

## ADVANCED JUDICIAL OFFICERS' FRAUD AND CORRUPTION WORKSHOP

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### Character evidence

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**Summary:** A defendant may introduce evidence to show that he/she is of good character. By doing so, however, they put their character in issue and the prosecutor may cross-examine witnesses or, in some cases, the defendant about their character and about any previous convictions. The purpose of introducing evidence of good character is primarily to establish the credibility of a witness or the defendant, as well as to point to the improbability of guilt. Evidence of good character also becomes very important when sentencing the defendant upon conviction of an offence.

The common law, at least in Australia, proceeds on the assumption that a witness is creditworthy. So, evidence-in-chief going only to the character of a witness (even another witness) is generally inadmissible. Evidence of a prior consistent statement is not admissible. Things might change – if a witness's character or reliability are challenged, the response might include assertions of good character. If it is suggested that a witness is giving recently fabricated evidence, that might entitle the party calling the witness to tender the instructions. Obviously, this is all about the credit of the witness, not the direct proof of facts.

What about the character of a defendant?

#### **Good character**

An accused person may adduce evidence of good character.

#### **How?**

A defendant may raise character in cross-examination of a prosecution witness or a witness called by a co-accused. Or, of course, by calling witnesses to attest to the defendant's good character.

On the strictest view, evidence of good character should be given in general terms, without supporting detail. In Forbes, *Evidence in Queensland*, is this example –

The following evidence given by a Queen's Counsel at the trial of a Sydney judge for perverting the course of justice is exemplary:

*Mr John Lloyd-Jones ... told the court that he had known Judge Foord since 1961 both as a barrister and a judge, and that he is a man with a very high reputation for personal integrity and professional integrity and as a person on whose word you can completely rely.*



That is, evidence of character, strictly speaking, may only be given by statements of reputation. The editors of *Cross* write, *There is much to be said for abandoning a rule which is difficult to apply and widely ignored.*<sup>1</sup> *Forbes: But in practice good-character witnesses are often allowed to elaborate.*<sup>2</sup>

Good character evidence usually includes the defendant's absence of criminal history. There might be different views about whether just not having criminal history is equivalent to good character calling for directions to the jury. In *Solomon*,<sup>3</sup> a Queensland case where the charge was rape and the appellant complained that the trial judge failed to direct the jury about what was said to be evidence of the appellant's good character, including that he had no criminal record, Jerrard JA said:

*People who are mean, greedy, ruthlessly ambitious, devoid of sympathy for the weaknesses or needs of others, exploitative, ungenerous, and unkind, can go through life without any convictions for criminal offences. An absence of them says very little about character.*

### **Why?**

The purpose for leading evidence of good character is to persuade the tribunal of fact that the defendant, given his (reputed) character, is unlikely to have committed the offence and, if the defendant gave evidence, that it supports the credibility and reliability of the evidence.

In *Attwood v The Queen*<sup>4</sup>, the High Court of Australia said:

*The expression "good character" has of course a known significance in relation to evidence upon criminal trials; for it denotes a description of evidence in disproof of guilt which an accused person may adduce. He may adduce evidence of the favourable character he bears as a fact or matter making it unlikely that he committed the crime charged. .... evidence of good character is regarded as really bearing on the probability or improbability of guilt. As Cockburn C.J. said: "The fact that a man has an unblemished reputation leads to the presumption that he is incapable of committing the crime for which he is being tried".*

At common law, evidence of good character is to be taken into account in deciding whether the Crown has proved its case beyond reasonable doubt and, where the defendant's credibility is in issue, in assessing that credibility.<sup>5</sup>

The relevance of the evidence will depend on the case.

### **Weight**

The real *Why?* It is a regular submission, upon a plea of guilty by a person without criminal history, or without criminal history like the offence then before the Court, that the offending is "out of character" for the defendant. When pressed for what that means, counsel usually repeat that the defendant has not committed such conduct before, that the defendant has been a hardworking

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<sup>1</sup> [19110]

<sup>2</sup> [15.36]

<sup>3</sup> *R v Solomon* [2006] QCA 244

<sup>4</sup> (1960) 102 CLR 353 at 359

<sup>5</sup> *Cross* [19125]



contributing citizen whose colleagues and family (what's the value of a reference from the family?) and perhaps other senior community figures all give reference to his or her previous good character. These submissions are made on behalf of, for example, a person who has pleaded to or been found guilty of long running fraud, or child-sexual offences. The Court knows that people may be guilty of serious offending even while they relate to, and are regarded by, all around them as a person of impeccably good character.

*Directions to the tribunal of fact.*

In *Solomon*, the same judge said, with respect to the duty of a trial judge to direct the jury, .. in *Melbourne v The Queen (1999) 198 CLR 1*, a majority in the High Court held that where evidence was led of good character, a judge was not obliged to direct the jury as to the manner in which that could be used. The joint judgment in *Simic v The Queen (1980) 144 CLR 319 (at 333)* held that there is no rule of law that in every case in which evidence of good character is given the judge must give a direction as to the manner in which it can be used. That judgment added that no doubt, generally speaking, if such a direction was asked for it would be wise to give it.

In an older Queensland decision<sup>6</sup>, the appellant was convicted of stealing horses, over his defence of honest claim of right to them. He led evidence of his good character. The judge's refusal to direct the jury on the use to be made of the evidence was a factor contributing to the verdict being overturned on appeal. The appeal court considered the issue significantly relevant to the defence. The trial judge had also commented:

*The only comment I make with regard to evidence of good reputation or good character would be to say to you gentleman that I suppose, in the case of every criminal, there was a time when he was a person of good repute. There has always got to be a first time, but it is for you to consider.*

In his reasons, Gibbs J, agreed with an earlier decision ....

*that it would not be right to lay down that in every case where evidence of good character is given the Judge should give the jury a direction as to the way in which that evidence can be used. I would further agree that it would be wise to give such a direction in every case in which it is asked for.*

The latter is probably good advice, especially if the good character evidence bears some specific relevance to an issue in the trial.

Many of you hear trials without a jury, and so will be directing yourselves. In *Melbourne v The Queen*, two judges of the High Court of Australia quoted a passage from a dissenting judgment in the New Zealand Court of Appeal decision in *R v Falealili [1996] 3 NZLR 664* which provides not just a guide to directing a jury but to the use of good character evidence.

*[I]f the evidence of the accused's good character is both probative and relevant the Judge will, almost as a matter of course, direct the jury as to its significance in summing up the defence case. It would be*

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<sup>6</sup> R v Thompson [1966] QWN 47



*unfair not to do so. If, on the other hand, the purported character evidence is lacking in probative force and of remote relevance to the charge in issue, the Judge may decide that a good character direction is not warranted. Or the Judge may consider that it would be prudent to proffer a good character direction, but then to qualify it in order to put it in perspective having regard to the circumstances of the case. To proscribe that, whenever character evidence is adduced or elicited, a good character direction should be given and that it must generally embrace both the credibility and propensity limbs of the direction is an unnecessary fetter on that discretion.*

*In some cases the good character of the accused may be an integral part of the defence. A number of reputable persons may have testified as to the accused's character. In other cases the so-called evidence of good character may be little more than a passing reference, included by defence counsel, perhaps, simply because there is no other defence. In other cases the established facts of the case may itself indicate that, irrespective of how unblemished the accused's reputation may be, he or she can barely be described as a person of good character. Because the circumstances will vary greatly it is not possible to lay down comprehensive guidelines as to when and how the Judge's discretion should be exercised. Nor is it desirable to do so. Unless guidelines are treated as being just that, guidelines and no more, they could themselves inhibit the exercise of a Judge's discretion to do what is most appropriate having regard to the facts of the particular case.*

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### **Bad character**

The Crown may not, generally, adduce evidence of the defendant's character.

*Makin v Attorney-General for New South Wales* [1894] AC 57 at 65<sup>7</sup>

*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.*

*But if the defence leads or extracts evidence of good character, that is, puts character in issue, the Crown may rebut it. By cross-examining the defendant or the character witnesses and by leading extrinsic materials. In some places, this is governed by statute.*

*The material that may be introduced includes not just previous convictions but other discreditable conduct. It would not seem to include a charge that resulted in acquittal.<sup>8</sup> Forgive the multiple*

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<sup>7</sup> And see *Pfennig v The Queen* (1995) 182 CLR 461



*negatives, but it is difficult to see why the Crown should not be able to rebut character evidence which amounted to the evidence of individual experience of the defendant with similarly targeted evidence of bad acts. As the authors of Cross ultimately write:*

*Evidence of reputation, general or specific, is thoroughly unconvincing. It necessarily rests upon hearsay, gossip and rumour, and permits a witness to state something without perjury which the witness believes to be unjustified, and knows will be used as the foundation for an inference believed by the witness to be false.*

I attach the Queensland Benchbook directions for Character Evidence, in case your jurisdiction does not have similar guidance, and with the warning at footnote 9.

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<sup>8</sup> *Maxwell v DPP* [1935] AC 1309



**Attachment 1 - from the Queensland Supreme and District Court Benchbook<sup>9</sup>**

**Good Character/ Bad Character**

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Suggested direction where evidence of good character has been led.

**[Refer to evidence] This evidence is part of the evidence to be taken into account in deciding whether you are satisfied beyond reasonable doubt of his guilt. The influence that this evidence has on you is a matter for you. It is relevant in two respects.**

**The first is in considering whether a person with the kind of reputation sworn to by the witnesses would do the acts alleged by the prosecution.**

**The second is in considering the credibility of the defendant's evidence [and/or any exculpatory statements made out of court which are in evidence]. When considering his evidence, do you think that his general reputation adds weight to it?**

**Evidence of general reputation, like any other evidence, is simply part of the framework within which you reach your decision. You consider it in the context of the other evidence. How much weight you give it, in that context and using it for the purposes I have told you about, is a matter for you.**

Suggested direction where evidence has been given of the defendant's good character, evidence in rebuttal has been given by the prosecution, and bad character is not relevant (see directions on Bad Character)

**The defendant has called evidence to establish that he is a person of good character. Witnesses have attested that he is a person of unblemished character. [Refer to evidence]**

**The prosecution has, however, led evidence that the defendant has [prior convictions or other evidence as to character]. The prosecutor submits that having regard to this evidence you would not accept him as a person of good character, while counsel for the defendant maintains that you would nonetheless do so.**

**It is necessary therefore to consider the totality of the evidence as to the defendant's character and determine whether you accept that he is a person of good character.**

**If you accept that he is a person of good character, you may take that evidence into account in his favour in the following ways: [continue with good character direction].**

**If, on the other hand, you do not accept that the defendant is a person of good character, evidence of bad character must not be used to strengthen the prosecution case against him. You are not entitled to say "Because of the defendant's bad character we think he is a person who is likely to have committed the crime."**

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<sup>9</sup> Warning – the suggested directions are exactly that, suggestions. The Bench Book carries the exhortation that judges should use the suggested directed as a guide amended according to the issues and evidence in the case. And I add, according to your legislation.



**Indeed, if you do not accept that the defendant is a person of good character, the law requires you to put all consideration of character out of your minds in determining whether you are satisfied beyond reasonable doubt that the defendant is guilty of the crime charged.**

It is not inevitable that a trial judge must give a direction as to the use to be made of good character evidence adduced for the defendant in any case in which it is raised.<sup>10</sup> It is a matter for assessment in each case whether the evidence is relevant to either the defendant's credibility or the unlikelihood of his having committed the offence in question or both. The suggested directions should be read in that light. A defendant's lack of previous convictions does not necessitate a good character direction.

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<sup>10</sup> *Melbourne v The Queen* [\(1999\) 198 CLR 1](#), *R v Jurcik* [\[2001\] QCA 390](#), *R v Hinschen* [\[2008\] QCA 145](#), *R v TZ* [\(2011\) 214 A Crim R 316](#).



## Attachment 2

### Bad Character/ Previous Convictions

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#### Bad Character/Previous Convictions of Witness

Evidence has been given that [X], who gave evidence for the prosecution (or defendant), has previous convictions. That is something you can take into account when considering his credibility and the weight to be given to his evidence.

The fact that someone has previous convictions does not necessarily mean his evidence has to be rejected out of hand. It is a matter for you what weight you give to the fact that he has been previously convicted.

In deciding that, you look at the rest of the evidence, including any evidence that supports his evidence independently, and weigh his evidence and the fact that he has convictions in that context.

If after you have done that, you are satisfied that he is a truthful and accurate witness you can act on his evidence notwithstanding that he has previous convictions

[Where explicit warning as to dangers warranted]: **The fact that someone has a history of criminal behaviour does not necessarily mean he is lying on this occasion. But because of the extent of his criminal record, and the kind of offences for which he has been convicted, you should keep in mind the dangers in accepting him as a truthful witness. You have to exercise caution before you act on his evidence.** [Refer to any independent evidence supporting his evidence]

**But, if you are satisfied he is a truthful witness after having seen him give evidence and having considered his evidence in conjunction with the other evidence and given due weight to the dangers about acting on his evidence, you can act on the version of facts he has given.**

There is no general rule that a warning should be given of the dangers of convicting on the uncorroborated evidence of witnesses possessing bad character or a criminal record. It is a question to be considered in any case as to whether the witness' record or the circumstances of the case are such as to make an explicit warning necessary.<sup>11</sup>

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<sup>11</sup> *R v Sinclair and Dinh* (1997) 191 LSJS 53.



**Bad Character/Previous Convictions of Defendant<sup>12</sup>**

1. Evidence as to the defendant’s previous convictions or bad character where he has made an issue of his own character or that of prosecution witnesses.

**Evidence has been given that the defendant has convictions for .....**

**That fact must not be used by you to say that because he has committed offences before, therefore he must be guilty of the present offence.**

**Its use is more limited than that. It is this. The manner in which the defence has been conducted has involved a challenge to the truthfulness of prosecution witnesses. In evaluating the defendant's evidence and determining what impact it has on your assessment of the truthfulness of the prosecution witnesses, you are entitled to take into consideration that the defendant is a person who has convictions for offences of [.....].**

**A finding that you reject his evidence and accept that of the prosecution witnesses may lead you to find him guilty if the challenged evidence proves or helps to prove the elements of the offence. But you must come to any finding of guilt by that process, not by assuming that because of his criminal record he must have committed the offence for which he is now on trial.**

The jury should be given a clear statement of the limited purpose of permitting evidence of previous convictions or bad character to be adduced by cross-examination under s 15(2)(c) (that is, to deny the defendant the benefit of a false claim as to good character, or to discredit him where he is in conflict with prosecution witnesses whose character he has attacked, but not, per se, as tending to his guilt of the offence charged.)<sup>13</sup> That is so whether counsel requests such a direction or not.<sup>14</sup>

2. Evidence directed to showing that the defendant is guilty of the offence charged.

**You have heard in this trial this evidence (identify evidence given by prosecution witnesses or defendant in cross-examination). It is relevant to the prosecution case in this way and this way only. It goes, if you accept it, to showing that [explain relevance]. That is the specific purpose for which the prosecution has been allowed to lead the evidence and you must not use it for any other purpose. You may not seek to draw some inference from it that because the defendant has [been charged with or committed other offences or been said to have been involved in undesirable conduct, as the case may be] that he is therefore more likely to have committed the offence you are considering. In other words, it would be quite wrong for you**

<sup>12</sup> Section 15(2) *Evidence Act* 1977 deals with the asking of questions tending to show that a defendant is of bad character or has committed offences. The four circumstances in which a defendant may be cross-examined under s 15(2) are: where the defendant has sought to establish his own good character or has cast imputations on the character of prosecution witnesses; where the matter is probative of guilt of the offence charged; where the questions are directed to showing that another defendant is not guilty of the offence with which they have been charged; and where the defendant has given evidence against a co-defendant. In the first three instances, leave is required. It can be seen that the evidence in the second and third instances will be relevant to the issues in the case, and thus may also be the subject of questions put to witnesses other than the defendant, whereas in the first and fourth it may merely affect credibility.

<sup>13</sup> *Donnini v The Queen* (1972) 128 CLR 114.

<sup>14</sup> *BRS v The Queen* (1997) 191 CLR 275.



to say, having heard that evidence, that the defendant is the sort of person likely to have committed the offence.

**If you accept this evidence you may use it only to consider whether it assists the prosecution, in the way I have described, to prove its case against the defendant.**

Evidence may emerge on the prosecution case or through cross-examination of the defendant himself<sup>15</sup> which indicates that he has been charged with or convicted of other offences, or is otherwise adverse to his character. Such evidence is, of course, admissible if it is directly probative of the offence before the court.<sup>16</sup> In such an instance it is necessary to explain the relevance of the evidence while making it clear that no inference of disposition or propensity can be drawn.

3. Evidence directed to showing that a co-defendant is not guilty.
  - (a) Where evidence goes to show that co-defendant is not guilty of an offence with which the defendant is not charged -

**You have heard in this trial this evidence** (identify evidence given by witnesses or defendant in cross-examination). **[Mr X], counsel for [the co-defendant] has asked these questions and led this evidence to show that it was [the defendant] who committed the offence of ..... and not [the co-defendant]. It goes, if you accept it, to showing that [explain relevance].**

**You may use it in these ways only: It can be used, if accepted by you, as going to the proof of the prosecution case against [the co-defendant] on this charge, and also as detracting from the prosecution case against [the co-defendant].]**

- (b) Where evidence goes to show that co-defendant is not guilty of an offence with which both are charged:

**[A], counsel for [the co-defendant] cross-examined [the defendant]/led evidence from a number of witnesses to the following effect [set out evidence]. It goes, if you accept it, to showing that it was [the defendant] who committed the offence of ..... and not [the co-defendant] [explain relevance]. You must consider it for that purpose only; that is insofar as it concerns the case against [co-defendant]. It forms no part of the evidence against [defendant] on the charge of ..... It cannot advance the prosecution case against him in any way. In particular it is not permissible for you to say, if you were to accept that evidence, that because [defendant] may have committed that offence he is therefore likely to have committed the offence with which he has been charged. The evidence has no relevance to the charge against [defendant]. Its only relevance is to the charge against [co-defendant].**

<sup>15</sup> With leave under s 15(2)(a) *Evidence Act*.

<sup>16</sup> See for example *R v Aston-Brien* [2000] QCA 211 in which the alleged provision of amphetamines immediately after a rape was described as “an integral part of the prosecution case”; *R v Ettles* (1997) 27 MVR 265 in which the defendant’s ingestion of cannabis was relevant to his manner of driving on a dangerous driving charge; *R v OGD* (No 2) (2000) 50 NSWLR 433 in which an admission of having done “these things” to the complainant (i.e. sexual assault) was made during the course of a similar assault on a witness; and *R v Grosser* (1999) 73 SASR 584 in which a history of the defendant’s prior arrest on fraud and firearms charges was relevant to charges of attempted murder arising out of a police siege of the defendant’s farmhouse. See also direction on Similar Facts.



Evidence may be adduced from witnesses or from a defendant in cross-examination<sup>17</sup> which is adverse to his character, but has a purpose in showing that a co-defendant is not guilty of an offence of which he has been charged. Such evidence must go to the issues, either in the Prosecution's case against the co-defendant or the co-defendant's defence; merely showing that the defendant was of bad character would not, of itself, advance the co-defendant.

There is a distinction to be drawn between the situation in which the defendant and co-defendant are both charged with the offence on which the co-defendant wishes to adduce the evidence; and that in which the co-defendant only is charged (as might occur for example, where there is a joint indictment involving a series of offences with a factual nexus but not all defendants are charged with every offence).

In the former situation it would seem to follow that the evidence would both tend to exculpate the co-defendant and inculpate the defendant of an offence with which he was charged and a direction in terms of 2 above should be given.

In the second case the evidence, while relevant to the issues against the co-defendant, could only be impermissible bad character evidence as against the defendant and the jury should be directed to consider it only in the co-defendant's case.

4. Where the defendant has given evidence against a co-defendant.

**[A], counsel for [co-defendant] cross-examined [defendant] as to [prior convictions/bad character]. His answers may be taken into account by you in assessing the credibility of the evidence [defendant] has given against [co-defendant] and considering whether you think he has been truthful in that regard. The evidence of his previous convictions/bad character may not be used by you however, to say that because he has admitted to having done such things in the past he is somehow more likely to be guilty of the crime with which he is charged. It would be wrong to proceed in that way.**

Cross-examination of the defendant attempting to show his commission of other offences or bad character is permissible<sup>18</sup> where a defendant gives evidence against a co-defendant. That situation arises where the defendant gives evidence which "supports the prosecution case against the co-defendant in a material respect or undermines the defence of the co-defendant"<sup>19</sup>. Cross-examination in this instance may be designed to show that the co-defendant is the perpetrator of the crime, in which case the considerations set out at 3 above will apply and a direction in whichever of the forms is appropriate should be given.

Alternatively the questioning may be designed to attack the credit of the defendant. In that event a direction in the terms above is suggested.

5. Where the defendant's convictions are inadvertently raised in the course of the trial.

**You heard evidence that the defendant has in the past been convicted of an offence [or has been in custody]. That evidence is irrelevant. It would be unfair to speculate about it, and you must not use it in any way. I direct you that you should put it entirely out of your minds.**

<sup>17</sup> The situation contemplated by s 15(2)(b) *Evidence Act*.

<sup>18</sup> By virtue of s 15(2)(d), without leave of the Court.

<sup>19</sup> *R v Crawford* [1997] 1 WLR 1329 at 1333, applying *Murdoch v Taylor* [1965] AC 574 at 592.

