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Greg Taylor

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Respects of Character

Greg Taylor*

The uniform evidence legislation, unlike the common law, allows the accused to claim a good character in a "particular respect" and, if that is done, limits the Crown to rebuttal evidence relating to the "particular respect". The varieties of good character evidence that may be given are already enormous, and this "particular respect" idea multiplies the combinations even further by allowing, for example, not merely the accused's lack of criminal convictions as a whole to be proved, but also their lack of convictions in any selected field. But what can constitute a "respect of character"? There is no help at all in the legislation. This article shows that the problem can, however, be solved by reference to the already established principle that the accused cannot raise character except intentionally. It is therefore the accused's delineation of the "respect", properly understood, that defines it.

I. Introduction

Departing from the common law, the uniform evidence legislation sees the accused's character as divisible. It abolishes the old common law rule of indivisibility under which an accused could not raise only a part of their character as an issue. At common law, once the accused raised the issue of character, every aspect of character was open for rebuttal evidence by the Crown. Accordingly, an accused who wished to put before the jury their lack of convictions for crimes of violence, for example, could not (except under some other rule, such as the more-prejudicial-than-probative principle) prevent the jury from hearing about all their other convictions such as those for offences of dishonesty.[1]

The uniform evidence legislation, however, allows the accused to claim to be, "either generally or in a particular respect, a person of good character".[2] In the case of the claim to be a person of good character

* Fellow of the Royal Historical Society; Professor, Adelaide Law School, University of Adelaide; Professor of Comparative Law and Common Law, Marburg University, Germany; Honorary Associate Professor, RMIT University, Melbourne; Barrister and Solicitor of the Supreme Court of South Australia.

[1] There was a valiant but unsuccessful academic attempt to upset this rule: RN Gooderson, "Is the Prisoner's Character Indivisible?" (1953) 11 *The Cambridge Law Journal* 377; see also G Bellew et al, *Australian Uniform Evidence Law: Principles and Context* (Butterworths, 2019) 424; Jeremy Gans, Andrew Palmer and Andrew Roberts, *Uniform Evidence* (OUP, 3rd ed, 2019) 356; Andrew Ligertwood and Gary Edmond, *Australian Evidence: A Principled Approach to the Common Law and Uniform Acts* (Butterworths, 6th ed) 292–293. The cited article also contains references to the authorities on this point, of which the most often cited was *R v Winfield* (1939) 27 Cr App R 139. A judicial response to the article may be found in *R v Stalder* [1981] 2 NSWLR 9, 29 (Yeldham J, dissenting); (1981) 3 A Crim R 87. According to WAN Wells, *An Introduction to the Law of Evidence* (Government Printer, 4th ed, 1991) 58, the common law's assumption was that "just as (to use a phrase which commends itself to our High Court) 'the mind is indivisible', so also is character, which derives from the mind". The source of the internal quotation may be found in *Attorney-General (South Australia) v Brown* [1960] AC 432, 447.

[2] See, eg, *Evidence Act 1995* (Cth) s 110(1). To be strictly correct, this section nullifies the hearsay rule, the opinion rule, the tendency rule and the credibility rule so far as they would prevent that claim from being made, rather than providing permission for it to occur: Stephen Odgers, *Uniform Evidence Law* (Law Book, 14th ed, 2019) 890. On the relationship between the character and tendency rules, see *Clegg v The Queen* (2017) 267 A Crim R 13, 27–29; [2017] NSWCCA 125. There is always a possibility that some other rule, such as the general discretion to exclude time-wasting evidence in s 135(c), or the general more-prejudicial-than-probative rule in s 137, might prevent character evidence from being produced, and that is why leave is required under s 112 (see also s 192) before such rebuttal evidence is called: see, eg, *R v Astbury (Ruling No 2)* [2018] VSC 592 (in which the question of "respect" was more or less leapt over for that question). As Ligertwood and Edmond, n 1, 291, point out, s 112 is limited in its terms to bad character evidence adduced by cross-examination of the accused, but it would be very unwise not to run proposed rebuttal evidence past the judge in the absence of the jury first. Other useful authorities may be found in Bellew et al, n 1, 436–437. The statutory words also abolish the old rule, observed largely in the breach, that character evidence was to be solely of general reputation: *R v Rowton* (1865) Le & Ca 520; 169 ER 1497. See *Bishop v The Queen* (2013) 39 VR 642; [2013] VSCA 273; *Wah v The Queen* (2014) 45 VR 440, [59]; [2014] VSCA 7. As pointed out in Australian Law Reform Commission, *Evidence*, Report No 38 (1987) 102, the "respect" phrase was taken from the now repealed s 413B(1) of the *Crimes Act 1900* (NSW) (see also

only "in a particular respect", the Crown is limited in rebuttal to "evidence adduced to prove (directly or by implication) that the defendant is not a person of good character in that respect".[3] The previous permission to call evidence about the whole of the accused's character has been removed if the accused calls evidence only about a "particular respect"; rebuttal evidence must be confined to the "particular respect".

But what is a "respect of character"? The legislation offers no help, and neither do the background materials provide much assistance; nor is it obvious to the unaided intelligence what a respect of character could be. The question may seem a somewhat out-of-the-way one, but in *Omot v The Queen*[4] the Court of Appeal for Victoria expressed the surprising view that an accused person who was charged with rape and desired the jury to know about his lack of convictions for sexual offences could not do so without opening up for the jury his not unblemished character in respect of offences of violence. The decision on this point in *Omot* was, in fact, obiter, for the Court also held that no properly instructed jury could have failed to have a reasonable doubt about his guilt on the facts and ordered a verdict of acquittal to be entered; the Court's view on the character point was therefore not necessary for its decision and accordingly obiter.[5] However, there must be many accused in sexual cases who have a record of some sort for violence; the point is important to them, and the case also raises the more general question of what a "respect of character" is.

The Court in *Omot* stated:

> In circumstances where [the complainant's] allegations unmistakably included the assertion that she had been forcibly subdued as an incident of the rape, it is fanciful to suggest that the applicant ought [to] be able to introduce evidence that he had no prior history of sexual offending. He was accused of a rape accompanied by violence, and had prior convictions for other offences – albeit of a non-sexual nature – where he had used violence in an endeavour to accomplish his criminal ends. To have permitted the applicant to introduce evidence that he was of good character in the particular respect adverted to – without the possibility of rebuttal – would have been to permit him to create a false impression of his character.[6]

This reads almost as if their Honours were unaware of the idea that character may now be divided into particular respects – as if the old common law rule still applied under which character was indivisible: for clearly the accused would not be permitted to represent himself as a man with no convictions for violence, which would be the only falsity that could possibly be involved, whereas he could truly claim

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s 413A(1)(b)); see further Australian Law Reform Commission (ALRC), *Evidence (Interim)*, Report No 26 (1985) 458, fn 65. Those provisions were unchanged from their enactment in 1974 to their repeal in the wake of the introduction of the uniform evidence legislation in 1995. Section 413B(1) permitted the accused to show that he was "generally or in a particular respect" of good character. However, under s 413B(1) the accused was not able effectively to disaggregate his character, because the Crown was, in contrast to the present provisions, not restricted to rebuttal on any particular "respect" of good character selected by the accused: *R v Stalder* [1981] 2 NSWLR 9, 18, 25, 29. The phrase in s 413B(1) was simply copied from Criminal Law Revision Committee, *Eleventh Report – Evidence (General)* (Cmnd 4991, 1972) 86, 178, where the concern appears to have been of a completely different sort – namely, emphasising that subtle claims to good character in specific fields count as well as express ones; see further New South Wales Law Reform Commission, "Working Paper on Evidence of Disposition" (1978) 107, 112–113, 122 (where the English Criminal Law Revision Committee's phrase is mentioned and a separate proposal for divisibility of character is made using different words). The history is also traced in *R v Stalder* [1981] 2 NSWLR 9, 13–15. There is, however, no information on the present point in New South Wales, *Report of the Criminal Law ["Amsberg"] Committee on Proposed Amendments to the Criminal Law and Procedure*, Parl Paper No 54 (1973) III 1155.

[3] See, eg, *Evidence Act* 1995 (Cth) s 110(3). The equivalent provisions in Caribbean jurisdictions, although modelled on Australia's uniform evidence legislation, are but little used: *Worrell v The Queen* [2014] BBCA 18, [19].

[4] *Omot v The Queen* [2016] VSCA 24.

[5] The decision sits ill with *Parsons v The Queen* [2016] VSCA 17 and also appears inconsistent with *R v Zurita* [2002] NSWCCA 22; although the Court in *Omot v The Queen* [2016] VSCA 24, [25] did refer to the latter case, their Honours confined the "respect" of character asserted to child sexual offences – but in *R v Zurita* [2002] NSWCCA 22, [19], the Court held that "had the matter been properly considered, that aspect of [the accused's] character might have been widened to encompass a lack of antecedents for sexual offences generally". The Court of Appeal for Victoria did not consider whether its brother Court had been plainly wrong in saying this, as it was required to do by *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* (2007) 230 CLR 89, 151–152; [2007] HCA 22.

[6] *Omot v The Queen* [2016] VSCA 24, [27].

to be someone with no convictions for sexual offences. Such a basic error of law may, however, be completely ruled out given the distinguished judges who comprised the Court in that case; rather, the root of the problem is that the legislation contains no guidance about what it means by a "respect" of character.

Assuming then that the last sentence of the quotation is merely poorly phrased, the remainder of this article shows how this decision is wrong because it puts the cart before the horse. It is essentially for the accused to define what respects of character he wishes to raise and if the accused wishes to say that he has no sexual offences on his record then that is a "respect" of character that defines the rebuttal evidence that the Crown is permitted to lead.

II. Types of Character Evidence

The difficulty with the statutory permission to slice one's character into "respects" is that there is no indication of what sort of angles may be chosen or how thin the slices may be. This corresponds in part to the varieties of different offences and defences available. In some cases – for example, when the victim has obviously been murdered – the accused will not contest that the act was committed, merely that he did it, in which case a character free of convictions for violent offences will be of assistance. In other cases the accused may admit killing the victim but claim self-defence, and here it may be best, depending upon the precise circumstances, to show that the accused is the sort of person who is slow to anger. In still other cases, such as those involving consent to sexual intercourse, a lack of convictions for sexual offences will be most valuable. Clearly, the overall shape of the defence will influence the sort of character slicing that may occur alongside other factors such as the nature of the crime and the types of good character that the accused can legitimately claim.

First of all, the accused might seek to lead evidence of good character in the form of showing a particular trait or disposition they possess. Thus, if evidence is "led with the intention of raising the likelihood that by reason of his general disposition as a gentle sort of person the [accused] was not the person who committed the violent act alleged against him",[7] the accused has put that trait or their disposition in contest. The classic example is the accused who is on trial for an offence of violence and declares violence foreign to their character and their guilt of the offence accordingly improbable; sometimes this occurs when an incautious, arrogant or foolish accused does, in fact, have a record for offences of violence[8] – although care does have to be taken in such cases as there is no rule of law that an accused who makes such claims has inevitably raised their character, because, as discussed below, that can be done only intentionally.

Secondly, the accused might present their personal history, or lack thereof, to the jury – most obviously a clean criminal record. This aspect is obvious and needs, perhaps, no further comment, except to say that an accused may make such a statement with confidence that it will not let in unproven allegations. An entirely clean criminal record is a "respect".[9] Subject to the questionable decision in *Omot*, it is also possible to divide one's record up and claim to have a clean record for sexual offences, for example; that

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[7] *Eastman v The Queen* (1997) 76 FCR 9, 54. As is tolerably well known, the accused in this case eventually received an award of damages for wrongful conviction: *Eastman v Australian Capital Territory* [2019] ACTSC 280. Another example is *R v Penrose (Ruling No 3)* [2016] VSC 192.

[8] As in, for example, *R v Stalder* [1981] 2 NSWLR 9, 11, 14, 24; compare *R v Manevski* [2016] NSWSC 1032, [14]–[29].

[9] *R v TAB* [2002] NSWCCA 274, [94]; *Parsons v The Queen* [2016] VSCA 17, [60] – contrasted with the discussion in the following paragraphs about the further types of good character evidence that could have been called; *R v Quinn (No 2)* [2016] NSWSC 1244, [21]; *R v AKB (No 7)* [2018] NSWSC 1120; *Director of Public Prosecutions (Vic) v Newman* (2015) 45 VR 302, 308; [2015] VSCA 25. Strangely Button J was not wholly convinced of what seems obvious in *R v Manevski* [2016] NSWSC 1032, [13], nor was Hodgson JA in *ES v The Queen (No 2)* [2010] NSWCCA 198, [81]–[88] – although in the latter case (at [91]) Whealy and Buddin JJ conspicuously declined to associate themselves with his Honour's remarks. In *R v Rogerson (No 12)* [2015] NSWSC 1099, [74], Bellew J takes the opposite view without considering any of the case law to the contrary or, indeed, anything much at all. Contrast the position where tendency evidence is put forward: *Clegg v The Queen* (2017) 267 A Crim R 13, 28; [2017] NSWCCA 125. A lack of criminal record for a "serious offence" was also accepted, although somewhat hesitatingly, as a "respect" in *R v Telfer* (2004) 142 A Crim R 132; [2004] NSWCCA 27; compare also *R v Qaumi (No 61)* [2016] NSWSC 1192 (first time in custody; the Court went straight to factors favouring exclusion of rebuttal evidence under ss 135 and 137 without considering

will not let in offences of dishonesty.[10] It can be seen that a claim to a non-violent nature in general, such as was considered above, is broader than a claim to a lack of convictions for offences of violence: the former claim will in rebuttal usually[11] let in instances of violence, but a claim of a clean criminal record lets in only other proven criminal offences under the same "respect", if any.

Thirdly, the accused might seek to show a particular tendency. Under s 97(1) of the Uniform Legislation, tendency evidence is evidence that shows that a particular person, in this case the accused, "has or had a tendency (whether because of the person's character or otherwise) to act in a particular way, or to have a particular state of mind". An example is a tendency to act properly with schoolboys in one's charge as a teacher. Here it is not merely a lack of convictions that is put forward, but positive evidence of a tendency towards proper behaviour that witnesses have observed.[12] Again, the claim is broader than but includes a claim of lack of convictions corresponding to the claimed tendency; if there are any, the accused is not merely a fool for making the claim but also liable to be confronted with them in rebuttal.

Fourthly, the accused might attempt to lead evidence of their reputation in the community, the only sort of character evidence that was officially allowed at common law.[13] This is occasionally done by calling notables such as the president of a community-based body of which the accused is a member to testify that the accused is respected for their contributions to the field in question – be it a church, a club such as Rotary, an ethnic community body, a school council or anything of that sort. In *R v El-Kheir* the accused called nine witnesses from among his friends and family to give evidence that he was "honest, pious and counselled against drug use".[14] This last also raises a fifth type of character evidence: evidence of the accused's personal commitment to and belief in upholding the law that they are charged with infringing. Another, sixth type of evidence that could be called is that of the individual good deed – "that a soldier has won a gallantry award, or that a man has made a substantial gift to a charitable institution, or that a citizen has won a bravery award".[15]

Some accused – a seventh type of good character evidence – seek to bolster their credibility by pointing to factors that indicate they are unlikely to lie on oath. For example, the religious oath they have taken and their fear of God that prevents them from telling a lie as a result[16] or their general honesty in their profession or employment[17] or in their lives generally, as evidenced by a lack of convictions for offences of dishonesty.

Finally – eighthly – cases have arisen in which the accused has attempted to show that they are a member of a profession, or of good standing within their professional community. This is possibly sometimes a sub-set of the fourth category; however, in relation, for example, to doctors charged with taking sexual liberties with their patients, it goes beyond that and shows not merely a good general reputation but fitness for practice and the absence of any knowledge of wrongdoing within what is sometimes a close-knit

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whether this was a "respect"). As many accused, such as the accused in *Wah v The Queen* (2014) 45 VR 440; [2014] VSCA 7, will have minor offences on their records there seems no reason to deny that this is a "respect", and indeed such a state of affairs is fairly regularly encountered in sentencing – but at trial it might be better to inform the jury of the minor offences concerned rather than leave them to speculate.

[10] *R v Zurita* [2002] NSWCCA 22; *Wah v The Queen* (2014) 45 VR 440, [90]; [2014] VSCA 7.

[11] See n 2. This qualification will mostly be taken as read in what follows.

[12] *Clegg v The Queen* (2017) 267 A Crim R 13, 27; [2017] NSWCCA 125; see also Bellew et al, n 1, 427.

[13] This rule has been abolished by the Uniform Legislation: see n 2.

[14] *R v El-Kheir* [2004] NSWCCA 461, [23]. Other examples include *R v Jacobson (Ruling No 6)* [2014] VSC 561; *Parsons v The Queen* [2016] VSCA 17, [62].

[15] *R v Stalder* [1981] 2 NSWLR 9, 19. Note, however, that it would take things too far to say that character evidence is given simply because the accused mentions in passing that he is helpful to his friends: *Gabriel v The Queen* (1997) 76 FCR 279, 281, 289.

[16] See, eg, *R v El-Kheir* [2004] NSWCCA 461, [63]. Contrast, although not on the point of credibility, the decisions in New Zealand summarised in Elisabeth McDonald, "From 'Real Rape' to Real Justice: Reflections on the Efficacy of More than Thirty-Five Years' of Feminism, Activism and Law Reform" (2014) 45 *Victoria University of Wellington Law Review* 487, 496–497.

[17] *Bishop v The Queen* (2013) 39 VR 643, 645; [2013] VSCA 273; *R v Jacobson (Ruling No 6)* [2014] VSC 561.

professional community. It is true that in *R v Zaidi*[18] evidence from the accused's patients to the effect that he had carried out pelvic examinations without incident was rejected by the Court. Nevertheless it must be noted, first, that this occurred under the pre-Act law and, secondly, that the Court made the odd observation that such evidence would show only the accused's competence at conducting pelvic examinations – not something that patients would be able to judge. Evidence from an accused doctor's patients that he has never conducted intimate examinations of them other than in a professional manner could certainly be taken to extremes and be rejected for being unduly time-wasting,[19] but there does not seem to be any reason why an accused doctor should not call a limited number of patients to give evidence of their personal experiences with him along with evidence of his reputation in the community consisting of his other patients – if it is possible to do this, as it might be in a small country town, for example, or among a group of people who have come into contact because they all suffer from a common malady. Equally, a solicitor accused of crimes can give evidence of honesty and good reputation and standing in that profession.[20]

In England, where a vaguely comparable statutory reform has led to the law in effect being quite similar to ours,[21] the recent case of *R v Omotoso*[22] indicates that an accused might assert good character simply by claiming to be a member of a respected profession – an auditor in this case – although on the facts it was doubtful whether the accused had actually gone quite so far as to do that. However, there is less to be gained for one's character by saying that one is a plasterer by trade and currently working as a choreographer, and such statements were rightly not held to be character evidence; neither of those occupations is a profession with good-character requirements for the retention of the right to practise, and on the facts of that case the accused had not attempted to claim any special credit for honesty in his work, for example.[23]

III. Slicing the Character

To all these options listed above, and perhaps some further ones that the author has not encountered, must be added the possibility of slicing each into a "respect". An example is constituted by *R v Ceniccola*,[24] where the Crown case was that the accused had shot his neighbour after a dispute about fences and wished to call another neighbour to show that a previous difficulty with their fence had been resolved amicably. In such a case the "respect" of character involved might be something like: a tendency to resolve disputes, or perhaps merely fencing disputes or disputes with neighbours, amicably. Other examples of thin character slicing may easily be suggested – for example: lack of violent disposition towards one's wife, or the simple lack of convictions for such offences;[25] lack of criminal history for sexual offences, as in *Omot*, involving grown women (not children or men); non-existence of a tendency

[18] *R v Zaidi* (1991) 57 A Crim R 189, 205.

[19] See n 2.

[20] Compare *Stanoevski v The Queen* (2001) 202 CLR 115, 121; 118 A Crim R 247; [2001] HCA 4.

[21] *Criminal Justice Act 2003* (UK) s 101(1)(f) allows bad character evidence "to correct a false impression given by the defendant". This has the effect of allowing the accused to divide their character: evidence by them that they have no convictions for crimes of violence does not create a false impression about the rest of their criminal record. Section 105(6) underlines this: "(6) Evidence is admissible under s 101(1)(f) only if it goes no further than is necessary to correct the false impression." It is also worth mentioning s 105(2), which Australia could well think of copying, for it provides a list of the circumstances under which an accused is responsible for the making of a false assertion (eg para (d): "the assertion is made by any witness in cross-examination in response to a question asked by the defendant that is intended to elicit it, or is likely to do so"). When the Crown asks a question of the accused in cross-examination that leads to a possibly character-related answer by the accused it is not always clear who adduced the evidence in question: *Gabriel v The Queen* (1997) 76 FCR 279, 294–297. For that reason, Ligertwood and Edmond, n 1, 294, see s 112 possibly as a provision separate from s 110 rather than a procedural provision attached to it, which is how the case law often sees it. A provision comparable to s 105(2) would allow for the clarification of such matters.

[22] *R v Omotoso* [2019] Crim LR 156.

[23] *Gabriel v The Queen* (1997) 76 FCR 279, 281, 289.

[24] *R v Ceniccola* [2010] NSWSC 1554.

[25] Compare *Seymour v The Queen* (2006) 162 A Crim R 576, 592; [2006] NSWCCA 206: lack of a record for violence against women.

to stab people;[26] a good reputation among colleagues in the same building; or good professional standing among teenage patients of a doctor.

The preparatory materials to the enactment of the uniform evidence legislation rightly rejected the common law's idea that anyone's character should be seen as indivisible.[27] Sometimes, however, scepticism is expressed about the idea of traits in general or even the utility of character evidence as a whole.[28] A word needs therefore to be said in defence of traits in particular and character evidence in general. First, character evidence, including but not limited to evidence of observed traits, clearly meets the test for relevance. That test requires us to ask whether evidence, if accepted, "could rationally affect (directly or indirectly) the assessment of the probability of the existence of a fact in issue in the proceeding".[29] It is a very low bar and evidence of a person's traits or character easily clears it. Such evidence reflects the everyday experience of life: while we have all been occasionally surprised by out-of-character behaviour by friends and relations, or even by our own behaviour, and it may also be true that "the whole truth about any of us would shock all the rest of us",[30] incidents of uncharacteristic behaviour are memorable precisely because of their comparative rarity. Noticing such regularities in others' or our own behaviour, while admitting the existence of unseen subtleties and exceptions, is nothing more than a common experience of life. Now it is hardly sufficient for an acquittal – but such evidence does not have to justify an acquittal in order to be of value and meet the test for relevance.

Secondly, character evidence is not dependent solely upon traits (or what amounts to the same thing, dispositions). As discussed above, there are "respects" of character that do not refer to traits as such and might merely be conceivably connected to them to some greater or lesser extent. Examples include the clean criminal record, the individual good deed and the good reputation in the community.

Thirdly, however, psychological learning supports the concept of traits with at least some degree of stability across life. It is certainly true to say that no single theory of personality, either with or without a concept of personality traits, commands anything like universal assent among psychologists. Textbooks on the subject almost uniformly present a series of theories of personality, among which are several trait-based ones alongside others that are unrelated to, or even inconsistent, with them. One textbook takes the trouble to address itself squarely to the series of inconsistent theories that it is about to present.

> The fact that this book presents these multiple theories might at first seem odd. Courses in most other scientific disciplines (*eg* chemistry, physics) are not organised around a series of different theories. Knowledge is organised by one commonly accepted conceptual framework. In part, this reflects the maturity of these other fields, which have been around longer than the science of psychology. […]
>
> Each [personality theory] captures important information about human nature. As you read about them, you should not be asking yourself, "Which theory was right, and which ones are wrong?". Instead, it is better to evaluate them by asking how useful they are in advancing basic knowledge and applications. Even a theory that gets some things wrong may have much value.[31]

In the law, that value may include assisting us to determine a just outcome in criminal cases.

Thus it can be seen that, while not every psychologist would support trait theories and possibly a few would even consider them next to worthless, a mature and scholarly perspective on the discipline recognises that there is no monopoly upon truth in any theory and that there is something in the idea of traits. Trait-based theories are entirely within the mainstream of current psychological learning. Every

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[26] *Gabriel v The Queen* (1997) 76 FCR 279, 298. This case was approved in an unreported judgment: Odgers, n 2, 895, fn 160.

[27] ALRC (1985), n 2, 219, 450, 457–458.

[28] Bellew J et al, n 1, 438; ALRC (1985), n 2, 217 also seems to express some doubts about the idea of traits, but a richer view emerges at 451–453.

[29] Section 55(1) of the Uniform Legislation. On the application of this provision to character evidence, there is nothing to add to what is stated by Bellew et al, n 1, 429.

[30] Said to be a "memorable aphorism of an Irish-American girl" in Alistair Cooke, *The Americans: Fifty Letters from America on Our Life and Times* (Bodley Head, 1979) 133.

[31] Daniel Cervone and Lawrence A Pervin, *Personality: Theory and Research* (Wiley, 12th ed, 2013) 30.

textbook of personality theory has one or more chapters devoted to them.[32] They emphasise that traits are not uniform across all situations and in every moment of one's life, but general regularities of disposition that produce a normally observable, but not always certainly present, pattern of behaviour.[33] Traits may be narrow (a love of sailing) or broad (neuroticism) and may change slowly over time.[34] Again all of these facts can be easily accommodated within the law's test for relevance without any need to throw the concept of traits overboard.

Scepticism about traits may be a hangover from a particular stage of psychological research in the 1960s when their existence or utility was called into doubt for a brief period. As one text puts it:

> **We can describe people meaningfully by their levels of various personality traits**
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> This point would seem obvious to most people, but there was a time when many psychologists believed that the whole idea of a personality trait was mistaken. […S]ome researchers suggested that the differences among people in their behaviour showed very little consistency across situations. But it was soon demonstrated that there is a great deal of consistency, when we consider people's behaviour "in the big picture", as aggregated or averaged across many situations. For example, the people who are the most organised in one situation might not be the most organised in another, but if you observe people's overall pattern of behaviour across a wide variety of situations, you can easily tell which people are the most organised.[35]

The same applies to other traits such as disposition to anger, generosity, extraversion, altruism, conscientiousness – the list is endless. While there might be variations in the same person in different situations, across many situations behaviour generally tends towards consistency.

Nevertheless, while a review of the psychological literature on the point clearly confirms the place of traits in that discipline it is even clearer that there is no canonical list and the number of individual traits is virtually unlimited. As is tolerably well known, there is a "Big Five" set of what might be called super-traits – openness to experience, conscientiousness, extraversion, agreeableness and neuroticism. Yet even that list is not universally accepted, with an alternative list of six sometimes being encountered. In the law, where traits are only one type of aspect of character that may be proffered, the available combinations and permutations and consequent variety are therefore almost limitless.[36] It is in fact not to be wondered at, looking at the psychological learning on traits alone, that the statute has not embarked upon the task of trying to define the concept of a "respect of character". It would not be possible to begin to say what sorts of slicing may occur; the possibilities are endless. However, the next part shows that any such attempt would have been superfluous anyway. The problem, if looked at correctly, solves itself through the application of already well-established principles.

IV. The Importance of Intention

The authorities, both at common law and under the uniform legislation, are unanimous that the accused's good character cannot be raised without a conscious intention to do so.[37] Accordingly, mere emphatic denials of prosecution allegations, such as that the accused has never hit his daughter or does not usually

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[32] See, eg, Cervone and Pervin, n 31, Chs 7, 8; Jess Feist, Gregory Feist and Tomi-Ann Roberts, *Theories of Personality* (McGraw Hill, 8th ed, 2013) Chs 12, 13; Richard M Ryckman, *Theories of Personality* (Wadsworth, 10th ed, 2013) Chs 8–10; Duane Schultz and Sydney Schultz, *Theories of Personality* (Cengage Learning, 11th ed, 2017) Chs 7, 8.

[33] Michael C Ashton, *Individual Differences and Personality* (Academic Press, 2nd ed, 2013) 28; Cervone and Pervin, n 31, 232, 293. See also Bellew J et al, n 1, 422–423, with further references to legal sources on this question and mock jury trials.

[34] JB Asendorpf, "Personality: Traits and Situations" in PJ Corr and G Matthews (eds), *The Cambridge Handbook of Personality Psychology* (CUP, 2009) 43–44.

[35] Ashton, n 33, 351; further details at 30–33.

[36] Compare Ashton, n 33, 352–353 – stating the same but with reference only to the psychological concept of traits, not the various aspects of personality we might refer to in the law.

[37] *R v El-Kheir* [2004] NSWCCA 461; *R v Qaumi (No 61)* [2016] NSWSC 1192 (accused nevertheless not to be disadvantaged because of counsel's mistake); *Clifton v Duong* [2018] ACTSC 346, [29]–[42]. This was demonstrated in a typically thorough and learned judgment of Hunt CJ at CL under the pre-uniform New South Wales statute (see n 2) in *R v Fuller* (1994) 34 NSWLR 233; 74 A Crim R 415. See further on the concept of intention in this context Odgers, n 2, 894. And this is no doubt one of the reasons

go around attacking people (in response to a question asked by the Crown that assumed that he did so), cannot be turned into assertions of good character enabling the Crown to lead rebuttal evidence.[38]

That was the law under the old dispensation, which did not recognise the claim of only a partially good character (for even the slightest attempt to raise character opened up the whole character and permitted rebuttal evidence). Nowadays the law does permit the accused to claim a character that is "good in parts" – which nevertheless still requires intention to do so. It is that intention that defines the "respect" of character that the accused wishes to raise and it is therefore that intention that controls the Crown's ability to lead rebuttal evidence. It would not even be coherent to say that the accused can raise good character only intentionally, and that the accused can raise only a part of their character, but also that the accused's intention ceases to have a role in working out what aspect of character the law will consider to have been raised. If intention controls the question whether the issue is raised at all, it must also control what part of it is raised.

That is not to say, of course, that the accused can simply dictate what intention they had. It is rarely necessary to descend to distinguishing between actual intention, as is required for the mens rea, and objective intention of the sort encountered in contract law – how a reasonable person would construe one's intention based on one's words and acts. For well-known practical reasons of proof there is often little difference in the result between those two ideas of intention.[39] In the end, though, the point of an assertion of good character is to produce an effect in the mind of others – jurors or other fact-finders. We are not asking, in posing this question of intention, whether the accused is worthy of punishment because they committed a bad act with a bad intention – in which case it would very famously be wrong to say that they must have intended the natural consequences of their acts.[40] The question is, rather, what effect the accused's words about their character would produce in the mind of a (presumably reasonable) juror or other fact-finder.[41]

It is clear enough, therefore, that the accused cannot simply state an intention and expect us to follow their decree blindly on this point. In jury trials, what should decide questions about the intention behind assertions allegedly about character is the understanding of the reasonable juror as the intended recipient

why it is often difficult to see why one case was decided one way and the other the opposite way: *R v Thomas* [2006] VSCA 167, [23]. What was said in *Gabriel v The Queen* (1997) 76 FCR 279, 295 makes one wonder whether this rule established itself by a sort of osmosis from the statutes permitting the accused to give evidence. Section 1(f)(ii) of the *Criminal Evidence Act 1898* (UK), widely copied in Australia, allowed the accused who chose to give evidence to be cross-examined about their bad character if "he has personally or by his advocate asked questions of the witnesses for the prosecution with a view to establish his own good character, or has given evidence of his good character, or the nature or conduct of the defence is such as to involve imputations on the character of the prosecutor or the witnesses for the prosecution". The final part of this obviously allowed for the argument that the accused, by merely denying the offence alleged, had doubted Crown witnesses' word and thus opened up their character – a principle that would obviously be unfair and required some type of limitation such as that provided by a requirement of intention (and is nowadays found in s 104(4) and (5) of the Uniform Legislation). However that may be, the proposition that one must intend to raise one's character to do so is a wholesome one and survives to this day: *R v Bartle* (2003) 181 FLR 1, 24–25, 29; [2003] NSWCCA 329; Gans, Palmer and Roberts, n 1, 357.

[38] *Gabriel v The Queen* (1997) 76 FCR 279, 281, 298, 300; *R v Bartle* (2003) 181 FLR 1, 27–28; [2003] NSWCCA 329; *PGM v The Queen* (2006) 164 A Crim R 426, 434–435; [2006] NSWCCA 310; *Tasmania v Martin (No 2)* (2011) 20 Tas R 445, 472–473; 213 A Crim R 226; [2011] TASSC 36; *Huges v Director of Public Prosecutions* (2013) 238 A Crim R 345, 353; [2013] VSCA 338.

[39] *Taylor v Johnson* (1983) 151 CLR 422, 428–429.

[40] *Director of Public Prosecutions v Smith* [1961] AC 290, 323–335; *Parker v The Queen* (1963) 111 CLR 610, 632–633; *Criminal Justice Act 1967* (UK) s 8.

[41] Contra, on nearly the same point, *R v Thomas* [2006] VSCA 167, [26], [30]; reproduced obiter in *Allen v The Queen* [2016] VSCA 59, [52] – but in *Thomas* the Court simply elided the questions of whose decision it is (the judge's, clearly) and on what basis that decision should be made. As jurors are less experienced than judges in the criminal law, and it is on their minds that an effect is hoped for, the judge's understanding of what the jurors will make of the statements in question is obviously the correct one. The case cited by Neave JA for the proposition contrary to that put forward by the author, *R v Perrier (No 1)* [1991] 1 VR 697; 50 A Crim R 122, seems if anything to support the author's view, for (at 709) Brooking J states that evidence was adduced "intending that the jury should gain the impression" of the accused's good character. *Dawson v The Queen* (1961) 106 CLR 1, 15, 20–21 deals with a technical term of the law in another, although related, context and cannot be applied in this situation. See also Bellew J et al, n 1, 427–428.

of the utterance in question and the person who is intended to act upon the utterance.[42] Nor of course can we permit the accused to get away with outright lies about their intention. The courts cannot allow an accused, "under the guise of offering evidence relevant to the issue",[43] to deliberately lead character evidence on honesty, for example, and then – dishonestly! – deny that the issue of honesty was raised; as in other areas of the criminal law, one cannot simply declare that one does not have a certain intention if one in fact does. It is a matter of fact for the judge to determine what intention the accused possessed in raising a particular "respect" of character. But it is the intention of the accused, properly determined, that is decisive, both as regards the raising of the whole issue of character and the particular "respect" chosen.

It is certainly not for the judge to restrict the "respect" chosen by the accused, as happened in *Bishop v The Queen*.[44] There the accused was charged with interfering with his step-daughter and gave evidence of his good general reputation in matters relating to children and his lack of any criminal record. The trial judge erred by unilaterally confining his directions on the topic to the accused's behaviour outside his home and in public without any basis for doing so.

Another example is provided by *R v Manevski*.[45] In that case the accused was charged with murder as part of a joint criminal enterprise with one Perkins and had already successfully tendered evidence of her clean criminal record in cross-examination of the policeman in charge of the investigation. She was then asked in chief whether she had agreed with Perkins to cause injury to the victim. She stated: "Anyone that knows me knows I would never do anything like that to anyone." In response the Crown wished to tender evidence that she alone had approached another person shortly after the alleged murder – that it was afterwards has no relevance, of course, when character is asserted – and crudely threatened that person and her family with death as a result of her alleged involvement with Manevski's boyfriend. Rather ingeniously her counsel argued that the quoted sentence from her evidence only referred to the topic of whether she would *agree with others* to do harm to third parties rather than being violent alone. It is most unlikely that a reasonable juror would make such a jesuitical distinction, and therefore this argument deserved to fail. Button J correctly rejected it on the ground that the accused had not concluded her denial with the words "with anyone" and on the broader ground that such a distinction would be "highly artificial".[46] Because the decisive question is how the reasonable juror would understand the "respect" of character asserted by the accused, it is clear that his Honour's ruling was correct; instinctively his Honour provided the right answer without being able to say why. (Very fairly, however, his Honour went on to limit the extent to which the evidence about the threat could be led by the Crown in rebuttal under s 137, the more-prejudicial-than-probative principle.)

This perspective also enables us to see why it is that the Court of Appeal for Victoria erred in *Omot*. It is certainly true that there is a lively controversy about whether rape is a crime of violence with incidental sexual aspects, a hate crime, an abuse of power or alternatively a crime with forced sex at its heart. This is not the place to go into such interesting issues.[47] It may be that the mixture of those ingredients varies among different instances of the crime; and certainly there was no extreme violence in the crime of which Mr Omot was accused that might lead one to the conclusion that the main purpose of it could have been violence rather than sexual gratification. It is not inevitable that rape should be seen as a crime of violence exclusively and in every instance, and indeed in some European countries such as Germany and Spain the main focus of recent rape-law reforms has been on ensuring that rape is not seen solely as a

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[42] It is worth remembering that the qualifications expressed above, in n 2, are still taken as read here. If, for example, the accused is unrepresented or the accused's counsel reacts in the heat of the moment to a forensic surprise, there may be good reasons of fairness for not allowing rebuttal evidence by the Crown even though there was objectively an intention to raise character.

[43] *Eastman v The Queen* (1997) 76 FCR 9, 53. And contrast, on the facts, *R v Skaf* [2004] NSWCCA 74, [199]–[230].

[44] *Bishop v The Queen* (2013) 39 VR 642, 645, 649, 653.

[45] *R v Manevski* [2016] NSWSC 1032.

[46] *R v Manevski* [2016] NSWSC 1032, [28].

[47] See, eg, M Heath and K Toole, "Sexual Offences" in D Caruso et al (eds), *South Australian Criminal Law and Procedure* (Butterworths, 2nd ed, 2016) 265.

crime of violence but has, rather, at its heart the lack of consent by the victim and thus can be committed even if there is no violence and the victim puts up no resistance.[48]

That being so, it is quite understandable for Mr Omot to claim to have had the intention to put forward only his lack of convictions for sexual crimes in his defence. He was making no claim to be a generally non-violent person or to have a clean record for such offences. There is nothing in the least implausible or bizarre about the assertion by Mr Omot that he possessed the claimed intention such as might make us doubt whether anyone could really have that intention (in other words, he was clearly not lying about his intention in raising his character) or cause us to wonder whether reasonable jurors might understand the assertion in some broader way than the utterer of the statement subjectively intended it to be understood. It is almost beyond argument that reasonable jurors would have no difficulty in understanding and accepting the statement that one has no sexual offences on one's record as saying just that and nothing more – nothing about non-sexual offences of violence in particular. It puts the cart before the horse to say that Mr Omot had committed violence in non-sexual contexts. That is not what he was claiming, and it is not legitimate to broaden his claim in order to reject it. To put the same point from another angle: just as accused persons can claim, if their history permits them, to be the sort of people who abstain from particular sorts of violence such as stabbing,[49] Mr Omot could frame his case, with some loss of clarity and directness, by saying that he has never committed an act of violence accompanied by sex – or, in short, that he has no convictions for rape or any other sexual crime.

It would be an astonishing state of affairs if the statute did not lead to this result. Jurors notoriously look askance at persons who are guilty of sexual crimes as in a unique category of their own – regardless of any academic debates – and Mr Omot was entitled to let them know that he had no record in that "respect", just as it is legitimate for an accused to say that he does not stab people or make the jury "aware that he was not a known paedophile, and that it was not suggested that he had ever previously committed offences against children".[50] The uniqueness of sexual crimes – their being in a category all by themselves – is also recognised by a myriad of special procedural rules applicable to them and them alone because of their special nature[51] and also to their being in several discrete sub-divisions of the *Crimes Act 1958* (Vic) separately from offences of violence. Of course, it cannot be suggested that statutory drafting will always provide an easy answer to our questions, but it is surely significant for the issue raised in *Omot* that offences of violence for which the accused had a record are in one part of the legislation while sexual offences can be found at some distance from them in separate sets of provisions. This fact too enables us to grasp with ease his intention in making his statement about his clean record for sexual crimes.

V. Conclusion

The key to defining the "respect" of character is therefore the accused's intention, properly understood, in that regard, just as intention is also the key to determining whether the issue was raised at all. This finding aligns, too, with the simple fact that the initiative for raising character at all lies with the accused.

[48] In Germany, after some controversy, s 177 of the *German Criminal Code* was amended in 2016 by the *Fünfzigstes Gesetz zur Änderung des Strafgesetzbuches – Verbesserung des Schutzes der sexuellen Selbstbestimmung* (BGBl 2016 I 2460) to change rape from an offence that could be committed only by using violence or threats of violence or in situations where the victim was "rendered helpless against the actions of the perpetrator" into a crime committed "against the recognisable will of another person" with no reference to violence except in the factors aggravating the sentence. In Spain the "wolf pack" case of 2016 focused attention there on the need to ensure that rape could be committed even when the victim was too terrified to resist, for example: Veronica Gisbert Gracia and Joaquim Rius-Ulldemolins, "Women's Bodies in Festivity Spaces: Feminist Resistance to Gender Violence at Traditional Celebrations" (2019) 25 *Journal for the Study of Race, Nation and Culture* 775, 783–784. (After that article was published, the accused in the "wolf pack" case were after all convicted of rape by Spain's highest court, as various media reports indicated.)

[49] See ALRC (1985), n 2, 219, 450, 457–458.

[50] *Wah v The Queen* (2014) 45 VR 440, [90]; [2014] VSCA 7; see also *Parsons v The Queen* [2016] VSCA 17.

[51] See, eg, *Criminal Procedure Act 2009* (Vic) Pt 8.2, Div 2. The existence of such provisions in every State and Territory must show at least that in making the distinction between sexual crimes and non-sexual violence we scarcely have to do with "semantics or questionable distinctions" (Bellew J et al, n 1, 431)!

Even taking into account the fact that it is not the accused's real, but their objectively determined, intention that is decisive here, it might be thought that this leaves too much power in the hands of the accused to define the "respect". There is, however, a natural control mechanism in this field. It is not difficult to imagine what a jury would conclude about an accused who told them that they have no criminal record for sexual assaults using weapons against boys aged nine or 10 years old on Saturday afternoons in public parks. There is no need to fear that such absurdly narrow or artificial "respects" of character will be selected by accused people. As discussed above, *Manevski* provides another strategy for heading that possibility off: it is not a detailed grammatical analysis of the precise meaning of the words in an accused's statement that will be decisive, but the reasonable understanding of their import in the context of the case.

One question that may be raised, however, as a result of the new statutory scheme for divisibility of character is when an accused will ever be taken to put their character in issue generally as distinct from in one or more "respects". As discussed, there are almost uncountable ways of dividing up character, first by subject matter and then by "respect". It is hard to imagine that all possible bases will ever be covered in any one case. This may be more a theoretical question than a real danger that some special rule would need to head off, for again the accused's definition of the field of character will control the type of rebuttal evidence that may be given.