QUEENSLAND LAW REFORM COMMISSION

MATTERS ARISING OUT OF THE REPORT OF THE COMMITTEE OF INQUIRY INTO THE ENFORCEMENT OF CRIMINAL LAW IN QUEENSLAND

REPORT NO. 28

A Report of the Queensland Law Reform Commission

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17th May, 1979

The Honourable W.D. Lickiss, M.L.A.,
Minister for Justice and Attorney-General,
BRISBANE.

Dear Minister,

Re: Report of the Committee of Inquiry into the enforcement of Criminal Law in Queensland

I refer to your letters of 16th February, 1979 and 1st March, 1979 asking the Law Reform Commission to consider certain matters arising out of the abovementioned report. The Commission has prepared a paper dealing with three of these matters:

(A) Evidence of disposition

(B) The rule in R. v. Gleeson

(C) Corroboration

In the paper, the Commission recommends that no action be taken with respect to the first and second matters. With respect to the third, Corroboration, the Commission recommends the repeal of the absolute requirements for corroboration contained in sections 212, 215, 217 and 218 of the Criminal Code.

The paper does not deal with the forth matter that you referred to the Commission, viz., the possible creation of a statutory tort of unlawful search. This matter arose out of a concern expressed by the Committee of Inquiry (Report para. 150) that many people, out of ignorance, consent to searches that would be otherwise unlawful. We notice that the Australian Law Reform Commission in its interim report on Criminal Investigation (Report No.2, 1975, para. 205) said:

"The Commission considers, on balance, that an appropriate solution is for searches on consent to be permitted, provided that such consent is entirely voluntary and is made after being informed of the right to refuse consent. Although we do not wish to multiply unduly the number of pieces of paper that police officers must carry about with them, we think that the rights in question here are

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> sufficiently important of protection to require that any consent on which the police rely in conducting a search should be acknowledged in writing. The absence of any such written acknowledgment would be prima facie evidence that no such notification was made, or consent given."

We have provisionally formed the opinion that this approach is the only one that could be effectively taken should it be thought necessary to deal with this matter. However we prefer not to express a final opinion until we have had an opportunity of considering further material on the subject that may come to hand.

I forward herewith a copy of our paper.

Yours sincerely,

(The Hon. Mr. Justice
D.G. ANDREWS)
Chairman.

LAW REFORM COMMISSION

QUEENSLAND

MATTERS ARISING OUT OF THE REPORT OF THE COMMITTEE OF INQUIRY INTO THE ENFORCEMENT OF CRIMINAL LAW IN QUEENSLAND

The Honourable W.D. Lickiss, M.L.A.,
Minister for Justice and Attorney-General,
BRISBANE.

This paper deals with three of the matters arising out of the report of the Committee of Inquiry into the enforcement of criminal law in Queensland that have been referred to the Commission for consideration:

(A) Evidence of disposition

(B) The rule in R. v. Gleeson

(C) Corroboration

We recomend that no action be taken with respect to the first and second matters. With respect to the third, Corroboration, we recommend the repeal of the absolute requirements for corroboration contained in ss.212, 215, 217 and 218 of the Queensland Criminal Code.

(A) EVIDENCE OF DISPOSITION

The Commission has been asked to consider whether the law in relation to evidence of disposition requires alteration : Committee of Inquiry report paras. 323-327. As we see it, the

essential issue raised for our consideration is whether the similar fact rule should be codified. A piecemeal alteration of that rule does not appear to have been contemplated by the Committee of Inquiry nor, in our view, would such an approach be desirable.

The Committee of Inquiry sets out in its report (para. 323) the often-quoted statement of the principle under which evidence is admissible against an accused person notwithstanding that it shows that he has been guilty of criminal acts other than the one charged. This is the statement made by Lord Herschell L.C. in Makin v. Attorney-General for New South Wales [1894] A.C. 57 at p.65:

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

The Committee of Inquiry goes on to point out (paras. 324 and 325) that this principle has been considered and refined in many decisions and that, speaking very generally, evidence of former offences in which an accused person has been concerned is admissible notwithstanding that it may show a disposition to commit offences, for the following purposes -

(a) to rebut (if necessary, in advance) a defence open to the accused, for example, accident, mistake, innocent association (in a sexual case).

(b) to demonstrate that the accused has committed other offences in the particular manner or mode of operation as that

employed in the offence charged. The similarity must be very close.

(c) to show that the accused has a tendency to commit offences with the particular person concerned in the offence charged (for example, in cases of incest).

(d) to establish the identity of the accused as the offender.

On the other hand, if the evidence shows only that the accused person is of bad disposition, it is inadmissible. As Lord Goddard C.J. said in R. v. Sims [1946] K.B.531 at p.537, "Evidence is not to be excluded merely because it tends to show the accused to be of a bad disposition, but only if it shows nothing more."

The question to be answered is whether the law governing the admissibility of similar fact evidence, referred to in a general way by the Committee of Inquiry, should be enacted in codified form. Ought Parliament to replace the common law on this subject by rules set out in a statute? As we have stated above, we do not think a piecemeal alteration of the similar fact rule would be desirable. The only alternative, apart from leaving the common law to develop of its own accord, is to codify that rule.

It is not impossible to codify the rules of evidence even in countries that have adopted the English common law. The American Law Institute adopted a Model Code of Evidence in 1942 and the National Conference of Commissioners on Uniform State Laws in America drafted and approved Uniform Rules of Evidence in 1953. In 1972, the English Criminal Law Revision Committee in its eleventh report recommended a draft Criminal Evidence Bill that would have codified much of the law of evidence applicable to criminal proceedings. Each of these texts contains provisions governing the admissibility of similar fact evidence. In 1978, the Law Reform Commission of New South Wales published a working paper on Evidence of Disposition containing a draft Bill that would, in effect, codify the similar fact rule.

Despite these developments, we are unable to recommend that the similar fact rule or, as some prefer to call it, the rule relating to evidence of disposition be codified in

Queensland. The main reason for this is that the rule is still being actively developed and, it is to be hoped, clarified by the common law in Australia and in England. There is a significant danger that any rule now enacted by the Queensland legislature would come to be increasingly out of step with the developing common law. An analogy may be drawn with s.632 of the Criminal Code whereby Sir Samuel Griffith codified the law relating to the corroboration of the evidence of accomplices in a form that has proved to be out of step with the developed common law. Despite the difficulties it causes, s.632 has remained on the statute book for nearly eighty years.

As the Committee of Inquiry points out, the judgment of Lord Herschell in Makin v. Attorney-General for New South Wales contains what has been regarded as the classic statement of the principle governing the admissibility of evidence of similar facts (or disposition). The authority of the statement has only recently again been endorsed by the High Court of Australia in Markby v. The Queen (1978) 52 A.L.J.R.626 at p.629. Yet there has been a perceptible shift away from full acceptance of the statement during the last decade. It has been argued, we think quite persuasively, that the statement does not precisely indicate the basis upon which similar fact evidence is admitted. Indeed one commentator, L.H. Hoffman in "Similar Facts after Boardman" (1975) 91 L.Q.R. 193 at p.200, goes so far as to say:

> "... the Makin rule affords no real guidance on whether similar fact evidence is admissible or not. It erects a distinction between different kinds of relevance when the true distinction is between different degrees of relevance. The irrationality of the Makin distinction has escaped exposure only because, as is shown by cases like Straffen and Ball, it has never actually been applied. "

Referring to the decision of the House of Lords in D.P.P. v. Boardman [1975] A.C.421, Hoffman goes on to say:

> "The importance of Boardman is that it contains the first clear statements of the true rule and raises the hope that judges may now be released from their 80 years of unequal struggle in trying to apply Makin."

A similar view has been expressed, though in milder terms, by Professor Rupert Cross, author of Cross on Evidence. See, for example, his article "Fourth Time Lucky - Similar Fact Evidence

in the House of Lords" [1975] Crim.L.R. 62. In the recent Queensland case R. v. Zaphir [1978] Qd.R.151, the Court of Criminal Appeal applied the tests laid down in Boardman without mentioning the earlier decision of the Privy Council in Makin. Although in Markby v. The Queen (above) the High Court of Australia endorsed the authority of Makin, it also relied upon the tests laid down in Boardman.

The common law on this subject can thus be seen to be in a state of development. The day is gone when a statute codifying the similar fact rule could be based upon the statement made by Lord Herschell in Makin v. Attorney-General for New South Wales. It might almost be as dangerous to base such a statute upon the speeches of their Lordships in R. v. Boardman, where a wide variety of views were expressed.

The Committee of Inquiry (report para.327) draws attention to the discussion of the subject in depth by the English Criminal Law Revision Committee in its eleventh report published in June 1972 : Cmnd 4991. As part of its draft Criminal Evidence Bill, the English Committee recommended a clause (cl.3) under the heading "Admissibility of other conduct of accused tending to show disposition." We have set out the clause in Appendix A to this paper. The clause reveals more adequately than we can express the difficulties confronting anyone who attempts to codify the similar fact rule. Professor Rupert Cross, a distinguished member of the English Committee, has admitted to the feeling that cl.3 is the least likely of all the clauses of the draft Criminal Evidence Bill ever to become law : [1973] Crim.L.R. 400

In its working paper on Evidence of Disposition published in 1978, the Law Reform Commission of New South Wales has also proposed for consideration certain sections (ss.110-113) to be inserted into the Evidence Act 1898 (N.S.W.) dealing with evidence of disposition. We set these out in Appendix B. The working paper contains a criticism of these proposals in the following terms (at p.124):

> "One view considered within the Commission in the course of work on this subject is that it is undesirable to state the law relating to evidence of disposition in statutory form. The argument is that the law is about similar facts, not about

> disposition, evidenced in the main by conduct. The argument asserts that s.110 approaches the problem from the wrong end. The law is not about, and the codification of it should not be about, the question when disposition evidence is to be admissible. It is about when certain logically relevant evidence, namely similar fact evidence, is to be restricted or inadmissible. (The answer is when similar fact evidence causes undue multifariousness or undue prejudice, the latter particularly in criminal cases.) It is said that s.110 would have unfortunate consequences. It is said that the area is not ripe for codification, particularly on the civil side, which has not been much developed. But if codification is desired, the argument proceeds, then it should be approached in a way that brings out the real legal issues. "

We quote this criticism, not necessarily because we agree with it, but in order to show how difficult it may be to get agreement upon a set of words to enact into law on this subject.

(B) THE RULE IN R. v. GLEESON

The Commission has been asked to consider whether there should be some statutory alteration of the rule in R. v. Gleeson [1975] Qd.R.399 : Committee of Inquiry report paras. 328 -331. This was a case in which two questions of law were reserved by the learned trial judge for the opinion of the Queensland Court of Criminal Appeal. The questions were stated as follows:

1. Is an accused person entitled to have determined on a voir dire the admissibility of confessional evidence because of the alleged use of threats, force, promises or inducements if the accused person says that despite such threats, force, promises or inducements the confessions were not made?

2. Is an accused person entitled to have determined on a voir dire or preliminary hearing the question of whether the learned trial judge should in the exercise of his discretion exclude confessional evidence if the accused person says the confessions were not made?

The Committee of Inquiry summarized the judgment of the Court of Criminal Appeal as follows:

> "329. In answering the first question the court drew attention to the purpose of a voir dire: a "trial within a trial" in which the accused person puts the Crown to proof of the fact that a confession is free and voluntary. The procedure therefore predicated that a confession had in fact been made; the purpose of the inquiry was to establish whether the confession was admissible in evidence; this was a question for the judge, and not for the jury. The question here was whether a confession had been made at all, and this was a question of weight of evidence and not of admissibility; it was therefore a question for the jury and the judge had no function to perform in deciding it. It was held a voir dire was not available.
>
> 330. The second question was answered to the effect that the question of the discretionary exclusion of confessional evidence could not arise unless a confession had in fact been made. If the accused person denied having made a confession at all a preliminary inquiry designed to show that evidence of a confession, given by a police officer, should be excluded in the exercise of the judges' discretion, could only be an attack upon the weight of the confession. This was again a question for the jury. "

In order to deal with the issue raised for our consideration, it is necessary to distinguish between two different grounds for objecting to confessional evidence. Firstly, evidence of an alleged confession may be objected to on the ground that the evidence tendered is irrelevant. Secondly, it may be objected to on the ground that the prosecution has not shown that the confession was made voluntarily. In both cases, where the trial is before a jury, the judge must rule on the admissibility of the evidence. However there is an important difference between the nature of decision to be made by him in each case.

Where evidence is objected to on the ground that it is irrelevant, an assertion is being made that the evidence tendered is inherently defective, i.e., that it is not evidence of the fact it seeks to establish or that it cannot sustain the inference sought to be drawn from it. The Victorian Full Court had this situation in mind in R. v. Thomas [1970] V.R.674 at p.679 when it said:

> "We think that different considerations apply where the evidence is objected to not on the ground that a condition precedent to its admission has not been satisfied, but on the ground that the evidence is irrelevant because it cannot sustain the inference sought to be drawn from it or that it is not evidence of the fact it seeks to establish. Where the trial is before a jury, although it is still for the judge to rule upon the admissibility of the evidence, it is for the jury, and not for the judge, to say whether the inference ought to be drawn or whether the evidence establishes the fact sought to be proved. The judge's task is merely to say whether the evidence if believed by the jury is reasonably capable of supporting the inference or establishing the fact, and if he so decides, that question must be left to the jury to determine, and cannot be withdrawn from it. A statement made by another in the presence and within the hearing of the accused is hearsay and it can only be used as evidence against him if he has done something in the way of utterance, silence or conduct which in the particular circumstances justifies an inference that he has acknowledged the truth of the statement so as to make it his own, or has so conducted himself as to show a consciousness of guilt."

A similar situation would have arisen in R. v. Gleeson if the objection had been made that the evidence tendered was not reasonably capable of supporting the inference or establishing the fact that the accused had made a confession.

The situation is quite different where evidence of a confession is objected to on the ground that it was not made voluntarily. Here, as the Victorian Full Court pointed out in R. v. Thomas at pp. 678 - 679:

> "... the basis of the objection is not some inherent defect or deficiency in the evidence itself but a ground which arises independently of it. It is concerned with circumstances which are not part of the evidence sought to be excluded and which must be established as a condition precedent to its admission. In the case of confessions it was laid down by Lord Sumner in Ibrahim v. R. [1914] A.C.599 at p.609 that 'no statement by an accused is admissible in evidence against him unless it is shown by the prosecution to have been a voluntary statement in the sense that it has not been obtained from him either by fear of prejudice or hope of advantage exercised or held out to him by a person in authority', and in determining whether the statement was made voluntarily the content of the statement

> and its truth is immaterial. Similarly in the case of an objection to the admission of a dying declaration, the objection is based on a matter extraneous to the content of the declaration, namely whether at the time the declaration was made the maker had a 'settled hopeless expectation of death.' "

It is unusual for the admissibility of evidence to be determined on a voir dire where the ground of the objection is that the evidence is irrelevant. The reason for this is the limited nature of the decision to be made by the trial judge in such circumstances. His task is merely to say whether the evidence, if believed by the jury, is reasonably capable of supporting the inference or establishing the fact sought to be proved. Proceedings on the voir dire for this limited purpose were conducted at the trial in R. v. Thomas. However, as the Queensland Court of Criminal Appeal affirmed in R. v. Gleeson, the trial judge ought not to undertake upon the voir dire an enquiry into the value and weight of evidence whose probative value is wholly a matter for the jury. There has recently been a decision of the English Court of Appeal (Criminal Division) to the same effect : R. v. Terrelonge [1977] Crim.L.R. 218.

It may be argued that the law stated above should be changed, that the probative value of evidence of a confession (quite apart from any question of its voluntariness) should be a matter for the trial judge as well as for the jury. According to this argument, evidence of a confession should not be admitted unless the trial judge is first satisfied on a voir dire that the confession was in fact made.

However, apart from a factor to be mentioned below, the Commission does not have before it any material suggesting it would be desirable to make such a change by an act of the legislature. We must start with the assumption that it is undesirable to require the very same fact or issue to be determined twice over during the course of a trial, once by the trial judge on a voir dire and again by the jury at the end of the trial. In general, this would be a needless duplication of effort. Not only may two decisions be required to be made but two lots of evidence relevant to exactly the same issue may need to be given. What is more, because of the provisions of the Evidence Act s.15 relating to the cross-examination of the accused person, the evidence given on the voir dire may not be the same as the evidence given before the jury. It is noteworthy

that, on this point, the law affirmed by the Queensland Court of Criminal Appeal in R. v. Gleeson is consistent with the law proposed by the American Law Institute in its Model Code of Evidence (r.505) and by the English Criminal Law Revision Committee in its draft Criminal Evidence Bill (cl.2(2)).

Nevertheless, a complication arises when a trial judge is asked to exclude evidence of a confession while there is still a dispute that any confession was made. The trial judge may be asked to exclude the evidence on the ground either that the confession was made involuntarily or, if made voluntarily, that it was made in circumstances of such unfairness to the accused person that the trial judge should exercise his discretion to exclude it. If the accused person admits that he made the confession, the decision to be made by the trial judge on the voir dire is a relatively straight-forward one. If on the other hand the accused person denies that he made the confession, the trial judge is then confronted with the problem of making a decision about the voluntariness or fairness of a confession whose existence he cannot determine but must leave, for reasons stated above, to be determined by the jury. It is clear from the recent decision of the Queensland Court of Criminal Appeal in R. v. Hart [1979] Qd.R. 8 and of Dunn J. in R. v. Borsellino [1978] Qd.R. 507, each distinguishing R. v. Gleeson on this point, that a trial judge can be faced with this difficulty. An accused person may deny making a confession while at the same time asking the trial judge to exclude evidence of a confession on which the prosecution relies.

Is it desirable to require a trial judge to make decisions about the voluntariness or the fairness of an alleged confession when he may not be satisfied that any confession was made? Would it not be better to allow the trial judge to satisfy himself that a confession was made before he goes on to determine whether it was made voluntarily or in circumstances of fairness to the accused person? We think this is the essential issue that has ultimately emerged from R. v. Gleeson.

The difficulties that have arisen do not seem to us to be sufficiently great to warrant legislative action. We are reluctant to recommend a solution that would necessarily cut across widely-accepted principles of law unless there is a clear case for such action. As with the similar fact rule, the common law on this and related subjects is being actively developed in Australia and elsewhere. The judgments in R. v. Gleeson, R. v. Borsellino and R. v. Hart, referred to above, testify to this. In our view, it would be unwise at the present time to attempt a legislative solution that could have the effect of isolating the law of Queensland from developments taking place elsewhere in jurisdictions following the common law.

(C) CORROBORATION

The Commission has been asked to consider whether there should be an absolute requirement for corroboration in relation to a number of offences: Committee of Inquiry report paras. 313-316. A number of sections of the Queensland Criminal Code provide that a person cannot be convicted of certain offences upon the uncorroborated evidence of one witness, namely:

s.52. Sedition;
s.57. False evidence before Parliament;
s.117. False statement as to qualification as an elector;
s.125. Perjury;
s.195. False declarations and statements;
s.212. Defilement of girls under twelve;
s.215. Defilement of girls under sixteen and of idiots;
s.217. Procuration of girls under eighteen, etc.;
s.218. Procuring defilement of women by threats, etc.

In addition, s.632 provides that a person cannot be convicted of an offence on the uncorroborated testimony of an accomplice or accomplices. Finally, s.40 provides that a person cannot in general be convicted of treason or of certain related offences except on the evidence of two witnesses.

In the case of the above offences, corroboration is required as a matter of law. In the case of certain other offences, as the Committee of Inquiry points out (para. 314), while corroboration is not required as a matter of law, the jury is warned by the trial judge that caution should be exercised before convicting on uncorroborated evidence. For example, a warning is given in cases with a sexual element, such as rape. This is a rule of practice rather than of law. The existence of two distinct rules, one of law expressing an absolute requirement for corroboration, the other of practice requiring a warning to be given, can cause difficulty. As the Committee said, in a case of rape:

> "... if the complainant is under 16, and if consent is in issue, as it is in nearly every case of rape, the offence under s.215 (mentioned above) is an alternative for the jury to consider. The latter offence requires corroboration as a matter of law, whereas in rape corroboration is looked for as a matter of practice."

Therefore, in such a case the jury may need to consider both the absolute requirement for corroboration with respect to the offence under s.215 as well as the warning given them by the trial judge about corroboration with respect to the charge of rape.

We have been asked on this occasion only to consider the absolute requirements for corroboration : Appendix B of Committee's report, recommendation No.53(a). These are contained in the sections of the Criminal Code mentioned above. Section 632, relating to accomplices, may be put to one side as it has already been the subject of a report by us. Section 40 (treason etc.) raises constitutional and social issues that appear to us beyond the scope of the present inquiry. We therefore refrain from making recommendations with respect to it or s.52 (sedition), which raises issues of a similar kind.

The remaining sections, broadly speaking, relate either to offences of a sexual nature or offences involving false testimony or statements. The first group includes:

s.212. Defilement of girls under twelve;
s.215. Defilement of girls under sixteen and of idiots;
s.217. Procuration of girls under eighteen, etc.;
s.218. Procuring defilement of women by threats, etc.

The second group includes:

s.125. Perjury;
s.57. False evidence before Parliament;
s.195. False declarations and statements;
s.117. False statement as to qualification as an elector.

The important difference between these two groups is that the first group, unlike the second group, relates to a class of offence upon the trial of which (in the absence of an absolute requirement for corroboration) there is an established practice whereby the trial judge warns the jury to exercise caution before convicting on uncorroborated evidence. This practice was discussed at length in the High Court of Australia in Kelleher v. The Queen (1974) 131 C.L.R.534.

We recommend the repeal of the provisions of the first group that require corroboration as a matter of law for specified sexual offences. It seems to us unnecessarily confusing to have two distinct rules relating to corroboration in sexual cases, one of law expressing an absolute requirement for corroboration for certain offences, the other of practice requiring only a warning to be given in relation to certain other offences. It is anomalous that while the rule absolutely requiring corroboration applies to the offence defined by s.215 of the Criminal Code (defilement of girls under sixteen), only the warning rule applies to the closely related offence defined by s.216 (indecent treatment of girls under sixteen). See R. v. Cook [1927] St.R.Qd.348. The offences are similar in character and each is punishable by imprisonment with hard labour for five years. It is distinctly anomalous that while only the warning rule applies to rape, the rule absolutely requiring corroboration applies to the lesser offence defined by s.215.

Since 1975, a person charged with an offence defined by s.215 (1) may be dealt with summarily under s.229A. It may therefore be argued that the absolute requirement for corroboration serves a useful purpose now that it could not have served before 1975. However, under s.229A, a person may be dealt with summarily upon his plea of not guilty only if his age at the time of the alleged offence did not exceed seventeen years. Moreover, a person charged with an offence defined by s.216 may also be dealt with summarily, yet for this offence there is no absolute requirement for corroboration. It is our view, therefore, that the possibility of summary proceedings does not materially affect the matter.

We are not at present satisfied that the provisions of the second group requiring corroboration as a matter of law for certain offences involving false testimony or statements should be repealed. In its eleventh report, the English Criminal Law Revision Committee said in relation to perjury (pp. 114-115):

> "The majority of us do not think that the requirement of corroboration in the case of perjury in judicial proceedings ... should be altogether abolished ... No doubt anything which would make it easier to secure the punishment of the many bad cases of perjury which are known to occur would be advantageous for the administration of

> justice; but we doubt whether the abolition, or (except in the respect mentioned below) an alteration, of the requirement would have this effect. In any case the majority think that the requirement is still desirable, because to make a prosecution for perjury too easy might discourage persons from giving evidence. There would also, in the opinion of the majority, be the danger that the successful party to litigation might seek to have his opponent or the latter's witnesses prosecuted for perjury as a result of his evidence having been preferred to theirs (though the latter objection would mostly be got over by our proposal put forward below that the consent of the Director of Public Prosecutions should be necessary for a prosecution for perjury in judicial proceedings). We therefore recommend that corroboration should still be required in respect of perjury in judicial proceedings... "

Although we do not necessarily agree with this reasoning, it raises sufficient doubts in our minds to deter us from recommending the abolition of the requirement for corroboration in relation to perjury. If corroboration is still required for perjury, it would not be easy to achieve the abolition of the requirement for the other related offences. Before recommending a general abolition, we would wish to see more material indicating such an abolition to be desirable than we have yet had an opportunity of seeing.

To summarize : we recommend the abolition of the absolute requirement for corroboration contained in ss. 212, 215, 217 and 218 of the Criminal Code with the intent that only the rule of practice relating to corroboration in sexual cases should apply to the offences defined by these sections.

17th May, 1979.

APPENDIX A

Clause 3 of the draft Criminal Evidence Bill prepared by the English Criminal Law Revision Committee in its eleventh report : (1972) Cmnd. 4991, pp.174-175.

Admissibility of other conduct of accused tending to show disposition.

3. (1) Subject to the provisions of this section, in any proceedings evidence of other conduct of the accused shall not be admissible for the purpose of proving the commission by him of the offence charged by reason only that the conduct in question tends to show in him a disposition to commit the kind of offence with which he is charged or a general disposition to commit crimes.

In this section "other conduct of the accused" means conduct of the accused other than the conduct in respect of which he is charged.

(2) In any proceedings evidence of other conduct of the accused tending to show in him a disposition to commit the kind of offence with which he is charged shall be admissible for the said purpose if the disposition which that conduct tends to show is, in the circumstances of the case, of particular relevance to a matter in issue in the proceedings, as in appropriate circumstances would be, for example -

(a) a disposition to commit that kind of offence in a particular manner or according to a particular mode of operation resembling the manner or mode of operation alleged as regards the offence charged; or

(b) a disposition to commit that kind of offence in respect of the person in respect of whom he is alleged to have committed the offence charged; or

(c) a disposition to commit that kind of offence (even though not falling within paragraph (a) or (b) above) which tends to confirm the correctness of an identification of the accused by a witness for the prosecution.

(3) Where in any proceedings evidence of any other conduct of the accused is admissible by virtue of subsection (2) above for the purpose of proving the commission by him of the offence charged, and the accused has in respect of that other conduct been convicted of an offence by or before any court in the United Kingdom or by a court-martial there or elsewhere, then, if evidence tending to establish the conduct in question is given by virtue of that subsection, evidence that he has been so convicted in respect of it shall be admissible for that purpose in addition to the evidence given by virtue of that subsection.

(4) In any proceedings where the conduct in respect of which the accused is charged is admitted in the course of those proceedings by or on behalf of the accused, evidence of other conduct of the accused tending to show in him a dispositon to commit the kind of offence with which he is charged shall be admissible for any of the following purposes, namely -

(a) to establish the existence in the accused of any state of mind (including recklessness) proof of which lies on the prosecution; or

(b) to prove that the conduct in respect of which the accused is charged was not accidental or involuntary; or

(c) to prove that there was no lawful justification or excuse for the conduct in respect of which the accused is charged,

notwithstanding that the other conduct is relevant for that purpose by reason only that it tends to show in the accused a disposition to commit the kind of offence with which he is charged:

Provided that no evidence shall be admissible by virtue of this sub-section for the purpose of proving negligence on the part of the accused.

(5) If in any proceedings evidence of any other conduct of the accused is admissible by virtue of subsection (4) above for any purpose mentioned in that subsection, evidence that he has in respect of that other conduct been convicted of an offence by or before any court in the United Kingdom or by a court-martial there or elsewhere shall (notwithstanding anything in subsection (3) above) be admissible for that purpose, whether or not any other evidence of that conduct is given.

(6) If at the trial of a person for an offence the court is satisfied with respect to any matter which is admissible in evidence by virtue of subsection (2), (3), (4) or (5) above that the admissibility of that matter did not arise or become apparent until after the conclusion of the prosecution's case or that it was not reasonably practicable for evidence of that matter to be given before the conclusion of that case, then, notwithstanding any rule of practice -

(a) any person who gives evidence for the defence may be cross-examined about that matter; and

(b) subject to any directions by the court as to the time when it is to be given, evidence of that matter may be given on behalf of the prosecution after the conclusion of the prosecution's case.

(7) Nothing in the foregoing provisions of this section shall prejudice -

(a) the admissibility in evidence in any proceedings of any other conduct of the accused in so far as

that conduct is relevant to any matter in issue in the proceedings for a reason other than a tendency to show in the accused a disposition; or

(b) the operation of any enactment (whether contained in this Act or in any other Act, whenever passed) by virtue of which evidence of other conduct of the accused, or evidence of his conviction of an offence, is or may become admissible in any criminal proceedings.

(8) The provisions of section 25 of this Act apply for the purposes of this section.

(9) Section 27(3) of the Theft Act 1968 (admissibility, where a person is being proceeded against for handling stolen goods, of evidence that he has acted in certain ways with repsect to stolen goods or has been convicted of theft or of handling stolen goods) shall cease to have effect.

APPENDIX B

Draft sections proposed by the Law Reform Commission of New South Wales in its working paper on Evidence of Disposition (1978), pp.120 - 123.

Disposition generally.

110. (1) In this section -

"Conduct", in relation to the disposition of a person, means instances of the conduct of that person relevant to the existence of that disposition, and declarations of that person so relevant; and

"disposition" means a continuing propensity of a person to behave in some way.

(2) Subject to subsections (3) and (4), where there is a question whether a person behaved in some way or with some state of mind on some occasion, evidence of his conduct on another occasion, being conduct of particular weight in showing whether he had a disposition to behave in that way, is admissible, but other evidence of his disposition is not admissible, unless relevant otherwise than to show whether, by reason of his disposition, he behaved in that way or with that state of mind on the firstmentioned occasion.

(3) In a criminal legal proceeding, where an aspect of the disposition of a person (whether he is or is not a party to the proceeding) is relevant to the guilt of an accused person (whether he is or is not the person an aspect of whose disposition is so relevant) -

(a) evidence of the conduct of the first person;

(b) evidence by way of general description of instances of his conduct;

(c) evidence of his reputation;

(d) evidence of the opinion held of him by an expert; and

(e) other evidence -

being in each case relevant to that aspect of disposition, is admissible on tender by that accused person.

(4) In a criminal legal proceeding, evidence tendered by an accused person of his own good disposition may be rebutted by the prosecution, but only by evidence of conduct of that accused person.

Cross-examination etc. of accused on his disposition.

111. (1) This section applies in a criminal legal proceeding to the examination of an accused person by the court or by another party.

(2) Evidence inadmissible by virtue of this section is inadmissible notwithstanding any enactment other than this section.

(3) In this section, "disposition" means a continuing propensity of a person to behave in some way.

(4) Subject to subsection (5) -

(a) evidence that the accused person under examination is in general or in a particular respect a person of bad disposition;

(b) evidence that the accused person under examination has been charged before a court, or in an information of complaint before a justice, with committing an offence other than the offence the subject of the proceeding;

and

(c) evidence of any conviction, acquittal or other thing following such a charge -

is not admissible, except to the extent that evidence to the same effect has already been given in the proceeding.

(5) Subsection (4) does not apply -

(a) where the evidence is relevant otherwise than by way of showing the disposition of the accused person under examination;

(b) where the evidence is admissible under section 110(2);

(c) where the evidence is relevant to the guilt of another accused person and is tendered by that other accused person;

(d) where the evidence is of substantial relevance to the credibility as a witness of the accused person under examination and is tendered by another accused person, the accused person under examination having given evidence which is relevant against the case of that other accused person; or

(e) where the evidence is relevant to any aspect of the disposition of the accused person under examination, he having tendered evidence of his good disposition in that respect.

(6) Where in any legal proceedings evidence of any conduct of a person is admissible to prove his disposition, and he has in respect of that conduct been convicted of an offence by or before any court or by a court-martial in Australia or elsewhere, then, if such evidence is tendered, evidence that he has been so convicted or that the order has been made, shall be admissible.

(7) In this section "conviction" includes -

(a) in the case of a court-martial within the meaning of the Courts-Martial Appeals Act 1955 of the Commonwealth a conviction which is or is deemed to be a conviction of a court-martial for the purposes of that Act;

(b) in the case of the Courts-Martial Appeals Tribunal constituted under that Act, a finding of guilty under section 25, 26 or 27 of that Act;

(c) in the case of a court-martial constituted under the Imperial Act called the Army Act, 1955, or under the Imperial Act called the Air Force Act, 1955, a finding of guilty which is, or falls to be treated as, a finding of the court duly confirmed; and

(d) in the case of a court-martial constituted under the Imperial Act called the Naval Discipline Act, 1957, a finding of guilty which is, or falls to be treated as, the finding of the court.

Routine practice.

112. Evidence of routine practice is admissible to prove that conduct on a particular occasion conformed with the routine practice.

Discretion to exclude.

113. Where it appears to the court that the admission of any evidence tendered under this section would be unfair to any party on the ground that its prejudicial effect may exceed its probative value, the court may exclude that evidence.