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1 April 2010

Hon Simon Power
Minister Responsible for the Law Commission
Parliament Buildings
WELLINGTON

Dear Minister

EVIDENCE ACT REVIEW: OPERATION OF THE VERACITY AND PROPENSITY PROVISIONS

Background

1. Both veracity and propensity are species of character evidence. Under the new Evidence Act 2006, they are the only route for the admission of character evidence.

2. Veracity means the disposition of a person to refrain from lying, either generally, or in the proceeding. It is about a person's truthfulness.

3. Propensity means evidence of acts, omissions, events or circumstances in which a person has been involved, that tend to show that person's propensity to act in a particular way or have a particular state of mind. Previous convictions, or multiple criminal charges that are similar in nature to the instant charge, are a couple of examples of possible types of propensity evidence.

4. In 2008, in the report *Disclosure to Court of Defendants' Previous Convictions, Similar Offending, and Bad Character* (NZLC R103, May 2008), the Law Commission undertook to provide advice by 28 February 2010 on the operation of the veracity and propensity provisions of the Evidence Act (sections 37 to 43 of the Act).

5. Our report arose out of concerns about the way the pre-2006 law had been applied, in the Rickards / Shipton / Schollum proceedings. By the time we reported, the new Act's provisions had commenced, and the Court of Appeal in *R v Healy* [2007] NZCA 451 had explicitly said that the previous law no longer applied under the new Act; a fresh approach was, therefore, required. The Court had also taken a more liberal view on the facts to the admissibility of evidence in that case than the previous law would have contemplated.

6. In that report, we were not persuaded that there was any difficulty with the Act's approach to these provisions. However, we were reporting less than a year after the Act had commenced. We therefore thought it would be premature to conclude no change was required; it was too early to state conclusively the approach the courts might take. We preferred to continue to monitor the working in practice of the veracity and propensity provisions.

7. We subsequently sought slight extension of the report-back date to the end of March, to which the Minister agreed.

Summary of advice

8. Each of the veracity and propensity provisions is individually reviewed below.

9. The picture is, we think, very largely a positive one. Although this advice highlights a number of problems or possible problems, it should not be inferred that the provisions on the whole are not working. In the vast majority of cases, the law seems to have operated smoothly, as intended, and produced the right results.

10. The Courts have embraced the notion that the Act should be a fresh start, and that, therefore, the language of the provisions is the proper starting point for interpreting them.

11. There have been some instances of former, pre-Act, practice creeping through, most notably under section 40, which defines propensity evidence. In a line of half a dozen appellate cases, the Court of Appeal has discussed evidence in terms that clearly categorise it as propensity evidence, whilst at the same time declining to apply the statutory safeguards that are the purpose of the propensity provisions. The Court has, instead, elected to rely upon the looser tests in sections 7 and 8 of the Act as the route to admissibility. This is not at all desirable. Indeed, it is an approach that carries some risk. However, it is not producing injustice.

12. Only one appellate case has been decided under section 42, which relates to propensity evidence admitted by one defendant against a co-defendant. The case, *R v Moffat* [2009] NZCA 437, is therefore the leading case. In it, the Court of Appeal takes a somewhat more liberal approach to the admission of evidence than we think strictly justified, concluding that once the terms of section 42 have been met, evidence will not be excluded under section 8 on the grounds of prejudice to a co-defendant.

13. The Court's approach in *Moffat* will necessitate severance in some cases, which has the potential for other collateral disadvantages. However, we do not consider that the approach gives rise to any risk of miscarriage of justice, and we are not convinced that the problem lies in the drafting, as opposed to interpretation. The decision in question is quite recent and, once again, we are inclined to take a back seat approach for now, and observe how matters proceed.

14. Without exception, any problems that are occurring seem to be ones of interpretation and method, rather than the legislative drafting. This makes it tricky, from a law reform point of view, to assess whether intervention is needed; in other words, whether an attempt should be made to improve upon drafting that seems to be very largely sound.

15. As one would expect, the Courts are continuing to refine, and in some instances self-correct, their early interpretations of the provisions. We consider that opportunity ought to be allowed for this process to continue. Consequently, although the operation of this legislation has not been perfect, we think it remains possible that any wrinkles will be ironed out over time.

16. Our recommendation, again, would be to keep the matter under review, and deal with any issues arising in 2012, when the remainder of the Act will be reviewed in accordance with section 202.

Veracity (sections 37 to 39)

17. Section 39, which relates to challenges to a co-defendant's veracity, is not reproduced here. There are no issues arising from it that require discussion.

18. Sections 37 and 38 provide:

> **37 Veracity rules**
>
> (1) A party may not offer evidence in a civil or criminal proceeding about a person's veracity unless the evidence is substantially helpful in assessing that person's veracity.
>
> (2) In a criminal proceeding, evidence about a defendant's veracity must also comply with section 38 or, as the case requires, section 39.
>
> (3) In deciding, for the purposes of subsection (1), whether or not evidence proposed to be offered about the veracity of a person is substantially helpful, the Judge may consider, among any other matters, whether the proposed evidence tends to show 1 or more of the following matters:
>
> (a) lack of veracity on the part of the person when under a legal obligation to tell the truth (for example, in an earlier proceeding or in a signed declaration):
>
> (b) that the person has been convicted of 1 or more offences that indicate a propensity for dishonesty or lack of veracity:
>
> (c) any previous inconsistent statements made by the person:
>
> (d) bias on the part of the person:
>
> (e) a motive on the part of the person to be untruthful.
>
> (4) A party who calls a witness—
>
> (a) may not offer evidence to challenge that witness's veracity unless the Judge determines the witness to be hostile; but
>
> (b) may offer evidence as to the facts in issue contrary to the evidence of that witness.
>
> (5) For the purposes of this Act, **veracity** means the disposition of a person to refrain from lying, whether generally or in the proceeding.
>
> **38 Evidence of defendant's veracity**
>
> (1) A defendant in a criminal proceeding may offer evidence about his or her veracity.
>
> (2) The prosecution in a criminal proceeding may offer evidence about a defendant's veracity only if—
>
> (a) the defendant has offered evidence about his or her veracity or has challenged the veracity of a prosecution witness by reference to matters other than the facts in issue; and
>
> (b) the Judge permits the prosecution to do so.
>
> (3) In determining whether to give permission under subsection (2)(b), the Judge may take into account any of the following matters:
>
> (a) the extent to which the defendant's veracity or the veracity of a prosecution witness has been put in issue in the defendant's evidence:

(b) the time that has elapsed since any conviction about which the prosecution seeks to give evidence:

(c) whether any evidence given by the defendant about veracity was elicited by the prosecution.

Issues arising from case law

19. Case law on these provisions establishes several key points. Some of them are non-contentious and do not require further discussion; one is expanded on further below.

- Evidence adduced by a defendant about his or her absence of prior convictions is not relevant to veracity: *R v Kant* [2008] NZCA 194; *Wi v R* [2009] NZSC 121.
- The veracity provisions affect the permissible scope of cross examination, as well as the admissibility of evidence contesting denials by the witness (the former "collateral issues" rule). In *R v Alletson* [2009] NZCA 205 the Court held that questions which were not both relevant *and* substantially helpful should not even have been asked. This is an expansion of the collateral issues rule.
- In *R v Smith* [2007] NZCA 400, the Court considered the meaning of "substantially helpful" in section 37, and held that often in practice there will be little, if any, difference, between the new Act and the common law.
- In determining the scope of the veracity rule, Courts need to look at the principal purpose for which evidence is adduced: whether to establish a disposition to lie or refrain from lying, or for some other collateral purpose. *R v Tepu* [2009] 3 NZLR 216 and *R v Davidson* [2008] NZCA 410, the two leading cases on this issue, are discussed further below.

Discussion – *Tepu* and *Davidson*

20. In *Davidson*, the Court of Appeal held that a complainant's earlier videotaped statement, in which she had denied any sexual offending occurred, was admissible, and not governed by the veracity provisions (as the Crown had argued). The defence was not wishing to demonstrate the complainant's disposition to lie or refrain from lying. Its case was that the videotape was the true account, even though the collateral effect of it, if believed, would establish that she must have lied on subsequent occasions. It was the primary purpose for which the statement was being introduced that was the determinant of whether the veracity provisions should be invoked. Where the predominant purpose is to establish the truth of what is asserted, the veracity rules have no application.

21. We, and others, think that this correctly confines the scope of the provisions.

22. By contrast, in *Tepu*, the Court considered the admissibility of a defendant's previous false statement. When questioned initially by the police, he had denied ever having met the complainant, an alleged victim of sexual offending. Subsequently, security system video footage proved this to be false, whereupon the defendant changed his defence to consent, or reasonable belief in consent. The prosecution sought to adduce the initial false statement; the defence argued that this should be governed by the veracity provisions, which would have resulted in the exclusion of the evidence.

23. Again, the Court of Appeal held that the primary use of the statement was not to attack the defendant's veracity – paralleling its approach in *Davidson*. The Crown was not attacking character or disposition simply by virtue of alleging lying on a particular occasion. An allegation that a defendant lied in a statement to the police does not, of itself, involve an allegation that he has a disposition to lie. The statement was admissible, without engaging sections 37 and 38.

24. Views differ as to correctness of this line of reasoning. Optican and Sankoff take the view that such evidence would have always been admissible at common law (albeit for limited purposes) – it was relied upon as circumstantial evidence of guilt, by way of inference drawn from the falsehood, rather than evidence about veracity.[1] Therefore, they consider its admission was the right result. Mahoney disagrees, taking a narrower statutory interpretation approach.[2] On his analysis, the result was wrong, the veracity provisions should have been applied, and would have worked to exclude the evidence in this case. First, section 37 addresses any evidence "about a person's veracity"; the *Tepu* Court was, therefore, misdirected in framing its judgment around the absence of any attack on veracity. And secondly, in any event, it was in fact an attack: *"The whole point of the prosecution evidence of Mr Tepu's lie is to demonstrate to the jury Tepu's lack of veracity, and to ask them to disbelieve his testimony. This is a classic 'challenge'."*

25. However, even if Mahoney's view is accepted, he argues that the legislation's scheme is clear, just misinterpreted by the Court. In other words, he does not suggest that any legislative amendment is required.

26. There is, however, another implication, if Mahoney's view is accepted. His approach would have resulted in the application of sections 37 and 38, and thus the exclusion of the evidence in the circumstances of this case (because the section 38 pre-requisites had not been satisfied). We have some difficulty with that proposition: we think that lies about the current offending ought to be admissible, regardless of section 38.

27. Overall, while there is room for some doubt and argument about the Court's method of arriving at its result in *Tepu*, we believe it was the right result. On the whole, we consider that it will be better to continue to monitor the operation of these provisions, rather than intervening immediately.

28. As well as considering these points of law, we have reviewed all other decisions under sections 37 to 39 that we were able to obtain. There have not been many cases, but we think that the courts are applying the sections as intended, and the right results are, in general, being reached. This tends to bolster our view that immediate legislative intervention is not required. As far as case law to date is concerned, it seems the provisions are working.

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1 Scott Optican and Peter Sankoff *Evidence Act Revisited for Criminal Lawyers* (NZLS seminar, February 2010).

2 Richard Mahoney "Evidence" [2009] NZ Law Rev 127.

Veracity – other issues

29. In our previous report, we identified four technical questions that we thought might warrant eventual attention. These are discussed at paras 9.12 - 9.16 of the report. Briefly, they were:

- Section 37(3)(b) refers to "offences that indicate a propensity for dishonesty or lack of veracity". We doubted whether dishonesty offending equates to veracity, and whether dishonesty offending should always be elevated above all other offending for the purpose of establishing veracity.
- Where a defendant is charged with dishonesty, we queried whether a mechanism might be needed to stop previous dishonesty convictions, admitted for veracity purposes, from being improperly used as propensity evidence.
- There may be doubt about whether evidence given by multiple complainants, usually in sexual offending cases, is veracity or propensity evidence. If it is only veracity then, similar to the point above, there may be a problem in stopping juries from improperly using it as propensity.
- Previously, the prosecution was not allowed to lead evidence of a defendant's previous convictions, when the defendant (via his or her counsel, or another witness) had attacked the credibility of a prosecution witness without giving evidence himself or herself. Under the new legislation, the position is unclear.

30. We remain of the view that these issues will warrant eventual attention. However, we do not consider them sufficiently pressing to be addressed separately now, as opposed to 2012, in the light of the absence of other problems identified with sections 37 to 39.

31. It may yet be that the courts will in due course resolve them, when they do arise. Indeed, they must have arisen in daily court business by now, but they have not been identified to us as causing real obstacles or injustices.

Section 44, and false sexual offending allegations

32. Section 44 is not one of the veracity / propensity provisions. However, an issue has arisen regarding its interaction with section 37, in circumstances where a complainant has allegedly previously made false allegations of sexual offending.

33. Section 44 provides:

> **44 Evidence of sexual experience of complainants in sexual cases**
>
> (1) In a sexual case, no evidence can be given and no question can be put to a witness relating directly or indirectly to the sexual experience of the complainant with any person other than the defendant, except with the permission of the Judge.
>
> (2) In a sexual case, no evidence can be given and no question can be put to a witness that relates directly or indirectly to the reputation of the complainant in sexual matters.
>
> (3) In an application for permission under subsection (1), the Judge must not grant permission 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.
>
> (4) The permission of the Judge is not required to rebut or contradict evidence given under subsection (1).

(5) In a sexual case in which the defendant is charged as a party and cannot be convicted unless it is shown that another person committed a sexual offence against the complainant, subsection (1) does not apply to any evidence given, or any question put, that relates directly or indirectly to the sexual experience of the complainant with that other person.

(6) 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.

34. Section 44 replaces the former section 23A of the Evidence Act 1908, and fulfils the same function.

35. In *R v C* [2007] NZCA 439, the Court of Appeal held that evidence of reputation for making false sexual offending allegations is not admissible under the Act. This is because, according to the Court, evidence of reputation in sexual matters is excluded by section 44(2); and under section 37, the select committee deleted a reference to evidence of reputation for untruthfulness, saying that it considered a person's reputation was irrelevant and should not be considered when determining veracity.

36. However, the Court held that where there is manifestly clear evidence that a complainant has previously made a false complaint, leave to offer the evidence is likely to be granted under section 44 if it would otherwise be admissible under section 37. In these circumstances, the sexual context will be seen as tangential to the issue of the veracity of the complainant and the focus will therefore be on section 37. But in other cases, where the truth or falsity of the past complaints is disputed, the matter will fall to be determined under section 44 in essentially the same way as it was under the old section 23A, as evidence of sexual experience.

37. There are two issues with this approach.

38. The first is that it is both confusing, and not semantically logical. Logically, the fact that a complainant has previously made a false complaint, or an allegedly false complaint, cannot relate to either the sexual experience of the complainant or her sexual reputation, and thus must be beyond the scope of section 44. A false complaint can, by definition, relate only to her honesty or (in the language of the Act) veracity.[3]

39. However, the approach taken in *C* replicates the earlier law. Courts' adherence to this pre-Act position signals that they are evidently happy that the approach works in practice. Although we are not entirely comfortable with it as a matter of logic, it is not explicitly at odds with the new terms of the Act.

40. Secondly, we think that the distinction between reputation for untruthfulness (inadmissible) and disposition to lie (veracity, dealt with under section 37) is less clear than the Court in *C* suggests. We think that there must surely be a degree of overlap between the two: disposition is a form of reputation, and reputation must have arisen at some point from at least one instance of a lie or alleged lie.

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3 "The Evidence Act and sexual offences" [2008] NZLJ 386. In *Evidence Volume 2: Evidence Code and Commentary* (NZLC R55) we similarly said, about the draft code as it then read: "Section 46(3) does not preclude evidence of a complainant's reputation to lie about sexual matters; for example, a reputation for making false allegations of sexual assault. *Such evidence is about reputation for truthfulness (or lack of it), not about reputation in sexual matters*, and is admissible provided that it complies with the truthfulness rules."

41. However, in *R v K* [2009] NZCA 176 the Court resiled somewhat from its former position, holding that evidence of reputation for untruthfulness may in fact be admissible under section 37 after all, for reasons that included:

- The veracity rules as enacted are identical to the original proposals of the Law Commission, which contained no explicit reference to reputation evidence. The Law Commission recognised that this left some room for reputation evidence to be admitted in the rare event that it would be substantially helpful: *Evidence Law: Character and Credibility* (NZLC PP27).
- The select committee chose not to prohibit (at least explicitly) evidence of a person's reputation for veracity. This may be contrasted with the changes it made to section 44, prohibiting evidence about the sexual reputation of a complainant in a sexual case.

42. We agree that this revised position is appropriate.

Propensity evidence – introduction

43. Broadly speaking, propensity cases decided under the Evidence Act to date can be divided into two groups. First, there are cases in which the courts have side-stepped the propensity provisions, notwithstanding their prima facie applicability. Second, there are cases in which sections 40 to 43 have been applied. Both sets of cases are discussed in more detail below.

44. In both instances, we can find nothing at all to indicate that any aspect of the provisions is acting as a barrier to the proper admission of relevant evidence. In the first category of case, even if sections 40 to 43 had been applied, we think that the evidence would have been admitted. And in the second category, when the provisions were applied, they seem to be working smoothly and properly. There is nothing to indicate evidence is being either inappropriately withheld from juries, or inappropriately admitted.

Definition and scope of propensity evidence (section 40)

45. Section 40, which defines propensity evidence, provides:

> **40 Propensity rule**
>
> (1) In this section and sections 41 to 43, **propensity evidence**—
>
> (a) means evidence that tends to show a person's propensity to act in a particular way or to have a particular state of mind, being evidence of acts, omissions, events, or circumstances with which a person is alleged to have been involved; but
>
> (b) does not include evidence of an act or omission that is—
>
> (i) 1 of the elements of the offence for which the person is being tried; or
>
> (ii) the cause of action in the proceeding in question.
>
> (2) A party may offer propensity evidence in a civil or criminal proceeding about any person.
>
> (3) However, propensity evidence about—
>
> (a) a defendant in a criminal proceeding may be offered only in accordance with section 41 or 42 or 43, whichever section is applicable; and
>
> (b) a complainant in a sexual case in relation to the complainant's sexual experience may be offered only in accordance with section 44.
>
> (4) Evidence that is solely or mainly relevant to veracity is governed by the veracity rules set out in section 37 and, accordingly, this section does not apply to evidence of that kind.

46. If evidence is not considered to be propensity evidence, none of the strictures in sections 41, 42 and 43 apply. Admissibility will be governed by the generally applicable provisions in sections 7 and 8.

Discussion – section 40 appeal case law

47. In *R v Healy* [2007] NZCA 451, the Court held that the wording of the statute should be the starting point in propensity analysis. And in *R v R* [2008] NZCA 342, the Court held that section 40 of the Evidence Act is "broadly worded and therefore … it is possible to bring a large class of evidence within the section".[4]

48. However, in subsequent cases, the Court's approach has been less straightforward. There are a number of cases in which, in order to find evidence admissible, the Court of Appeal has declined to apply section 40 and related sections, and has instead turned to the rather different route via sections 7 and 8 to reach the result that is appropriate. The Court has described what is clearly propensity evidence as merely "part of the narrative", or "directly relevant".[5]

49. The resulting theoretical distinctions are somewhat tenuous. They are also difficult to understand, since it is clear from the Courts' own language in each case where this has occurred to date that the evidence would have been, and in our view should have been, properly admitted even if sections 40 and 43 had been applied. In other words, the sections are not an obstacle to admissibility.

50. It may be that this is a hangover from the previous similar fact law, where, because of the complexity and anomalies of that law, the courts would work around it in a similar fashion to that demonstrated above, referring to the broader or direct relevance of the evidence. However, that should no longer be necessary. There is no dispute that, as the Court itself held in *Healy*, the Act should be taken to be a fresh start.

51. All of this can be illustrated by the half dozen cases briefly reviewed below.

52. In *R v Tainui* [2008] NZCA 119, the defendant had made comments the night before an alleged sexual assault, that "one in five women get sexually abused" and "three in four females are sexually molested by the time they reach a certain age". The Court held that this did not amount to propensity evidence, because the Crown did not lead evidence of Mr Tainui's statements to show his propensity to have a particular state of mind. And yet, it also held that the Judge had correctly directed the jury that Mr Tainui's words were relevant to establish whether or not he "had sexual activity in mind from earlier in the evening". It held that "what was said was not propensity evidence but was instead directly material to whether or not Mr Tainui later sexually violated the complainant," thus admissible under section 7. The Supreme Court refused leave to appeal.

53. In *R v R* [2008] NZCA 342, evidence was admitted to demonstrate the defendant's ongoing pattern of offending against his family, which commentators have agreed would (on the facts of the case) obviously meet the section 40 definition. However, the Court held that it was not necessary or appropriate to undertake a propensity evidence analysis. In one sense, said the Court, the

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4 See further "Recognising propensity evidence" [2009] NZLJ 284.

5 Scott Optican and Peter Sankoff *Evidence Act Revisited for Criminal Lawyers* (NZLS seminar, February 2010); "Recognising propensity evidence" [2009] NZLJ 284.

evidence would show a propensity of the appellant, because it would show the appellant's tendency to behave in a particular way. However, they ultimately determined that while the evidence was relevant, and therefore admissible, "the fact that the evidence may also, in a broad sense, suggest a propensity" was a subsidiary feature of its relevance.

54. In *R v Broadhurst* [2008] NZCA 454, the defendant had sought on numerous previous occasions to explain away unusual bruising and other injuries to a small child, as clumsiness or falling incidents on the part of the toddler. This was regarded as improbable by experts, and the injuries were consistent with a severe sustained pattern of abuse. The pattern of injury and explanation was also consistent with the circumstances of the present charge. The Court held that, while it was possible to regard the evidence as propensity evidence and to analyse its admissibility in accordance with section 43 of the Evidence Act, a "more direct route" to the admissibility of the evidence was via sections 7 and 8. It further observed that, "whether the evidence is labelled as propensity evidence or simply regarded as relevant evidence, the same test for admissibility is reached in either case" (our emphasis). The emphasised part is incorrect: the test for admissibility is plainly not the same under both approaches, although the result (admission of the evidence) almost certainly would have been.

55. In *R v Gooch* [2009] NZCA 163, two witnesses, married women in the appellant's circle, testified about the nature of his conversations with and behaviour towards them, which seemed to have sexual connotations and had made them feel uncomfortable. The Crown argued that it was evidence of sexual frustration and various manifestations of it, relevant to motive; however, it neither expressly nor implicitly established the appellant's attitude to non-consensual sex. The Court applied *R v R*, holding at para 8: "On the primary question of relevance, we consider that the evidence is generally relevant, for the reasons advanced by counsel for the Crown. We consider that the potential relevance of the evidence is as contended for by the Crown, not as propensity evidence." But:[6]

> The Court's denial that this was evidence of propensity can be contrasted with the ways in which the evidence was described in the later parts of the judgement. For instance "the events two weeks earlier mark the beginning of a pattern of behaviour which continued ... " (para [12]); "the evidence was ... relevant as indicating a preoccupation with sexual thinking" (para [28]); and in conclusion:
>
> > it was relevant for the jury to have before it evidence of a pattern of behaviour by the appellant during the period leading up to the incident of inappropriate and lascivious behaviour towards women when affected by liquor and in the context of evidence that he was sexually frustrated and resentful. (para [37])
>
> When considered against the definition of propensity evidence in s 40 it is difficult to see how evidence of a "pattern of behaviour" and of a "preoccupation with sexual thinking" is not "evidence that tends to show a person's propensity to act in a particular way or to have a particular state of mind".

56. In *R v Mohamed* [2009] NZCA 477, on charges of assault and homicide, there was prior evidence of neglect, including leaving child in an overheated van two weeks before her death. The Court held that this was not propensity evidence, but instead "evidence that is part of the sequence of events leading up to Tahani's death". However, the Court also said: "The van incident can be seen as tending to show a propensity on Mr Mohamed's part to act towards Tahani in a way that was careless of her wellbeing and indifferent to her needs and suffering ... [and] a propensity on [Mrs Mohamed's] part to go along with ill-treatment of

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6 "Recognising propensity evidence" [2009] NZLJ 284.

Tahani". But: "It is not necessary to carry a s 43(3) exercise through to a conclusion. While the evidence can be seen as probative as showing propensity, its probity is best weighed as part of the relevant facts."

57. The approach does pose some risk for future cases. According to academics Optican and Sankoff:[7]

> it is far from clear why the court often seems so determined to conclude that prosecution evidence should not engage the propensity calculus of s 43. Indeed, the whole point of s 43 is that, since juries are likely to give great weight to propensity reasoning in the determination of guilt, the admissibility of evidence tending to trigger such thinking processes should be controlled by a stringent, multi-factored balancing test. Accordingly, a limited reading of the meaning of "propensity evidence" under s 40(1)(a) risks violence to Parliament's clear intent of having judges strictly regulate the Crown use of such material in a criminal trial.

58. However, to date, no miscarriage of justice has resulted from this line of authority. As with the veracity provisions, given that the courts seem to be reaching the right results to date (in terms of their decisions to either admit or exclude particular evidence), albeit sometimes by somewhat circuitous routes, we think that the law should be allowed to continue to develop a little before any decision to intervene is made.

Propensity evidence from a defendant about himself or herself (section 41)

59. Section 41 provides:

> **41 Propensity evidence about defendants**
>
> (1) A defendant in a criminal proceeding may offer propensity evidence about himself or herself.
>
> (2) If a defendant offers propensity evidence about himself or herself, the prosecution or another party may, with the permission of the Judge, offer propensity evidence about that defendant.
>
> (3) Section 43 does not apply to propensity evidence offered by the prosecution under subsection (2).

60. In *Wi v R* [2009] NZSC 121, overruling *R v Kant* [2008] NZCA 194, the Supreme Court held that evidence that a defendant has no previous convictions meets the definition of propensity evidence. Other good character evidence may also be admissible under the propensity provisions.

Discussion – *Kant* and *Wi*

61. In *Kant*, the Court of Appeal had held that an accused's lack of previous convictions was inadmissible as propensity evidence. The Court considered that it was generally neutral as to guilt or innocence of the particular offence charged, or indeed as to propensity, since it might equally be attributable to not having been apprehended. This was overruled in *Wi*. According to the Supreme Court, such evidence has a tendency, if only a slight tendency, to prove that the defendant, on account of the lack of previous convictions, is less likely to have committed the offence or offences with which he is charged.

62. *Wi* also held that, beyond proof of lack of previous convictions, the defence may be able to introduce a broader range of good character evidence, but not all will meet the necessary threshold of relevance. This affirms the approach of the

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7 Scott Optican and Peter Sankoff *Evidence Act Revisited for Criminal Lawyers* (NZLS seminar, February 2010).

Court of Appeal in *R v Alletson* [2009] NZCA 205. From evidence of good character – evidence from a clergyman as to his participation at church, and decent honest character – the jury would have been asked to infer that the appellant was not the sort of person who would have committed sexual offences against young girls. The Court of Appeal held that such evidence could not, by any logical chain of reasoning, tend to prove anything of consequence at the trial for sexual offending. However, that was not to say evidence of good character would never be relevant as propensity evidence.

63. *Wi* also stands for two further propositions:

- If such evidence is adduced, it may open the door to rebuttal evidence from the prosecution. However, evidence of lack of previous convictions without more will not do so.
- The trial judge may give a direction about the proper use of such evidence, but this is not mandatory.

64. Crown Law has expressed some concern with these latter aspects of the decision: that it creates uncertainty about when a direction should be given, and that precluding the Crown from responding, albeit only to very narrow class of good character evidence, is not consistent with the party-neutral thrust of the Act.

65. We are comfortable with the approach in the interim. In general, it reflects what was intended. We think that, for the time being, it will be best to take Crown Law's concerns under advisement, and continue to monitor developments.

66. In *Alletson*, the Court also discussed the Australian approach,[8] and suggested it might raise an issue as to whether good character evidence should be generally admissible, not constrained by the scope of the veracity and propensity provisions. We initially reached a similar conclusion, but that provision did not find its way into either the final draft Code or the 2006 Act. We concluded that veracity and propensity are the only aspects of character that are relevant in civil or criminal proceedings.[9] This issue has, therefore, already been addressed.

Propensity evidence offered against co-defendants (section 42)

67. Section 42 provides:

> **42 Propensity evidence about co-defendants**
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> (1) A defendant in a criminal proceeding may offer propensity evidence about a co-defendant only if—
>
> (a) that evidence is relevant to a defence raised or proposed to be raised by the defendant; and
>
> (b) the Judge permits the defendant to do so.
>
> (2) A defendant in a criminal proceeding who proposes to offer propensity evidence about a co-defendant must give notice in writing to that co-defendant and every other co-defendant of the proposal to offer that evidence unless the requirement to give notice is waived—
>
> (a) by all the co-defendants; or
>
> (b) by the Judge in the interests of justice.

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8 In Australia, specific provision is made for evidence of good character, in section 110 of the Evidence Act (Cth), which provides: "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".

9 *Evidence Volume 1: Reform of the Law* (NZLC R55), at para 155.

(3) A notice must—

(a) include the contents of the proposed evidence; and

(b) be given in sufficient time to provide all the co-defendants with a fair opportunity to respond to that evidence.

68. *R v Moffat* [2009] NZCA 437 is the only Court of Appeal decision to date dealing with section 42. As a result of *Moffat*, the current law is arguably looser than would be justified by a proper reading of the Act, because of the Court having read down the effect of section 8.

Discussion – *Moffat*

69. Section 42(1)(b) has as one prerequisite the requirement for propensity evidence offered by a defendant about a co-defendant to be "relevant to a defence raised or proposed to be raised by the defendant".

70. In *Moffat* (formerly *R v Jamieson* 4/12/08, HC Timaru CRI 2008-076-328), the defence case was that the group of six defendants co-accused of beating and kicking and stomping someone to death had comprised two groups, those who inflicted the fatal injuries, and a "less active" group, of which the defendant was part. The High Court had held that evidence of previous convictions for violence, including punching and kicking people in the head, of two of the six defendants, was either not relevant (because it told the jury nothing about whether the defendant seeking to call the evidence had been involved in the attack), or would be unduly prejudicial to those two defendants, applying section 8 of the Evidence Act.

71. On appeal against conviction for manslaughter, arguing both that the evidence was relevant in terms of section 42, and that section 8 should not be applied, a majority of the Court of Appeal overruled the High Court. They disagreed on the issue of what, on the facts, constituted relevance to the defence. McKenzie J, dissenting, held that this evidence conferred primarily a tactical advantage; he considered that relevance to the defence is not the same thing as making it more likely that the defendant will win, and needs to be construed as a stricter test.

72. However, all the judges considered that, if the requirements of section 42 are satisfied, a defendant should not be prevented from adducing any evidence that would support his or her case, referring to the section 25 Bill of Rights Act right to present a defence. Accordingly, a judge should not (as the High Court had) invoke section 8 of the Evidence Act on the grounds of collateral damage to another defendant. In extreme cases, where prejudice would be undue, the appropriate remedy would instead be severance. However, there was no miscarriage of justice, because in the Court's view admission of the evidence would not have made a difference to the end result of the trial.

73. Optican and Sankoff disagree.[10] In their view, the High Court was right, and the Court of Appeal wrong on the second aspect of their decision, regarding section 8.

74. The academics agree that it is important for judges considering section 42 to focus on whether the evidence supports merely the trial tactics of a defendant in a multi-defendant proceeding, or is actually probative on a material aspect of the

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[10] Scott Optican and Peter Sankoff *Evidence Act Revisited for Criminal Lawyers* (NZLS seminar, February 2010).

defendant's defence. Propensity evidence that is simply a character-blackening exercise, or that is used simply to distract the jury or obfuscate the defendant's own role in the case, should not satisfy the test of admissibility under section 42(1)(a). However, the division of opinion in the Court on this issue seems to have been on the facts, not the law.

75. However, they go on to argue that section 42 does not need to explicitly refer to section 8(1)(a), because that overarching provision of the Evidence Act applies regardless, and requires a judge to exclude any type of evidence if the court concludes it would have an unfairly prejudicial effect on the proceeding. "The proceeding" is a broad enough concept to cover the interests of other co-defendants. This should not be enfeebled by judges, they argue. A judge is obliged to consider the interests of all defendants, and that is what the respective sections provide for.

76. The effect of *Moffat*, in their view, is therefore that the current law is looser than would be justified by a proper reading of the Act. Defendants who can satisfy the section 42 threshold will not be constrained by section 8 considerations of the interests of co-defendants; instead, where this is an issue, severance would need to be ordered, which may have other adverse implications (eg, for resources, or witnesses).

77. In terms of any potential for a miscarriage of justice to arise from the present position, it seems fairly clear that there is no prospect of undue prejudice to any defendant (because in that event, severance would be ordered), and it may work to the benefit of some defendants, by allowing them to rely upon evidence that would otherwise be excluded if section 8 was more strictly applied.

78. We think that, along with the line of cases discussed under section 40, that challenge the scope of propensity evidence, this is the most significant issue with the present operation of the Act. However, just as in all of the other instances we have identified, we are not wholly convinced that the problem lies in the drafting of the statutory provisions, as opposed to their interpretation, which it remains open to the courts to address, as they have already done in some cases. *Moffat* is quite a recent decision, and once again, we recommend that no action should be taken at this time. Instead, we will continue to monitor progress.

Propensity evidence offered by prosecution about defendants (section 43)

79. Section 43 provides:

> **43 Propensity evidence offered by prosecution about defendants**
>
> (1) The prosecution may offer propensity evidence about a defendant in a criminal proceeding only if the evidence has a probative value in relation to an issue in dispute in the proceeding which outweighs the risk that the evidence may have an unfairly prejudicial effect on the defendant.
>
> (2) When assessing the probative value of propensity evidence, the Judge must take into account the nature of the issue in dispute.
>
> (3) When assessing the probative value of propensity evidence, the Judge may consider, among other matters, the following:
>
> (a) the frequency with which the 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 constitute the offence for which the defendant is being tried:

(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 constitute the offence for which the defendant is being tried:

(d) the number of persons making allegations against the defendant that are the same as, or are similar to, the subject of the offence for which the defendant is being tried:

(e) whether the allegations described in paragraph (d) may be the result of collusion or suggestibility:

(f) 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 constitute the offence for which the defendant is being tried are unusual.

(4) When assessing the prejudicial effect of evidence on the defendant, the Judge must consider, among any other matters,—

(a) whether the evidence is likely to unfairly predispose the fact-finder against the defendant; and

(b) whether the fact-finder will tend to give disproportionate weight in reaching a verdict to evidence of other acts or omissions.

80. The line of cases discussed above, under section 40, are all also section 43 cases – or would have been, had the Court invoked the propensity provisions.

81. As with veracity, we have reviewed all the cases we were able to obtain in which the propensity provisions have in fact been applied. The approach the courts are taking to section 43 is very much a case by case fact-specific balancing exercise. That is the approach the Act requires and, in our judgement, as with veracity, the right evidence is being admitted or excluded, as the case may be. This indicates to us that, when applied, the provisions are working.

Summing up on propensity evidence under section 43

82. In *R v Stewart* [2008] NZCA 429, the Court held that section 43 requires greater specificity in the directions given to juries than the pre-Evidence Act approach. The more detailed approach to the directions that should be given, that we proposed in our report *Disclosure to Court of Defendants' Previous Convictions, Similar Offending, and Bad Character* (NZLC R103, May 2008), was adopted.

Consultation

83. We have been consulting with front line practitioners on these issues by way of various forums, and expect to continue to do so. For example, we issued an open invitation in the Law Society's LawTalk magazine; we are in touch with two special committees (the judicial Higher Courts Evidence Committee, and the NZLS Evidence Committee); we have corresponded directly with key stakeholders; and taken account of academic comment.

84. All feedback received so far has been fully taken into account in formulating this advice.

85. If you agree with our recommendation for further deferral of this work, the issues identified in this briefing along with any unresolved issues will remain under consideration, pending a further report in 2012.

Geoffrey Palmer
President

AGREE / DISAGREE

Hon Simon Power
Minister of Justice / Minister Responsible for the Law Commission

22 / 4 / 10 [date]