evidence not later than fifteen days before the date on which the trial in which such evidence is to be offered is scheduled to begin, except that the court may allow the motion to be made at a later date, including during trial, if the court determines either that the evidence is newly discovered and could not have been obtained earlier through the exercise of due diligence or that the issue to which such evidence relates has newly arisen in the case. Any motion made under this paragraph shall be served on all other parties and on the alleged victim.

(2) The motion described in paragraph (1) shall be accompanied by a written offer of proof. If the court determines that the offer of proof contains evidence described in subdivision (b), the court shall order a hearing in chambers to determine if such evidence is admissible. At such hearing the parties may call witnesses, including the alleged victim, and offer relevant evidence. Notwithstanding subdivision (b) of rule 104, if the relevancy of the evidence which the accused seeks to offer in the trial depends upon the fulfillment of a condition of fact, the court, at the hearing in chambers or at a subsequent hearing in chambers scheduled for such purpose, shall accept evidence on the issue of whether such condition of fact is fulfilled and shall determine such issue.

(3) If the court determines on the basis of the hearing described in paragraph (2) that the evidence which the accused seeks to offer is relevant and that the probative value of such evidence outweighs the danger of unfair prejudice, such evidence shall be admissible in the trial to the extent an order made by the court specifies evidence which may be offered and areas with respect to which the alleged victim may be examined or cross-examined.

(d) For purposes of this rule, the term "past sexual behaviour" means sexual behaviour other than the sexual behaviour with respect to which an offense under chapter 109A of title 18, United States Code is alleged.

Rule 607. Who May Impeach

The credibility of a witness may be attacked by any party, including the party calling the witness.

Rule 608. Evidence of Character and Conduct of Witness

(a) *Opinion and reputation evidence of character*. The credibility of a witness may be attacked or supported by evidence in the form of opinion or reputation, but subject to these limitations:

(1) the evidence may refer only to a character for truthfulness or untruthfulness, and

(2) evidence of truthful character is admissible only after the character of the witness for truthfulness has been attacked by opinion or reputation evidence or otherwise.

(b) *Specific instances of conduct*. Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness' credibility, other than conviction of crime as provided in rule 609, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness

(1) concerning the witness' character for truthfulness or untruthfulness, or

(2) concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified.

The giving of testimony, whether by an accused or by any other witness, does not operate as a waiver of the accused's or the witness' privilege against self-incrimination when examined with respect to matters which relate only to credibility.

Rule 609. Impeachment by Evidence of Conviction of Crime

(a) *General rule*. For the purpose of attacking the credibility of a witness, evidence that the witness has been convicted of a crime shall be admitted if elicited from the witness or established by public record during cross-examination but only if the crime

(1) was punishable by death or imprisonment in excess of one year under the law under which the witness was convicted, and the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the defendant, or

(2) involved dishonesty or false statement, regardless of punishment.

(b) *Time Limit*. Evidence of a conviction under this rule is not admissible if a period of more than ten years has elapsed since the date of the conviction or of the release of the witness from the confinement imposed for that conviction, whichever is the later date, unless the court determines, in the interests of justice, that the probative value of the conviction supported by specific facts and circumstances substantially outweighs its prejudicial effect. However, evidence of a conviction more than 10 years old as calculated herein, is not admissible unless the proponent gives to the adverse party sufficient advance written notice of intent to use such evidence to provide the adverse party with a fair opportunity to contest the use of such evidence.

(c) *Effect of pardon, annulment, or certificate of rehabilitation*. Evidence of a conviction is not admissible under this rule if

(1) the conviction has been the subject of a pardon, annulment, certificate of rehabilitation, or other equivalent procedure based on a finding of the rehabilitation of the person convicted, and that person has not been convicted of a subsequent crime which was punishable by death or imprisonment in excess of one year, or

(2) the conviction has been the subject of a pardon, annulment, or other equivalent procedure based on a finding of innocence.

(d) *Juvenile adjudications*. Evidence of juvenile adjudications is generally not admissible under this rule. The court may, however, in a criminal case allow evidence of a juvenile adjudication of a witness other than the accused if conviction of the offense would be admissible to attack the credibility of an adult and the court is satisfied that admission in evidence is necessary for a fair determination of the issue of guilt or innocence.

(e) *Pendency of appeal*. The pendency of an appeal therefrom does not render evidence of a conviction inadmissible. Evidence of the pendency of an appeal is admissible.

APPENDIX D

Extracts from Canadian legislation

s 276. Criminal Code

(1) In proceedings in respect of an offence under section 151, 152, 153, 155 or 159, subsection 160(2) or (3) or section 170, 171, 172, 173, 271, 272 or 273, evidence that the complainant has engaged in sexual activity, whether with the accused or with any other person, is not admissible to support an inference that, by reason of the sexual nature of that activity, the complainant
   (a) is more likely to have consented to the sexual activity that forms the subject matter of the charge; or
   (b) is less worthy of belief.

(2) In proceedings in respect of an offence referred to in subsection (1), no evidence shall be adduced by or on behalf of the accused that the complainant has engaged in sexual activity other than the sexual activity that forms the subject-matter of the charge, whether with the accused or with any other person, unless the judge, provincial court judge or justice determines, in accordance with the procedures set out in sections 276.1 and 276.2, that the evidence
   (a) is of specific instances of sexual activity;
   (b) is relevant to an issue at trial; and
   (c) has significant probative value that is not substantially outweighed by the danger of prejudice to the proper administration of justice.

(3) In determining whether evidence is admissible under subsection (2), the judge, provincial court judge or justice shall take into account
   (a) the interests of justice, including the right of the accused to make a full answer and defence;
   (b) society's interest in encouraging the reporting of sexual assault offences;
   (c) whether there is a reasonable prospect that the evidence will assist in arriving at a just determination in the case;
   (d) the need to remove from the fact finding process any discriminatory belief or bias;
   (e) the risk that the evidence may unduly arouse sentiments of prejudice, sympathy or hostility in the jury;
   (f) the potential prejudice to the complainant's personal dignity and right of privacy;
   (g) the right of the complainant and of every individual to personal security and to the full protection and benefit of the law; and
   (h) any other factor that the judge, provincial court judge or justice considers relevant.

s 277. Criminal Code

In proceedings in respect of an offence under section 151, 152, 153, 155, or 159, subsection 160(2) or (3) or section 170, 171, 172, 173, 271, 272 or 273, evidence of sexual reputation, whether general or specific, is not admissible for the purpose of challenging or supporting the credibility of the complainant.

s 12(1). Canada Evidence Act

A witness may be questioned as to whether he has been convicted of any offence, and, on being so questioned, if he either denies the fact or refuses to answer, the opposite party may prove the conviction.

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