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National Policing
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PROFESSIONAL PRACTICE

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PROFESSIONAL PRACTICE

PRACTICE ADVICE ON EVIDENCE OF BAD CHARACTER Second Edition

2008

Produced on behalf of the Association of Chief Police Officers
by the National Policing Improvement Agency

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PRACTICE ADVICE ON EVIDENCE OF BAD CHARACTER Second Edition

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EVIDENCE OF BAD CHARACTER

The Criminal Justice Act 2003 (the 2003 Act) made fundamental changes to the admissibility of evidence relating to the defendant's character and that of victims or witnesses. In particular, section 103 provides for the admissibility of previous convictions in support of the propensity to commit like offences and/or to be untruthful. Common law rules, in the main, are abolished. The main purpose of bad character evidence has been identified as assisting:

...in the evidence-based convictions of the guilty without putting those who are not guilty at risk of conviction by prejudice.

R v Hanson and others [2005] 1 WLR3169, [2005] EWCA Crim 824

A new form known as an MG16, which covers bad character evidence, is to be added to the prosecution files and will be included in the next *CPS (2004/05) Prosecution Team Manual of Guidance*. A copy of the **MG16 Evidence of Bad Character – Defendant**, is provided in **Appendix 1**.

Bad character evidence is a potentially complicated area and a short Q & A briefing is provided in **Appendix 2**.

Additional detailed guidance prepared with the Crown Prosecution Service (CPS) for Crown Prosecutors on this subject is in **Appendix 3**.

Bad character evidence is evidence of, or a disposition towards, misconduct on the part of the defendant, rather than evidence relating to the facts in issue. Misconduct means the commission of an offence or other 'reprehensible behaviour'.

Reprehensible behaviour can relate to similar types of charges. During the debate on the Criminal Justice Bill, September 2003, Baroness Scotland of Asthal stated:

Examples of where it might be appropriate to admit such evidence include circumstances where evidence on a number of charges being tried concurrently is cross-admissible in respect of the other charges. It might also be appropriate to admit evidence relating to charges on which the defendant was acquitted, as I have already cited in the example of *R v Z*. It would be unfortunate if an argument were to be accepted that, because a person has not actually been convicted of the offence, it cannot be said that the evidence shows that he has indeed committed such an offence and it is therefore excluded.

Case law

Since this practice advice was first published in March 2005 a considerable body of case law has developed. Case law is based on judicial decisions and is intended to assist judges during trials. It provides guidance on interpretation and application of legislation and should enhance understanding of the key issues. It is not intended to replace or undermine what is laid down by statute.

In the context of this practice advice case law provides a useful indication to practitioners on how bad character evidence can be used during a trial and, therefore, how it should be used during suspect interviews. It also provides guidance on case management issues and file preparation in readiness for submission to the CPS.

This second edition of this practice advice has been amended to include relevant case law.

1.1 BAD CHARACTER OF PERSONS OTHER THAN THE DEFENDANT

Leave is required before evidence of bad character can be admitted in the case of a non-defendant. Such evidence is only admissible if it:

- Is important explanatory evidence;
 - Has substantial probative value in relation to a matter which is in issue in the proceedings;
- AND
- Is of substantial importance to the case as a whole;
- OR
- All the parties agree to the evidence being admissible.

Important explanatory value means that it would be difficult or impossible to properly understand other evidence in the case without it. Evidence going to a matter in issue must have substantive probative value for understanding the case as a whole. To assess that value, the court must have regard to:

- The nature and number of events to which the evidence relates and when those events were alleged to have happened;
- The similarity between alleged instances in cases of misconduct;
- Any other factors the court considers to be relevant.

The substantial probative test does not direct the court as to whether previous misconduct is likely to impact on a witness's general credibility but rather their credibility in relation to an issue in the case. For example, why a victim or witness would lie about a particular incident as opposed to why they should generally be disbelieved. This applies particularly in sex offence cases where questions are asked about the sexual history of the victim with the intent of undermining the case against an accused. Such questioning would provide little of probative value and is the kind of conduct that the new provisions intend to outlaw. In effect, the advocate would now have to satisfy the court of an enhanced level of relevance (substantive probative value) about the specific credibility of a witness.

1.2 A DEFENDANT'S BAD CHARACTER

Evidence of a defendant's bad character is admissible where:

- All parties agreed to its admissibility;
 - The evidence is adduced by the defendant themselves, or is given in answer to a question asked by them in cross-examination and intended to elicit it;
 - It is evidence with important explanatory value;
 - The evidence is going to a matter in issue between the defendant and prosecution;
 - It has substantive probative value in relation to a matter in issue between the defendant and a co-defendant;
 - It is evidence to correct false impression given by the defendant;
- OR
- It is an attack on another person's character made by the defendant.

Evidence of important explanatory value is evidence without which the court or jury would find it impossible or difficult to properly understand other events in the case and it is of substantial value for understanding the case as a whole.

Evidence going to a matter in issue between the defendant and the prosecution is far-reaching and allows the admission of bad character evidence to demonstrate that the defendant has a propensity to commit offences of the kind with which they are charged, and/or a propensity to be untruthful. Similar fact evidence would be admissible under this section. A court can exclude evidence of propensity to commit offences of the kind charged where it is satisfied that the length of time between the two offences would make it unjust for it to be admitted.

The court must not admit evidence if, on application by the defendant to exclude it, it appears to the court that to admit such evidence would have such adverse effect on the fairness of the proceedings they ought not admit it.

Evidence to correct a false impression applies when there is an express or implied assertion that it is likely to give the court or jury a false or misleading impression about the defendant. Such assertions can be made by what the defendant says at interview, during the course of the proceedings, or what a witness says on the defendant's behalf. An assertion can also be made by way of conduct, for example, by demeanour.

An attack on the character of other witnesses restates existing law albeit that by reason of section 100 of the 2003 Act, defendants will not be at liberty to attack the character of other witnesses unless the appropriate test is passed. This principle is explained further by section 106 of the 2003 Act.

1.3 DEALING WITH BAD CHARACTER AT INTERVIEW

Prior to the 2003 Act, an interviewer could refer to previous bad character. The interview was not restricted to issues of material and admissible evidence. Such references stood to be redacted (removed), and there was a risk that subsequent admissions might be disallowed if they were seen to follow from oppressive questioning. The present law, by making a propensity to be untruthful and/or a propensity to commit offences relevant as evidence, reduces this possibility. As a result, these issues should be addressed in interview.

To remain within the spirit of the law and for the testimony to be admissible, the investigator has to choose the grounds and timing in cases where the provision is likely to apply. A propensity to offend is relevant and progressively more relevant according to similarity and frequency of offending. The 2003 Act specifically requires that the bad character be of the same description (a statement of the offence in a charge would be in the same terms) or category (prescribed by the Secretary of State) and requires the court to have regard to the length of time between previous offending and the current case. This does not prevent the investigator from establishing other similarities. The following all assist in establishing due relevance:

- Location (having previously offended thereabout);
- Nature of victim (eg, preys on older victims);
- Specifics of modus operandi (MO) (method of entry, goods stolen, eg, antiques);
- Words or phrases used towards the victim;
- Patterns of offending.

Where, either by time or style, the link between the current charge and previous offending is not strong, the matter should not be raised. The law now makes powerful provision to prevent guilty defendants from presenting themselves in false colours before a jury (which is now considered able to give sufficient weight to bad character evidence). This provision should not be undermined by injudicious use.

Proving a propensity to commit an offence can be difficult and has, therefore, been raised during trials on a number of occasions, covering several aspects which could be used to show propensity. A significant body of case law has now developed and this is set out in detail in **Appendix 3**.

Following *Hanson* it is suggested that the courts (and, therefore, officers interviewing suspects) should consider three questions to help them determine which convictions should be considered.

Where propensity to commit the offence is relied upon there are thus essentially three questions to be considered:

- (1) Does the history of conviction(s) establish a propensity to commit offences of the kind charged?
- (2) Does that propensity make it more likely that the defendant committed the offence charged?
- (3) Is it unjust to rely on the conviction(s) of the same description or category; and in any event, will the proceedings be unfair if they are admitted?

There is no minimum number of offences which will go to show propensity. When considering significant features, eg, aspects of the defendant's MO, the courts are encouraged not to view evidence of propensity too widely or too narrowly. These points are considered in more detail in the relevant sections of **Appendix 3**. Evidence put forward to show a propensity does **not** have to be evidence of previous convictions. Section 103(2) of the 2003 Act states that the prosecution can show a propensity by 'any other way of doing so'. This may include, for example, behavioural traits.

As to untruthfulness, *Hanson* highlights that a propensity for untruthfulness is not intended to be the same as a propensity for dishonesty. The provision is directed towards assessing the probative value of any remarks made by the defendant at interview or in their defence. In the same way that prosecution witnesses can be challenged by bad character, eg, 'you have lied before, why should the jury believe you?', so now the defendant might be challenged.

Hanson tries to clarify the difference between untruthfulness and dishonesty by saying:

It is to be assumed, bearing in mind the frequency with which the words honest and dishonest appear in the criminal law, that Parliament deliberately chose the word 'untruthful' to convey a different meaning, reflecting a defendant's account of his behaviour, or lies told when committing an offence.

Edwards et al [2005] EWCA Crim 1813 at [33] tries to clarify the matter further by stating:

As this court has previously pointed out, dishonesty does not necessarily equate with a propensity to be untruthful. It may be that the offence of theft by shoplifting,, could properly be regarded as not showing a propensity to be untruthful, rather than merely dishonesty. That cannot however, be said in relation to the offences of benefit fraud, committed on four occasions.

If the defendant offers plausible and convenient explanations or flat denials and has lied before in presenting their case or in interview, or where telling lies was a part of the offence, eg, deception, then reference to those circumstances is likely to apply.

Evidence of bad character is only admissible if the appropriate conditions apply. The investigator should, therefore, identify those conditions in framing questions. If the issue is a propensity to similar offending, then the similarities should be referred to. If untruthfulness is relevant, the defendant will have had to have made a denial which is disputed by him or herself or through another party; previous examples of false denials can then be raised. (Section 34 of the Criminal Justice and Public Order Act 1994 states that an inference can be drawn from silences in certain circumstances. This alone, however, would not justify raising previous untruthfulness.)

Issues relating to correcting false impressions or attacking the character of prosecution witnesses are more likely to occur at trial and to be matters for the prosecutor. The prosecutor has both the bad character issues raised at interview to substantiate during proceedings, and has further opportunity to plead inclusion of bad character evidence according to events unfolding in the trial.

Police officers can make best use of these provisions if they understand the purpose for them. That is to prevent the defendant advancing a plausible defence which, if their true character were known, would make it less likely, and, having researched the defendant's bad character, officers can draw out similarities and establish a pattern of behaviour.

I.4 EVIDENCE OF PREVIOUS CONVICTIONS

Where bad character is raised during a trial, the courts are encouraged to look beyond the type of offence previously charged (*Long* [2006] EWCA Crim 578) or the basic facts of the conviction. Unlike the old common law rules, previous offending no longer has to have a striking similarity. Therefore, significant features such as aspects of the MO, characteristics of victims and types of weapons used may go to show a propensity which would not otherwise be obvious from the charge or basic facts.

Although the Police National Computer (PNC) and a certificate of conviction are valuable sources of information about previous offending, they do not provide sufficient evidence of the circumstances of an offence. Moreover, in some cases, there is a risk that the PNC does not provide an accurate account of the facts as it relies on information transcribed from other sources. In *Ainscough* [2006] EWCA Crim 694 it was noted that the defendant did not dispute the dates and locations mentioned for the offences set out on the PNC, however, the description of the offences was disputed. In light of this the prosecution must be able to verify the facts and circumstances of the previous offending, using, where necessary, the original case papers and victim or witness testimony.

Proving convictions

Proving a defendant has previous convictions will often be the key admissible evidence of bad character. Admitting proof of previous convictions by way of a certificate of conviction is relatively straightforward. The problem arises when the defendant denies that the convictions apply to them. This may be an attempt to deceive the court or it may be genuine, ie, the prosecution is mistaken. Section 73 (1) PACE states that proof of a previous conviction should be advanced by:

- Production of a certificate of conviction, and;
- Proving the person named in the certificate is the person who is alleged to have committed the offences referred to.

The second point has been subject to discussion in recent years and has generated recent case law to assist the courts. The burden of proof should be to the criminal standard, ie, beyond reasonable doubt. The decision in *Burns* [2006] EWCA Crim 617, which follows that previously given in *Pattison v DPP* [2005] EWCA Admin 2938, states that ‘similarity in name and date of birth ...may or may not amount to prima facie proof.’ For example, if a defendant has an extremely common name, and the date of birth is not precisely the same as that of the defendant, the certificate of conviction may not be admissible because there would not be proof beyond reasonable doubt. On the other hand if the defendant has an unusual name, it may or may not be necessary to match dates of birth to prove that the certificate relates to the defendant.

Case preparation

The prosecution must strike a balance between proving bad character and the practical considerations of obtaining evidence of previous offending, especially where there has been a time lapse of several years between the previous offending and the current case. This is particularly important if the case relies heavily on bad character evidence to underpin other less compelling evidence. As there is no time limit for the relevance of previous offending, this can cause practical considerations in accessing old case papers and tracing victims and witnesses. Investigators and prosecutors must also take into account welfare issues and consider whether it is appropriate to ask a victim to give first-hand evidence in court. This is of particular importance where the previous offending relates to sexual offences.

When investigators are completing form MG16 – Evidence of Bad Character and preparing case files for the CPS, they must ensure that all relevant case papers, certificates of conviction and other relevant evidence are sourced as early as possible. This may also include tracing victims and witnesses. This work can place an additional time burden on investigation teams because the case papers may, for example, already be in storage, located in other force areas, lost or destroyed. There may also be delays in obtaining documents from courts. Senior officers must take this additional work into account when considering resource requirements for investigation teams. If the prosecution is to produce evidence of previous bad character at trial, they are required to comply with notice requirements under the Criminal Procedure Rules 2005 and to disclose relevant documents to the defence under the Criminal Procedure and Investigations Act 1996 (CPIA). In any event:

...it is necessary for all parties to have the appropriate information in relation to convictions and other evidence of bad character, whether in relation to the defendant or to some other person, in good time. That can only be achieved if the rules in relation to the giving of notice are complied with.

(Bovell and Dowds [2005] EWCA Crim 1091)

See [Appendix 3](#) for further information on notice provisions.

APPENDIX 1

MG16 EVIDENCE OF BAD CHARACTER – DEFENDANT

MG16

RESTRICTED (when complete)

EVIDENCE OF BAD CHARACTER - DEFENDANT
(Part 11 Criminal Justice Act 2003)

(One form per defendant)				

Defendant's full name:..... DOB:..... URN A/S No.

To be completed where notice to adduce evidence of bad character is being considered as part of the prosecution case. This information will be revealed to the Duty Prosecutor together with Form MG3 for pre-charge advice/charging decision or, where appropriate, post charge.

List below relevant evidence of or a disposition towards misconduct or other reprehensible behaviour relating to:

- **Commission of offences of the kind charged** including previous convictions for offence(s) of same or similar description (same charge/indictment) or category (refer to the Schedule of Prescribed Categories of Offences relating to Theft Act offences or sexual offences against persons under the age of 16 years)
- **Commission of any other related type of offences** (even where not of similar description or in same category)
- **The defendant's untruthfulness**, eg, convictions for perjury offences, deception.

Brief details of Charge(s) or Proposed Charge(s)	Relevant Evidence
	<ul style="list-style-type: none"> • Previous convictions: include more detailed information than contained on PNC printout, i.e. MO, concurrent charges, TICs, Cautions, Reprimands and Final Warnings, previous defences used if known. • Probative evidence (other than convictions): includes outstanding investigations, acquittals, discontinuances, previous allegations made against the defendant, incident reports including domestic violence/racial etc.
	<i>(Attach relevant documentation)</i>
	<i>(Attach relevant documentation)</i>
	<i>(Attach relevant documentation)</i>

Officer completing form (rank, number and job title)

Duty Prosecutor/Reviewing lawyer

Name:.....

Name:.....

Date:.....

Date:.....

APPENDIX 2

Q&A BRIEFING ON BAD CHARACTER PROVISIONS UNDER THE CRIMINAL JUSTICE ACT 2003

Q&A BRIEFING ON BAD CHARACTER PROVISIONS OF THE CRIMINAL JUSTICE ACT 2003

1. What is bad character evidence?

The Act defines evidence of a person's bad character as evidence of, or of a disposition towards, misconduct. Misconduct is defined as the commission of an offence or other reprehensible behaviour. So in addition to previous convictions, it may, for example, include evidence relating to concurrent charges or cautions. It may also include relevant evidence of disposition which did not amount to criminal behaviour, such as evidence of racism or by admission of sexual interest in children. It does not, however, need to include or be connected to the facts of the offence currently charged, or the investigation or prosecution of that offence.

2. Why were the bad character provisions changed under the Criminal Justice Act 2003?

The changes were made under the 2003 Act to reverse the previous rule whereby evidence of a defendant's bad character was generally inadmissible in criminal proceedings, unless its value outweighed its prejudicial effect. Under the 2003 Act relevant probative evidence of this kind will be admissible where it will properly assist the jury, unless it will unduly prejudice the fairness of the trial. The aim is to ensure that this evidence is available to juries, in the belief that they can be trusted to reach a just verdict.

3. What sort of information will be admissible under these provisions?

Essentially any evidence of, or of a disposition towards, bad character that is relevant and has value in terms of throwing new light on the case – provided it would not unduly prejudice the fairness of the trial. This could include all the types of evidence mentioned in **Question 1** above, plus Penalty Notices for Disorder (PNDs) and acquittals. Even before the changes introduced by the Criminal Justice Act 2003, the law already recognised that evidence going beyond previous convictions should be capable of being admitted in appropriate circumstances.

4. Will spent convictions be disclosable as bad character?

Yes in principle, but where a defendant opposes the admission of bad character evidence, the Act requires the court to take account – amongst other things – the length of time that has elapsed between the previous conviction and the matters which led to the current charges against the defendant.

(At present the Rehabilitation of Offenders Act 1975 does not specifically apply to criminal proceedings and these convictions are, therefore, in principle, admissible. Under the Consolidated Criminal Practice Direction, 8th July 2002 (as amended), Part 1, 1.6 Spent Convictions, the court's permission is required before a spent conviction can be referred to. Leave is to be granted if the interests of justice require.)

5. What is the effect of the Criminal Justice Act 2003 (Categories of Offences) Order 2004?

Under section 103(4)(b) of the Act, the Secretary of State may prescribe categories of offences which are 'of the same type', for use as an indicator that a defendant has a propensity to commit offences of a certain type. **Categories prescribed by such an order are for guidance only in relation to propensity; they are not prescriptive.**

The Order prescribes two proposed categories of offences:

- Theft;
- Sexual offences against young persons under 16 years of age.

The categories provide guidance to the courts on the admissibility of previous convictions in these particular areas of offending, where it is alleged that the defendant has a propensity to commit offences of the same kind as that with which they are charged. In practice this means that where a defendant has a conviction for an offence which is in the same category (as prescribed by the Order) as that with which they are charged, a strong presumption will be created that the previous conviction should be admitted. The defence, however, will still be able to argue that such evidence should not be admitted on the basis that it may lead to an unfair trial.

It is important to note that bad character evidence, including relevant previous convictions, may be admissible at trial **even where no relevant category of offences has been introduced.**

6. Why are there only two categories?

The categories attached to the Order cover two areas of offending that cause the public particular concern, and where there is a strong risk of repeat offending.

The absence of categories for other types of offending will **not** prevent previous convictions from being admitted if they demonstrate a propensity to commit offences of a certain type. Evidence of such convictions will be admissible under the main provisions of the Act, provided those convictions are relevant and probative. Categories of offences only support the Act's main provisions.

7. On what basis were the categories drawn up?

The terms of the Act require the offences in each category to be 'of the same type', therefore, the offences in the category must be closely related to each other. The rationale for each category is as follows:

Theft – the offences listed in the category are Theft Act offences; the common theme is that they all relate directly to stealing property that belongs to others. The category includes handling stolen goods because this offence is closely related to other offences in the category.

Sexual offences against young persons under 16 years of age – covers offences that involve sexual touching, penetration or other sexual activity, committed against children and young people under the legal age of consent.

8. Does this mean that only bad character evidence that falls within the same category as the offence with which a defendant is charged will be admissible in a criminal court?

No. The Act makes clear that there are several types of circumstance or gateways by which bad character evidence will be admissible, eg, where such evidence is 'important explanatory evidence', where it has 'substantial probative value', or where the defendant has made an attack on another person's character.

The purpose of categories is to provide guidance as to what sort of convictions create a rebuttal presumption of propensity. However, the categories are neither prescriptive nor exclusive and are not the only way to demonstrate propensity. The prosecution might want to introduce other relevant and probative evidence outside the categories and the Act enables them to do this. For example, a person charged with the rape of a child or young person under 16 years of age may have a history of less serious sexual offences (such as child pornography or grooming), which the prosecution might argue was relevant and probative, even though those earlier offences would not appear within the same category as the offence charged.

9. Will relevant bad character evidence that falls within the same category as the offence with which a defendant is charged automatically become admissible?

Following *Hanson* there is a presumption in favour of admitting the evidence subject to the rules laid down in that case. The defence would, however, have the right to challenge its admissibility. See **1.3 Dealing with Bad Character at Interview** for further information.

10. Why are the two categories so narrowly drawn?

The terms of the Act require the offences in each category to be 'of the same type'. The categories accurately reflect offences that are closely related to each other so as to be classified as of the same type.

11. What happens with other types of offending for which there is no category? Will bad character evidence not be admissible in such cases?

The general provisions of the Act allow for relevant, probative bad character evidence to be admitted, where it will not be unduly prejudicial. The operation of this new statutory scheme does not depend on the existence of categories. Categories – where they exist – will simply encourage the admissibility of previous convictions that are closely related to (of the same type as) the offence with which a defendant is charged. The absence of a category should not prevent the admission of relevant previous convictions (provided the admission of such convictions is not unduly unfair).

12. How will the Act help to reduce witnesses' fear of having their character attacked in court?

The Act provides new protection for witnesses. A party wishing to ask questions about a witness's previous misconduct will need to apply for the court's permission or obtain the agreement of all parties first. To be successful they will have to demonstrate that such evidence is 'important explanatory evidence' or has 'substantial probative value' to the case (for example, if it has a clear bearing on the witness's credibility). These requirements should make gratuitous and wide-ranging attacks on the character of witnesses a thing of the past.

APPENDIX 3

LEGAL GUIDANCE PAPER –

BAD CHARACTER

EVIDENCE

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BAD CHARACTER EVIDENCE: LEGAL GUIDANCE

1 INTRODUCTION

- 1.1 The Criminal Justice Act 2003 (the 2003 Act) introduces a new statutory scheme and a radical new approach to the admissibility of bad character evidence relating to non-defendants and defendants.
- 1.2 The *Law Commission's Report No 273 (2001)* and the *Review of the Criminal Courts of England and Wales (2001)*, conducted by Lord Justice Auld, highlighted defects with the previous law, and recommended changes. Witnesses were often exposed to gratuitous and humiliating exposure of irrelevant misconduct, but defendants did not lose their 'shield' where they did not testify.
- 1.3 In the light of the Law Commission's Report, the Auld Review and the government's objective of rebalancing the criminal justice system in favour of victims and witnesses, the 2003 Act was passed. Part 11 of the 2003 Act provides a statutory scheme which deals comprehensively with evidence of bad character. It abolishes the common law rules of admissibility of evidence of misconduct, as well as exceptions to that prohibition. The 2003 Act also repeals some of the previous statutory provisions relating to bad character.
- 1.4 The 2003 Act adopts a different approach to non-defendants' and defendants' bad character. For the first time non-defendants are given protection in statute against their bad character being exposed unless the substantial probative value test (enhanced relevance test) is satisfied. In contrast the 2003 Act has an inclusionary approach rather than an exclusionary approach to bad character of a defendant. A defendant's bad character evidence is not subject to the enhanced relevance test but is admissible if it falls within one of the 'gateways' in section 101 of the 2003 Act.
- 1.5 The effect of these provisions will mean that non-defendants are better protected from attacks on their character than previously. In relation to a defendant's bad character such evidence is likely to play a greater part in the investigation and prosecution of cases, and may form an essential part of the evidence against a defendant. This means that police and prosecutors should investigate the defendant's previous misconduct at the earliest opportunity in order to assess whether such evidence should be used as part of the prosecution case.
- 1.6 Most of Part 11 came into force on 15 December 2004. The provisions only apply to criminal proceedings which began on or after this date (section 141). This means persons arrested on or after 15 December 2004.
- 1.7 To assist the reader to determine whether bad character evidence would be admissible in court, case examples are set out in **Annex A** and a flow chart is set out in **Annex B**.

2 DEFINITION OF BAD CHARACTER

- 2.1 Section 98 of the 2003 Act defines 'bad character' as evidence of, or a disposition towards, misconduct. Misconduct means the commission of an offence or other 'reprehensible behaviour' (section 112).
- 2.2 The definition of bad character is wide enough to apply to conduct which has resulted in a conviction or an acquittal ((*R v Z* [2000] 2 AC 483). It can also apply to conduct for which the defendant has been charged but where the trial is still pending (*Adenusi* [2006] EWCA Crim 1059; (2006) 171 JP 169).

Adenusi [2006] EWCA Crim 1059; (2006) 171 JP 169

Adenusi (A) attempted to obtain a bank loan using a fake driving licence and gas bill. Staff spotted the forgeries and called the police, but A fled before they arrived. A's fingerprints were found on the gas bill. Five days later, at a different bank, A tried to open a bank account using another fake driving licence and gas bill, although they were in a different name.

A was arrested, and in respect of the second incident, pleaded guilty to two counts of using a false instrument with intent.

At A's trial, in respect of the first incident, A pleaded not guilty and the judge admitted evidence of A's previous conviction under s 101(1)(d) and 103(1)(a). The prosecution submitted the evidence on the basis that it could establish a propensity to commit offences of the kind A was charged with. A was convicted.

On appeal, A submitted that the previous conviction should not have been admitted since it related to offences committed after the alleged offence with which he was charged and could not, therefore, establish a propensity at the time of the earlier incident.

The Appeal was dismissed.

- 2.3 Reprehensible conduct should be looked at objectively, taking account of whether a particular kind of behaviour would be regarded as reprehensible by the public. *Renda* [2006] 1 WLR 2948 stated that 'reprehensible' suggests a degree of culpability or blameworthiness. The types of conduct that could come within this definition include racism, bullying, a disciplinary record at work for misconduct, a parent who has had a child taken into care due to neglect or abuse, and petty pilfering from employers. The term reprehensible conduct avoids arguments about whether or not conduct amounts to an offence, where this has not resulted in a charge or conviction.
- 2.4 The definition of bad character is the same for defendants as it is for non-defendants.

Exceptions to bad character

- 2.5 The definition of bad character in section 98 is subject to two exceptions. These relate to two categories of evidence which, at common law, were not subject to the general restrictions of bad character evidence. The exceptions are:
- (i) Evidence which has to do with the alleged facts of the offence with which the defendant is charged (section 98(a));
 - (ii) Evidence of misconduct in connection with the investigation or prosecution of that offence (section 98(b)).
- 2.6 Previously evidence that fell within the *res gestae* principle or was background evidence could be admitted as evidence, and was not subject to the exclusionary rule. Now if a defendant were charged with burglary, the prosecution's evidence of the facts of the offence, such as any witness to the crime and forensic evidence, would be admissible outside the terms of these provisions. So too would evidence of an assault that had been committed in the course of a burglary, as evidence to do with the facts of the case. Therefore, evidence that is connected with the alleged facts of the offence is admissible.
- 2.7 Similarly, section 98(b), evidence of misconduct in connection with the investigation or prosecution of the charge would be admissible outside these provisions. This exception covers conduct such as evidence of resisting arrest by running away because it may imply an acknowledgement of guilt; allegations of intimidation of witnesses; the defendant absconding during the course of the current proceedings; and the defendant breaching bail conditions.
- 2.8 The key test of whether evidence is admissible where the two exceptions apply is relevance. If the evidence goes to an issue in the case and tends to prove one of the elements of the offence then it is relevant and admissible.

3 ABOLITION OF COMMON LAW RULES

- 3.1 Section 99(1) abolishes the common law rules governing the admissibility of evidence of bad character.
- 3.2 The following rules are expressly preserved:
- Any rule of law under which, in criminal proceedings, evidence of reputation is admissible for the purpose of proving **good or bad** character, but only so far as it allows the court to treat such evidence as proving the matter concerned (section 99(2) and section 118(1));
 - Section 41 Youth Justice and Criminal Evidence Act 1999, that restricts evidence or cross-examination about the complainant's sexual history in trials for sexual offences (section 112(3)(b)). This means that in a trial for a sexual offence, to adduce evidence of a complainant's previous sexual behaviour which is also bad character evidence, both tests will have to be satisfied.

4 BAD CHARACTER OF NON-DEFENDANTS

The old law

- 4.1 Section 41 Youth Justice and Criminal Evidence Act 1999, restricted evidence or cross-examination about the complainant's sexual history in trials for sexual offences.
- 4.2 In all other cases, under common law, the defence could adduce the previous convictions, discreditable conduct, bias, corruption or untruthfulness of a prosecution witness, provided that the evidence was relevant to the issue of credibility.
- 4.3 The purpose of admitting evidence of a witness's bad character was to test the credibility of a witness, and the court controlled cross-examination on the character of the witness where it was considered irrelevant, unduly offensive or vexatious. The principles governing cross-examination were endorsed by Sankey LJ in *Hobbs v Tinling and Co Ltd (1929) 2 KB1*. Sankey LJ stated that:
- Questions were only proper when the answers would seriously impair the credibility of the witness;
 - Questions were improper if they related to matters so remote in time or of such a nature that if true they could not seriously impair the credibility of the witness;
 - Questions were improper if there was a substantial disproportion between the importance of the imputation against the witness's character and the importance of the issue to be decided.
- 4.4 A conviction could be proved against a witness who was cross-examined about a previous conviction but denied or did not admit it or refused to answer: section 6 Criminal Procedure Act 1865. Proof of a conviction in the UK was by production of a certificate of conviction together with proof that the person named in the certificate was the witness whose conviction was to be proved: section 73 Police and Criminal Evidence Act 1984 (see also **1.4 Evidence of Previous Convictions**).
- 4.5 The major restriction on the defence adducing evidence of the bad character of a prosecution witness was section 1(f)(ii) Criminal Evidence Act 1898. The effect of this section was to allow cross-examination of a defendant about D's bad character when the nature or conduct of the defence had cast imputations on the character of prosecution witnesses and deceased victims.
- 4.6 In deciding whether the defendant had lost their shield and was subject to cross-examination about D's own bad character, judges had to decide whether the defence had cast imputations on the character of the witness, or whether their questioning or evidence was no more than an emphatic denial.
- 4.7 The **Law Commission Report** suggested that there had been inconsistent prosecution practice in relation to the introduction of evidence of bad character of prosecution witnesses. It appeared that there had been a growing practice of the prosecution adducing the previous convictions of a prosecution witness as part of the prosecution case. The purpose of such disclosure was to minimise the impact of the defence extracting the bad character of prosecution witnesses by cross-examination.
- 4.8 The result of this practice had been that some defendants benefited from the introduction of evidence of the bad character of prosecution witnesses without putting their own character in issue.

- 4.9 This practice also placed the character of prosecution witnesses in issue unnecessarily, as it assumed that the defence wished to pursue certain issues when this was not the case.

The new law: Section 100 of the Criminal Justice Act 2003

- 4.10 Section 100 introduces new criteria for the admissibility of the evidence of bad character of non-defendants. Courts will be required to ensure that evidence of bad character of a non-defendant witness meets the statutory criteria for admissibility. Other than evidence admitted by agreement, the leave of the court must be obtained (section 100(4)).
- 4.11 Non-defendants are not defined in the Act but the term should include victims, whether or not they give evidence; the deceased in cases of homicide; witnesses; police officers who have been involved in the case; third parties who are not witnesses in the case; and defence witnesses.
- 4.12 Section 100(1) provides that:
In criminal proceedings evidence of the bad character of a person other than the defendant is admissible if, and only if:
- (a) It is important explanatory evidence;
 - (b) It has substantial probative value in relation to a matter which
 - (i) is a matter in issue in the proceedings, and
 - (ii) is of substantial importance in the context of the case as a whole, or
 - (iii) all parties to the proceedings agree to the evidence being admissible.

Important explanatory evidence

- 4.13 For the purposes of section 100(1)(a) evidence is important explanatory evidence if:
- (a) Without it the court or jury would find it impossible or difficult to properly understand other evidence in the case; and
 - (b) Its value for understanding the case as a whole is substantial (section 100(2)).
- 4.14 The term important explanatory evidence imports the concept of background evidence. Common law recognised that evidence of bad character was admissible outside the similar fact rule as background evidence. An example of this is *R v Sidhu* (1994) 98 Cr App Rep 59. D was charged in relation to conspiracy to possess explosives in England. A video showing D apparently leading activities of a group of armed rebels in Pakistan was admitted as evidence of continual background of history to the offence. In *R v Stevens* [1995] Crim LR 649 – evidence of previous occasions on which D had assaulted V was admitted as part of the background to a charge of murder.
- 4.15 Prosecutors should note that evidence under this section must be such that the fact-finders would find it impossible or difficult to understand other evidence in the case. Moreover, the explanatory evidence must give the fact-finders some substantial assistance in understanding the case as a whole. The word substantial is not defined in the Act but this is likely to mean more than minor or trivial (see the **Law Commission's Report** paragraph 7.17 and *R v Egan* [1992] 4 AER 470, although this case was concerned with 'substantial' in terms of substantial impairment of mental responsibility rather than bad character). If the evidence is more than minor or more than trivial, it will be admissible if it assists the court to understand the case as a whole.

Substantial probative value

- 4.16 In order to adduce evidence under subsection 100(1)(b) the court must be satisfied that the evidence is of substantial probative value.
- 4.17 In assessing the probative value of evidence for the purposes of subsection (1)(b) the court must have regard to the following factors:
- (i) The nature and number of the events, or other things, to which the evidence relates;
 - (ii) When those things or events are alleged to have happened or existed;
 - (iii) The nature and extent of the similarities and the dissimilarities between each of the alleged instances of misconduct, where the evidence is of a person's misconduct and it suggests it has probative value by reason of similarity between that misconduct and other alleged misconduct;
 - (iv) The extent to which the evidence shows, or tends to show, that the same person was responsible each time where the evidence is of a person's misconduct and it is suggested that that person is also responsible for the misconduct charged and the identity of the person responsible for the misconduct charged is disputed;
 - (v) Any other factors the court considers relevant.
- 4.18 The relationship between the first two factors (nature and number of events and when those things or events are alleged to have taken place) and the probative value are relatively straightforward. It is anticipated that these factors will be the most relevant and frequently applied when determining defence applications to adduce the bad character of prosecution witnesses.
- 4.19 The credibility of a prosecution witness may have substantial probative value in relation to a matter in the proceedings and is of substantial importance in the context of the case as a whole. Recent convictions for dishonesty are more likely to be of substantial probative value than one older conviction for dangerous driving, where the credibility of a prosecution witness may have substantial probative value in relation to a matter in the proceedings and is of substantial importance in the context of the case as a whole, eg, in a case of theft where the defence alleges the witness gave the item to the defendant, or taking without consent and the defendant alleges that the witness allowed the defendant to take the car.
- 4.20 It is important that previous convictions between non-defendants and defendants are treated in the same way, ie, that convictions which show a propensity to be untruthful should apply equally between witnesses and defendants, but bearing in mind the different standards set out in the 2003 Act, see paragraphs 7.36 – 7.38.
- 4.21 There is some overlap between the third and the fourth factors. The third factor may be relevant when the defendant alleges that another person is responsible for the offence(s) with which they are charged and the defendant seeks to rely on similar fact evidence. It should also be considered where the prosecution needs to prove the role of an accomplice, for example, where a burglar has a known modus operandi and those hallmarks are also evident in the burglary with which the defendant is charged, and the accomplice has not been charged.
- 4.22 The fourth factor will be applicable where the defendant wishes to show that another person was responsible and adduces evidence of that person's previous misconduct or conviction. There will usually be some evidence, most likely similar fact evidence, to link these offences together and to show that the same person committed all these offences.

All parties agree to the evidence being admissible

- 4.23 It was suggested (*Blackstone 2004*) that the reason for allowing evidence of the bad character of non-defendants to be adduced by agreement is not to protect the reputations or feelings of third parties, but to avoid distracting the court from the issues in the case.
- 4.24 Prosecutors should not consent to the inclusion of evidence of a non-defendant's bad character solely to save time, or in exchange for defence consent to adduce evidence of the defendant's bad character. Different tests of admissibility apply for defendants and non-defendants, and the test of admissibility for non-defendants is higher than for defendants.

5 PRACTICE AND PROCEDURE

Procedure

- 5.1 Where the prosecution is aware that a prosecution witness has previous convictions or cautions, that information should be disclosed to the defence according to the principles set out in the CPS legal guidance on disclosure. (See *CPS (2005) Prosecution Team, Disclosure Manual*.)
- 5.2 At present, all previous convictions except minor traffic offences must be disclosed at the primary disclosure stage – irrespective of their age or whether they are regarded as spent under section 7(2) Rehabilitation of Offenders Act 1974.
- 5.3 The defence should be reminded that the convictions may be used only for the purposes of the case, and that use for any other purpose may result in a contempt of court. The confidentiality of information disclosed under the Criminal Procedure and Investigations Act (CPIA) 1996 is protected by sections 17 and 18 of that Act.
- 5.4 The CPS is also under a duty to disclose to the defence information about police officers, who are witnesses, that might undermine the prosecution case, or might reasonably assist the defence. It does not matter whether the officers are called as witnesses, or their statements are read to the court or are unused material.
- 5.5 The effect of section 100 means that witnesses will be protected from wide-ranging and humiliating attacks on their credibility. It also ensures that clearly relevant evidence is admissible. Leave of the court is required before the evidence can be admissible and, accordingly, it seems clear that the cross-examiner cannot put allegations to the witness that they are of bad character without first seeking leave to do so, if agreement has not been given by all parties.

Making the application

- 5.6 The Criminal Procedure Rules 2005, Part 35 deals with the procedure of adducing a non-defendant's bad character in the crown court and the magistrates' court.
- 5.7 A party who seeks to introduce evidence of a non-defendant witness, or who wants to cross-examine a witness with a view to eliciting that evidence, must apply in a prescribed form. The application must be received by the relevant court and all other parties to the proceedings no more than fourteen days after the prosecutor has complied with, or purported to comply with, *inter alia*, section 3 of the CPIA; or has disclosed the previous convictions of the non-defendant; or as soon as reasonably practicable where the application concerns a witness for the defendant.

- 5.8 The details required in the prescribed form are:
- Details of the applicant;
 - Details of the case including the charges;
 - The particulars of the bad character evidence including how it is to be adduced or elicited in the proceedings, including the name of the relevant non-defendant and all other witnesses;
 - The grounds for the admission of such evidence under section 100;
 - An application for an extension of time, if appropriate.
- 5.9 On receipt of the form a party may oppose the application by giving notice in writing to the appropriate officer of the court, and all other parties, not more than fourteen days after receiving the application.
- 5.10 The court may allow the application to be made orally or in a different format to the prescribed form. It may also shorten or extend the time limits (even where they have expired) if it is in the interests of justice to do so.
- 5.11 Different time limits apply for proceedings in the Court of Appeal (see the Criminal Procedure Rules, Part 68).
- 5.12 Section 100 not only applies to a defendant wanting to adduce bad character of a prosecution witness, it also applies to the prosecution wanting to adduce bad character evidence of a defence witness. It is likely that the prosecution will not know the names of defence witnesses until they give evidence at trial, in which case the Criminal Procedure Rules allow for the prosecution to make the application at that time.
- 5.13 Prosecutors should be mindful of the rights and interests of witnesses and third parties, and the need to protect them from embarrassing public disclosure of their bad character where the enhanced relevance test is not met.
- 5.14 Prosecutors are also reminded of their duty not to refer to spent convictions without leave of the court. The Consolidated Criminal Practice Direction, 8th July 2002 (as amended), Part 1, 1.6 Spent Convictions, recommends that both court and advocates should give effect to the spirit of the Rehabilitation of Offenders Act by never referring to a spent conviction when such reference can reasonably be avoided (6.4). No one should refer in open court to a spent conviction without the authority of the judge, whose authority should not be given unless the interests of justice so require (6.6).
- 5.15 Prosecutors should only agree to evidence of the bad character of a prosecution witness being admissible when they are satisfied that bad character evidence is important explanatory evidence; that the evidence has substantial probative value in relation to a matter which is in issue in the proceedings and is of substantial importance in the context of the case as a whole; or it is in the interests of justice.
- 5.16 Since the introduction of the bad character provisions, case law has developed around the observance of the notice requirements set out in the Criminal Procedure Rules 2005. Rule 35 sets out a clear framework and there is an obligation on both the prosecution and defence to comply with both the letter and the spirit of the rule. What then is the procedure where the prosecution submits notice out of time?

- 5.17 In all cases the court has a discretion to allow an application out of time, or to extend relevant time limits, or accept verbal notice (See *Lawson* [2006] EWCA Crim 2572. Following *R (Robinson) v Sutton Coldfield Magistrates' Court* [2006] EWHC Admin 307 the courts must give consideration to two main points when exercising their discretion:
- The reasons for the failure to comply with the Criminal Procedure Rules, and;
 - Whether the defendant's position will, or has been, prejudiced by the failure to observe the time limits.
- 5.18 Subsequent case law suggests that the Court of Appeal will only interfere with the court's discretion where the defendant can demonstrate actual or potential prejudice (*R v Delay* [2006] EWCA Crim 1110, *R v M* [2006] All ER (D) 164 (May), *S v DPP* [2006] EWHC 1207 (Admin)). This approach should be viewed in light of the court's new case management powers, which, inter alia, require that cases be disposed of in a timely manner, and can impose penalties for failure to comply with the court's directions. The intention is to avoid cases being decided on a technicality where they do not result in prejudice or injustice, rather each case should be decided in a fair and timely manner on its merits. The Criminal Procedure Rules reflect the ruling of Lord Justice Steyn in *Soneji* [2005] UKHL 49 who indicated that even where there is a risk of prejudice to the accused it may be decisively outweighed by the countervailing public interest in not allowing a convicted offender to escape confiscation. This would include not allowing offenders to avoid justice because of a procedural technicality, especially if it was a bona fide error.

6 BAD CHARACTER OF THE ACCUSED

The previous law

- 6.1 The 2003 Act makes a radical change to the law relating to the circumstances in which evidence of previous misconduct of a defendant may be admitted in criminal proceedings. To try and understand the rationale behind the provisions of the 2003 Act it is helpful to highlight the previous law, since the form of the new provisions has been dictated by its defects. The previous law was an exclusionary rule. It provided that the prosecution could not, in general, adduce evidence of a defendant's bad character (other than that relating to the offence charged), nor of the defendant's propensity to act in a particular way even if relevant. This was an exception from the general rule that all relevant evidence was admissible. This was not a justification for the exclusion of evidence of prior wrongdoing in all cases and over time important exceptions developed at common law and statute.
- 6.2 The exceptions to the exclusionary rule fell into three categories: those related to evidence that was adduced by the prosecution against the defendant; those related to evidence which a defendant could adduce; and those related to evidence which could have been adduced in cross-examination of a defendant.

Exceptions to the rule of exclusion

- 6.3 Evidence that disclosed previous misconduct which was an ingredient of an offence was not subject to the exclusionary rule (eg, driving while disqualified).
- 6.4 The main exception to the exclusionary rule was the similar fact rule (somewhat misleading), which permitted the admission of evidence of the defendant's misconduct in order to show a propensity to commit offences of the type charged.

The leading authority was *DPP v P* [1991] 2 AC 447. The test of admissibility was whether the probative value of the evidence to be admitted was sufficiently great to make it just to admit it, notwithstanding that it was prejudicial to the accused in tending to show that D was guilty of another crime.

- 6.5 The defendant could, of course, adduce evidence of D's own previous misconduct without restriction. D could have also adduced evidence of a co-defendant's bad character if it was relevant to D's defence.
- 6.6 Section 1 of the Criminal Evidence Act 1898 prevented a defendant who gave evidence from being cross-examined about D's character unless one of the conditions specified in paragraph (f) was satisfied. In addition to being admissible to prove the offence charged, the conditions were that the defendant had tried to establish D's own good character or made imputations on the character of the prosecutor or witnesses for the prosecution or the deceased victim of crime, or that D had given evidence against a co-defendant.
- 6.7 Some of the principal defects of the previous law were:
- The test for admissibility of the similar fact rule was not clear on how it was to be applied;
 - It was not clear what constituted background evidence which may be very prejudicial;
 - Statutory rules relating to evidence adduced in cross-examination were supposed to have the effect that only bad character evidence which went to credibility was admitted, but the courts did admit evidence which did not relate to credibility;
 - The fear of the defendant losing D's shield had no effect where D did not testify or had no criminal record. This meant that tactical decisions played an important part in the defence and distorted the process;
 - There was no power to prevent the record of a co-defendant being admitted where the defendant had undermined the defence of a co-defendant, which could lead to unfairness.

The statutory scheme (section 101)

- 6.8 The 2003 Act introduces a new approach towards the admission of a defendant's bad character that starts from the position that evidence that is relevant to the case should be admissible. The general exclusionary rule against the admission of previous misconduct and other bad character is abolished and replaced with provision that evidence is admissible when relevant to the issues in the case, and it sets out clearly when that will be so.
- 6.9 Section 101 of the 2003 Act is the main provision permitting the admissibility of evidence of a defendant's bad character. There are seven circumstances, set out in section 101(1) (a) to (g). There is a staged approach to the admissibility of bad character evidence. First, a defendant's bad character is not admissible unless one of the conditions in subsection (1) applies. Second, if the evidence does fall within section 101(1) (a) (b) (c) (e) and (f), the evidence is admissible and where the evidence falls with section 101 (d) or (g), it is admissible unless, on application by a defendant, it has such an adverse effect on the fairness of the proceedings that the court ought not to admit it.

- 6.10 It is useful setting out in full section 101, which is the principal provision permitting the admissibility of evidence of a defendant's bad character. Section 101 provides:
- (1) In criminal proceedings evidence of the defendant's bad character is admissible if, but only if:
 - (a) All parties to the proceedings agree to the evidence being admissible,
 - (b) The evidence is adduced by the defendant himself or is given in answer to a question asked by him in cross-examination and intended to elicit it,
 - (c) It is important explanatory evidence,
 - (d) **It is relevant to an important matter in issue between the defendant and the prosecution,**
 - (e) It has substantial probative value in relation to an important matter in issue between the defendant and a co-defendant,
 - (f) It is evidence to correct a false impression given by the defendant, or
 - (g) **The defendant has made an attack on another person's character.**
 - (2) Sections 102 to 106 contain provision supplementing subsection (1).
 - (3) The court must not admit evidence under subsection (1)(d) or (g) if, on an application by the defendant to exclude it, it appears to the court that the admission of the evidence would have such an adverse effect on the fairness of the proceedings that the court ought not to admit it.
 - (4) On an application to exclude evidence under subsection (3) the court must have regard to, in particular, the length of time between the matters to which that evidence relates and the matters which form the subject of the offence charged.

Applications by defence to exclude bad character evidence (section 101(3))

- 6.11 The defence can apply to have the evidence excluded under subsection (d) and (g) where the evidence is relevant to an issue in the case between the prosecution and the defendant or has become admissible because of the defendant's attack on another person.
- 6.12 In these two circumstances the court must not admit such evidence if it appears that its admission would have such an adverse effect on the fairness of the proceedings that it ought not to admit it. In applying the test the court is directed to take account, in particular, of the amount of time that has elapsed since the previous events and the current charge.
- 6.13 The test in section 101(3) is designed to reflect the existing position under section 78 of PACE. Under this section the judge or magistrates assess the probative value of the evidence to an issue in the case and the prejudicial effect of admitting it, and exclude the evidence where it would be unfair to admit it.

- 6.14 The Act does not specify any other factors (apart from section 101(4)) that the court should take into account. However, other factors that the court may consider could include:
- The nature of the defence or possible defence, such as mistake, innocent association and accident;
 - Similarities or dissimilarities of the previous misconduct and the offence charged;
 - The nature and number of the events of previous misconduct, although one previous conviction can be sufficient to show propensity to commit a crime and to be untruthful;
 - Other evidence against the defendant showing that D committed the offence. The stronger the evidence against a defendant the less likely that the court would exclude it. Where there is no other evidence against a defendant, it would not be fair for a court to admit D's evidence of bad character.
- 6.15 Note that the test to be applied under section 101(3) is stricter than that under section 78 of PACE. Under this section the court **may** refuse to admit the evidence, whereas under section 101(3) the court **must not** admit such evidence if it would have such an adverse effect on the fairness of the proceedings.
- 6.16 The court can only exclude evidence of bad character on the application of the defendant and not of its own motion after the prosecution has served notice on the defendant and the court that it intends to adduce the defendant's bad character evidence. This does not mean that the prosecution must in every case under section 101(1) (d) and (g) serve a notice, especially when the court is to have regard to the length of time since the previous misconduct and it is clear that an old conviction would not be admitted in evidence.
- 6.17 Therefore, where evidence is admissible under subsection (1)(d) or (g), the prosecution should always serve a notice of intention to adduce bad character evidence unless it is highly likely that the court would not admit the evidence because of the adverse effect on the fairness of the proceedings.
- 6.18 Given how section 101 is to operate, if the prosecution gives notice to the defence to adduce such evidence, it is likely that the defence will, in almost every case, apply to exclude it.

Does section 78 apply to the other circumstances set out in section 101(1)?

- 6.19 The issue is whether the defence can rely on section 78 of PACE in relation to the other circumstances in section 101(1), namely subsections (a), (b), (c), (e) and (f). The argument in favour of the continued application of section 78 is section 112(3)(c) which provides that:

Nothing in this Chapter affects the exclusion of evidence on the grounds other than the fact that it is evidence of a person's bad character.'

- 6.20 The starting point under the Act when dealing with a defendant's bad character is that such evidence is admissible if one of the seven circumstances set out in section 101(1) are met. Although there is a leave requirement for non-defendant's bad character to be adduced, no such leave is required as a pre-requisite in relation to defendants. This demonstrates that the admissibility is to be considered the norm rather than the exception.

- 6.21 Following the case of *Highton, Van Nguyen and Carp* [2005] EWCA Crim 1985, section 78 PACE remains available as a means of excluding evidence. Its application, however, is limited.
- 6.22 It is not logical for section 78 to apply in the circumstances (a), (b) and (e). Clearly section 78 should not apply to (a) and (b) where all the parties agree and the defendant adduces evidence of D's own bad character. Evidence under (e) can only be adduced by a co-defendant and not by the prosecution. Under (c) and (f) if the court finds that the evidence reaches the required standard, it is unlikely to exclude it under section 78. Given the meaning of important explanatory evidence in (c), (see 7.5 – 7.9), it would be nonsense for the court to say that, 'without the evidence the court would find it impossible or difficult to properly understand other evidence, and its value for understanding the case as a whole is substantial', and then exclude it because it was fair to do so. Under (f) evidence can only be admitted to the extent that it will correct a false impression. It would defeat the purpose behind (f) if the court then excluded the evidence. Evidence admitted under (d) and (g) are already subject to the 'fairness' and 'unjust' tests, which arguably provide more protection for the defendant than section 78 (*Hanson*, paragraph 10).

7 THE SEVEN CIRCUMSTANCES WHERE EVIDENCE OF A DEFENDANT'S BAD CHARACTER IS ADMISSIBLE

- 7.1 Sections 102 and 106 of the 2003 Act expand on five of the seven circumstances where evidence of the defendant's bad character is admissible. Section 101 (a) and (b) are not further defined in the Act.

Agreement of the parties (section 101(a))

- 7.2 It makes no sense to exclude evidence if all parties agree that it should be admitted. Therefore, in these circumstances the evidence of bad character is admissible.

Waiver by the defendant (section 101(b))

- 7.3 A defendant's bad character is admissible if it is adduced by themselves, or is given in answer to a question asked by the defendant in cross-examination and intended to elicit it. This allows a defendant to adduce their own bad character where they feel it would be helpful to do so. There may be circumstances where a defendant chooses to do this. Examples may include where a defendant raises an alibi that they were in prison at the time. If the bad character is relatively innocuous in the context of the trial, the defendant might prefer to put it in evidence rather than leave it to the jury to speculate about it. The defendant may also consider that their own character, while bad, is less likely to indicate guilt than that of another person who the defendant alleges is a criminal.
- 7.4 The points to note about section 101(b) are:
- There is no statutory discretion to exclude evidence;
 - A defendant may lead evidence of their bad character, if they choose, and whether or not the co-defendant agrees;
 - Evidence is inadmissible if the defendant did not intend to elicit the evidence, such as an unsolicited disclosure by a witness of a defendant's bad character or evidence of bad character elicited in cross-examination due to a carelessly framed question.

Once evidence has been admitted under one of the gateways, it can be used for any purpose that is relevant to an issue in the case in which it was admitted. It can, therefore, be used to demonstrate propensity or credibility depending on the facts of the case. (*Highton, Van Nguyen and Carp* [2005] EWCA Crim 1985; [2006] 1 Cr App R 7 and *Edward and Rowlands* [2006] 2 Cr App R 4.)

Important explanatory evidence (section 101(c))

- 7.5 Bad character evidence is admissible if it is important explanatory evidence. Section 102 defines 'important explanatory evidence' as without the evidence, the court or jury would find it impossible or difficult to understand properly other evidence in the case, and its value for understanding the case as a whole is substantial. This is the same definition as important explanatory evidence in section 100(2) when dealing with non-defendant's bad character, see 4.13 – 4.15. The test laid down in *Beverly* [2006] EWCA Crim 1287 to assist the court, asks:
- are the jury going to be placed at a disadvantage in deciding the case without such evidence.
- 7.6 If the evidence is more than minor or more than trivial, it will be admissible if it assists the court to understand the case as a whole. For example, evidence of violence by D on a different occasion than that charged, evidence that D prevailed upon V, his girlfriend, to have an abortion, and evidence about D's knowledge of the effect of violence upon his girlfriend given that she had had a stroke, are all part of the important explanatory evidence to the relationship (see *R v Underwood* [1999] Crim LR 227).
- 7.7 Evidence that is comprehensible without additional explanatory evidence is inadmissible. In *R v Dolan* [2003] 1 Cr App R 281, D was charged with murder – probably by shaking his infant son – the prosecution adduced evidence of his violence, during the course of a previous relationship, towards inanimate objects. The Court of Appeal quashed the conviction because the evidence should not have been admitted. It could not be said that the case was incomplete or incomprehensible without the admission of the evidence.
- 7.8 The prosecution does not require leave before evidence can be admitted, but notice will have to be given by the prosecution to adduce such evidence. However, there may be arguments on whether the evidence meets the threshold test. If the evidence is admitted, it will be for the jury to decide how **important** and **substantial** it is.
- 7.9 At common law 'background evidence' was subject to section 78 PACE (see *R v M (T)* [2000] 1 WLR 421. However, it would seem that section 78 does not apply to important explanatory evidence because this is necessary to a proper understanding of the case. It does not depend on the evidence as probative because, strictly speaking, it does not prove an issue relating to guilt, but sets other evidence in context, notwithstanding any prejudicial potential of the evidence.

Relevant to an important matter in issue between the defendant and the prosecution (section 101(1)(d))

- 7.10 This subsection effects a fundamental and radical change to the previous law. It replaces and abolishes what was the common law scheme for adducing evidence of bad character in chief as stated in *DPP v P* [1991] 2 AC 447 and the statutory provisions for adducing evidence to show that the defendant should not be believed. The intention behind this is that evidence of previous misconduct that has relevance to an issue in the case should be admitted to give courts and juries the fullest possible relevant information for them to determine guilt or innocence.
- 7.11 At common law the general rule was that the prosecution could not adduce evidence tending to show that the accused was guilty of criminal acts other than those charged against D, or that D had a propensity to commit crimes of the kind charged. It was clear that the test was not just relevance, but that the probative value of that evidence was so high that its probative value outweighed its prejudicial effect.
- 7.12 Facts in issue are those necessary by law to establish the offence or defence to the charge. Relevant means if it tends, as a matter of logic, to make the fact in issue more or less likely. Facts relevant to an issue are facts which tend, either directly or indirectly, to prove or disprove a fact in issue (eg, a fact in issue, propensity to commit offences, or credibility).
- 7.13 Subsection (1)(d) sweeps away the test in *DPP v P* and depends only on relevance to 'an important matter in issue' (meaning, according to section 112, 'a matter of substantial importance in the context of the case as a whole'). As in 4.15, 'substantial' means more than minor or trivial. If the evidence is relevant to an issue in the case, it passes the threshold for admissibility. It is important to note that nothing requires the evidence to have any 'substantial probative value'.
- 7.14 Section 101 has to be read in conjunction with section 103. In deciding what is a matter in issue, section 103 provides that a matter in issue **includes:**
- (a) Whether a defendant has a propensity to commit crimes of the kind with which D is charged, except where D is having such a propensity makes it no more likely that D is guilty of the offence; and
 - (b) Whether a defendant has a propensity to be untruthful, except where it is not suggested that the defendant's case is untruthful in any respect.

When deciding whether to admit evidence of bad character, the judge must always consider the strength of the prosecution case. If there is no, or very little, evidence against the defendant, it is unlikely to be just to admit D's previous convictions, whatever they are. Evidence of bad character cannot be used to bolster a weak case, or to prejudice the minds of the jury against the defendant (*Hanson* [2005] 1 WLR 3169).

Propensity to commit crimes

- 7.15 As section 103(1)(a) highlights, this includes evidence that shows that a defendant has a propensity to commit offences 'of the kind with which he is charged'. This means that if a defendant is on trial for grievous bodily harm, a history of violent behaviour could be admissible to show the defendant's propensity to use violence.

- 7.16 Section 103(1) ends the common law rule preventing the use of propensity evidence as proof of guilt. In fact, at common law, evidence of propensity was admitted, along with other similar facts, if it was sufficiently cogent (eg, *R v Straffen* [1952] QB 911). However, 'mere' propensity – evidence showing that the defendant was 'the sort of person who might' rather than 'the sort of person who did' – was clearly inadmissible. In our view this may now be admissible within section 103(1)(a) because section 103 does not mention propensity as a presumptive 'important' issue.
- 7.17 The proviso to section 103(1)(a) 'except where his having such a propensity makes it no more likely that he is guilty of the offence' means where there is no dispute about the facts of the case and the question is, whether those facts constitute an offence, eg, on a charge of possession of drugs whether a particular drug was controlled or not.
- 7.18 D is charged with assaulting his wife. He has a history of violence both in relation to his wife and others. He claims that on one occasion in issue, she received her injuries falling down the stairs. In this case, D's previous convictions for violence are admissible (subject to the discretion to exclude) to show his propensity to commit offences of the kind with which he is charged and, subject to the facts, any acquittals would be admissible too (as the definition of bad character also includes acquittals).
- 7.19 In another example, D was a sports coach who was acquitted of rape. D denied any sexual contact with a female pupil but a plea of guilty to under-age sex with another female young pupil was concealed from the jury. Would D's conduct in respect of the under-age sex have made it more likely that D committed rape? Under section 103(1), D's conduct would show a propensity to have sex with female pupils, especially bearing in mind that D denied any sexual contact with the girl who had complained of rape.
- 7.20 Where propensity to commit offences is in issue, section 103(2) provides that D's propensity may be established, without prejudice to any other way of doing so, by evidence that the defendant has been convicted of an offence of the same description as the one with which D is charged or an offence of the same category as prescribed by the Secretary of State.
- 7.21 Offences of the same description are offences where the statement of offence in a written charge or indictment is in the same terms and are offences in the same category as prescribed (subsection (4)). It is not necessary for the earlier conviction to be described in identical terms. What matters is that the facts of the earlier conviction would be sufficient to support an offence charged in the same terms, for example, on a charge of burglary, a previous conviction for theft committed on premises while the defendant was a trespasser, would be in the same terms as the burglary.
- 7.22 Section 103 is, therefore, not just limited to the same offences (eg, charged with rape and has a previous conviction for rape) but also include offences of the same kind (eg, charged with assault by penetration and has a previous conviction for sexual touching).

- 7.23 Under section 103(4)(b), the Secretary of State may prescribe categories of offences which are of the 'same type' for use as an indicator that a defendant has a propensity to commit offences of a certain type. The Secretary of State has prescribed two categories, theft offences and sexual offences on persons under 16 (The Criminal Justice Act 2003 (Categories of Offences) Order 2004). This means that where a defendant has previous convictions for an offence in one of the categories, theft or sexual offences on persons under the age of 16 years, then an offence charged in the same category creates a strong presumption that the previous conviction should be admitted. However, the defence will still be able to argue that such evidence should not be admitted because it would be unfair to do so, and the questions established in *Hanson* must still be asked, see 7.27.
- 7.24 The common theme of the offences listed in the theft category is that they all relate directly to stealing property that belongs to others. The category of sexual offences on persons under the age of 16 years covers offences which involve sexual touching, penetration and sexual activity, and which were committed in relation to children and young people under the legal age of consent.
- 7.25 The reason for just these two categories is that they cover areas of offending that cause the public particular concern, and there is a strong risk of reoffending.
- 7.26 It is important to note that the absence of categories for other types of offending will not prevent previous convictions from being admitted if they demonstrate a propensity to commit offences of the same kind. Evidence of such convictions will be admissible under the main provisions of the Act, provided those convictions are relevant and probative. The categories of offences only support the Act's main provisions. For example, a person charged with the rape of a child may have a history of sexual offences (such as child pornography or grooming), even though those previous convictions would not appear within the same category as the offence charged.

Propensity to commit offences of the kind charged

- 7.27 A large body of case law has developed about the type of cases that can be used to show a propensity to commit offences of the type charged. Following *Hanson*, three questions should initially be asked:
- (1) Does the history of conviction(s) establish a propensity to commit offences of the kind charged?
 - (2) Does that propensity make it more likely that the defendant committed the offence charged?
 - (3) Is it unjust to rely on the conviction(s) of the same description or category; and in any event, will the proceedings be unfair if they are admitted?"
- 7.28 *Hanson* went on to say at paragraph 4:

The starting point should be for judges and practitioners to bear in mind that Parliament's purpose in the legislation, as we divine it from the terms of the Act, was to assist in the evidence based conviction of the guilty, without putting those who are not guilty at risk of conviction by prejudice. It is accordingly to be hoped that prosecution applications to adduce such evidence will not be made routinely, simply because a defendant has previous convictions, but will be based on the particular circumstances of each case.

- 7.29 Evidence of bad character must be of the kind charged. Bad character no longer has to reflect the common law rule of striking similarity (*Hanson*). The judgment in *Brima* [2006] EWCA Crim 408 showed that evidence which would not have passed the former common law test, may well satisfy the new statutory criteria under section 101(1)(d).

In *Brima* the defendant was charged with murder by stabbing. The prosecution brought evidence of previous less serious convictions involving the use of a knife to bolster an otherwise less than convincing case.

The first conviction in November 2002 was assault occasioning actual bodily harm. After an altercation with the victim earlier the same day, the defendant stabbed him in the leg with a knife. This case had certain other similarities with the present offence, in which the stabbing followed an altercation between the deceased and a friend of the defendant.

The second conviction in April 2003 was for robbery. The facts were that the defendant had held a knife to the throat of the victim and demanded his training shoes and top, which the victim handed over.

The prosecution contended that the defendant had a propensity to commit offences of violence using knives either by inflicting or threatening injury.

Royce J in *Brima* stated, 'In our judgement, the conclusion as to the capacity of these convictions to establish the requisite propensity that was reached by the judge was correct.' He also concluded in answer to the question: 'Does the propensity make it more likely that the defendant committed the offence charged?' that '...bearing in mind the proximity of these matters and nature it does.' Thirdly: 'Is it unjust to rely on these matters and in any event will the proceedings be unfair if they are admitted?' Royce J came to the conclusion that it would not be unfair to admit the conviction. 'We do not consider that the [trial] judge was plainly wrong. We consider that he was plainly right.'

- 7.30 Propensity should not be viewed too narrowly, nor should it be viewed too widely. In *Heffernan* [2006] EWCA Crim 2033 Gage LJ stated 'Here the criticism that the judge should have directed the jury that they should consider whether the conviction established a propensity to commit an offence in exactly the same way as the earlier offence in our judgement is too narrow'. In *Tully et al* [2006] 16 March (CA) [2006] EWCA Crim 2270 the defendants were charged with robbery and the judge admitted all other previous convictions for dishonesty offences (twenty-three for the first defendant and twenty-six for the second), rather than just the five for robbery, despite the prosecution applying to admit the robbery offences only. The judge's approach in this case was criticised although the conviction was upheld.

Nature of previous offending

- 7.31 The nature of the previous offending should not be a bar to its inclusion. In *Smith* [2006] EWCA Crim 1355 the defendant had a history of gaining entry to older people's houses by tricking them and then stealing or attempting to steal from them. The judge admitted the defendant's previous convictions, and the prosecution cross-examined the defendant on the details of these previous convictions. The purpose of this was to highlight the similarities between the previous convictions and the current offence charged. On appeal the defendant tried unsuccessfully to argue that the judge had admitted prejudicial details of the previous convictions and also that the prosecution had wrongly cross-examined D as to the details, so as to divert attention from the principal issue in the case. In dismissing the appeal, the Court of Appeal held that while a balance should be struck, it could never be ruled that because the previous offences were unpleasant, the detail could not be admitted.

Relevant date of previous offending

- 7.32 Where there is a considerable time lapse between the commission of an offence and the subsequent trial and conviction, *Hanson* states that the date the offence was committed should be the relevant date.
- 7.33 The age of an offence or conviction will not preclude it from being admissible if it goes to show a propensity, however, if there are long lapses in a pattern of offending, the older the case the less weight it will carry. In the case of *Murphy* [2006] EWCA Crim 3408 it was established that a single conviction, which was twenty-eight years old, did not show a propensity even though there were clear similarities with the current charge. Each case must be considered on its merits.
- 7.34 In some cases the previous conviction may relate to an offence committed after the current offence charged. This will not in itself prevent it from being admitted, even if it is the only other offence going to show a propensity. See the case of *Adenusi* at 2.2.

Propensity to be untruthful

- 7.35 The other matter in issue between the defendant and the prosecution identified is whether the defendant has a propensity to be untruthful (in other words, is not to be regarded as a credible witness) except where it is not suggested that the defendant's case is untruthful in any respect (section 103(1)(b)).
- 7.36 In the majority of contested cases, whether the defendant is telling the truth or whether the defence is true is itself an issue in the case. Under section 103(1)(b), propensity becomes admissible to prove untruthfulness, provided that the prosecution contends that the defendant's case is untruthful in some respect. This is intended to enable the admission of a limited range of evidence such as convictions for perjury or other dishonesty offences, eg, deception as opposed to the wider range of evidence where the defendant puts their character in issue by, for example, attacking another person's character.
- 7.37 The types of previous convictions, which may show a propensity to be untruthful, would include convictions for perjury, perverting the course of justice (depending on the facts of the case), fraud, deception and other dishonesty offences. Therefore, those previous convictions which are not generally to be treated as relevant to a general propensity to be untruthful are those convictions not involving any element of fraud, dishonesty or deception.

- 7.38 Whether a conviction shows a propensity to be untruthful should apply equally to non-defendants as well as defendants. For example, where the prosecution seek to routinely adduce a defendant's conviction for fraud on the basis that it says something important about a defendant's propensity to be untruthful, then this should also apply to a prosecution witness who has a conviction for fraud. Against this must be considered the differing standards in the Act itself in relation to the bad character evidence of defendants (relevant to an important matter in issue) and the higher threshold test of non-defendants (substantial probative value in relation to a matter which is of substantial importance in the context of the case as a whole).
- 7.39 If the defendant's explanation is so similar to that advanced by D on a previous occasion, then it is unlikely to be true. D is accused of robbing a mini-cab driver at knifepoint but claims that D entered the cab only after the robbery had taken place. Where this was an almost identical defence to the one D had raised in another, and very similar, robbery trial, this will be admissible (subject to the discretion to exclude) (*R v Reid* [1989] Crim LR 719 (CA (Crim Div))).
- 7.40 D aged 19 years is stopped at 2 am driving a car that has been reported stolen. D tells the police that the car belongs to a friend and that D has been given permission to borrow it. It is discovered D has three recent previous convictions for taking without consent (TWOC). There is a statutory defence to TWOC if the court is satisfied that the accused acted in the belief that D had lawful authority, or that the owner would have consented if they had known of the circumstances of the taking. Under section 103(1)(b) (propensity to be untruthful), D's previous convictions would clearly be relevant to whether D's version of events is true, and so evidence of D's bad character would be admissible.
- 7.41 Bad character will not be admissible under section 103(1)(b) where it is not suggested that the defendant's case is untruthful in any respect, for example, where the defendant and prosecution are agreed on the facts and the question is whether all the elements of the offence have been made out.
- 7.42 Prosecutors should note that a defendant would always be in jeopardy where they have given a previous unsuccessful defence (pleaded not guilty and was convicted). It is important, therefore, for prosecutors to obtain as much information about the defendant's bad character as possible, such as details of the offence, whether it was a plea of guilty or a conviction, and what was the nature of the defence.

For additional case law on propensity to be untruthful, see **1.3 Dealing with Bad Character at Interview**.

Safeguards

- 7.43 There is a safeguard under section 103(3) to the admission of evidence of propensity to commit a crime. Evidence of propensity should not be admitted if, because of the length of time since the conviction, or for any other reason, the court is satisfied it would be unjust to admit it. For example, D aged 50 years of age, is charged with burglary (he smashed a shop window and took an item on display); it would be very unlikely that the court would admit evidence of D's only previous conviction (a residential burglary), which happened thirty years previously.

- 7.44 The term 'any other reason' is not defined, but it is wide enough to include the nature and extent of the similarities and the dissimilarities between each of the instances of misconduct.
- 7.45 The effect of section 103(3) means that the court will not allow previous misconduct as evidence of propensity to commit a crime if it is unjust to do so. This is not defined but it means that the court would regard it as unjust if the admission of the bad character evidence has such an adverse effect on the fairness of the proceedings that the court ought not to admit it (the test in section 101(3)).
- 7.46 It should be noted that although section 103(3) only applies to a propensity to commit a crime, evidence of a propensity to be untruthful is subject to section 101(3).

**Matter in issue between the defendant and a co-defendant
(section 101(1)(e))**

- 7.47 Evidence of a defendant's bad character is admissible, if it has substantial probative value in relation to an important matter in issue between the defendant and the co-defendant. Once this threshold is met there is no power in the Act for the evidence to be excluded.
- 7.48 The power to admit bad character evidence in respect of an issue between the defendant and a co-defendant under section 101(1)(e) is restricted to evidence either adduced by the co-defendant, or which the co-defendant needs to elicit in cross-examination. Only a co-defendant, and not the prosecution, can adduce evidence of a defendant's bad character under this section (section 104(2)).
- 7.49 The test for admissibility is probative value in relation to an important matter in issue. As previously mentioned, the requirement of substantial is likely to be interpreted only as more than merely trivial, see 4.15.
- 7.50 Section 101(1)(e) is similar to the previous law and includes cases where the defence not only undermines the co-defendant's defence, but it is also inconsistent with that being run by the co-defendant (*Murdoch v Taylor* [1965] AC 574). This section would be applicable in a 'cut-throat' defence where two defendants are charged and their defence is that the other was responsible.
- 7.51 In considering matters in issue between the defendant and a co-defendant, where defendant A seeks to adduce defendant B's bad character on the grounds that B has a propensity to be untruthful, the evidence is only admissible if the nature and conduct of B's defence is such as to undermine that of A, ie, where the question of B's truthfulness is truly relevant to the case for A (section 104(1)).
- 7.52 Section 101(1)(e) allows the jury to take the evidence adduced about the co-defendant's bad character into account when deciding not only the defendant's propensity to be untruthful but whether the defendant committed the offence. The bad character evidence cannot, however, be used to prove guilt.
- 7.53 The leading case of *Lawson* provides a practical application of the new bad character provisions under section 101(1)(e).

Lawson appealed against a conviction for the manslaughter of Watts, who was mentally ill. Lawson had been one of a group of three co-defendants involved in pushing Watts into a lake after the victim had said he could not swim.

Co-defendant Quirk, who had pleaded guilty, actually pushed Watts into the water. But CCTV evidence showed Lawson making mock pushing actions behind Watts immediately before Quirk had pushed him in.

Lawson and the second co-defendant King denied they were secondary offenders in that they encouraged Quirk to push Watts into the water. They both sought to incriminate the other in their defence.

At the original trial King, who was acquitted, submitted, without notice, evidence of Lawson's bad character and cross-examined Lawson on it as part of a cut-throat defence.

Lawson, in his appeal, argued that King's evidence should not have been admitted because it was admitted late in the trial after Lawson had given his evidence-in-chief, and, therefore, Lawson had been unable to make an informed choice as to whether he should give evidence. Further he argued that the judge should not have admitted the conviction under section 101(1)(e) as it did not have substantial probative value regarding an important matter in issue. More importantly the evidence had not undermined the case against King as was necessary under section 104.

In dismissing the appeal the judge held that although King had adduced evidence without notice, and this was to be deplored, the judge had discretion to admit the evidence and his direction to the jury was entirely appropriate in directing them to use the evidence in relation to Lawson's untruthfulness. The Appeal Court determined that evidence as to who was telling the truth was an important issue and, therefore, the evidence was admissible under section 101(1)(e). The court also determined that the judge was correct in letting King cross-examine Lawson, and that Lawson's conviction was safe even if the evidence had not been adduced.

Evidence to correct a false impression (section 101(f))

- 7.54 The defendant gives a false impression if he is responsible for making an express or implied assertion which is apt to give the court a false or misleading impression about D (section 105(1)(a)).
- 7.55 The defendant can also be responsible for assertions made by other people. Examples include a witness who is called by a defendant (section 105(2)(c)), a witness being cross-examined who makes such an assertion where the court is satisfied that it was the defendant's intention to elicit such a response from the witness or the question was likely to do so (section 105(2)(d)), and an assertion is made by any person out of court and the defendant adduces evidence of it in the proceedings (section 105(2)(e)). Therefore, if the court is satisfied that the defendant is responsible for giving a false impression then the evidence of D's bad character will be admissible.

- 7.56 A defendant is not responsible for an assertion, however, if D either withdraws or disassociates themselves from the assertion (section 105(3)). The Act does not elaborate on how this must be done. Presumably once the court decides that the defendant is responsible for the assertion D, or those D instructs, should make it known to the court and the prosecution that D withdraws or disassociates themselves from it. The court may give a warning to a defendant of the consequences of not withdrawing or disassociating themselves from the assertion, but such a warning is not obligatory.
- 7.57 Where the assertion is made in interview and the prosecution seek to adduce the evidence of bad character on this ground, and the defendant has not withdrawn or disassociated themselves from it, then the defendant should do so in opposing the notice as set out in the Criminal Procedure Rules to adduce such evidence.
- 7.58 Warnings, however, may be particularly important in summary proceedings where the defendant is unrepresented. In such a case the clerk and the prosecutor should give a warning to the defendant in the absence of the magistrates. Prosecutors should, therefore, ask for an adjournment so that this can be done.
- 7.59 The defendant will also be responsible for giving a false impression by their conduct in the proceedings (other than the giving of evidence) (section 105(4)). Conduct includes appearance or dress. An example might be a defendant who attends trial dressed as a priest: D may not assert verbally that D is of good character but if D is of bad character this conduct could constitute giving a false impression.
- 7.60 Evidence (ie, evidence which has probative value in correcting a false impression) that becomes admissible can only go as far as it is necessary to correct the false impression given (section 105(6)). In correcting the impression, only the prosecution may introduce evidence of the defendant's bad character (section 105(7)).
- 7.61 Case law under section 101(1)(f) suggests that the common law principle laid down in *Winfield* (1939) 27 Cr App R 139, that character is indivisible, has now been overturned, eg, if the defendant adduces evidence of good character the prosecution is entitled to adduce evidence of bad character (*Weir et al* [2005] EWCA Crim 2866). Following *Weir et al* it is no longer permissible to cross-examine a defendant about their bad character because they have made an assertion about good character, so long as in doing so they have not created a false impression. For example, the defendant charged with sexual assault asserts they have a good character in relation to sexual morality because, inter alia, they are a priest. They have not mentioned their previous convictions for dishonesty offences, and the prosecution cannot cross-examine the defendant on them to counter the assertions of good character. This is because the defendant has not created a false impression about the previous convictions and they are not relevant to the charge for sexual assault. The prosecution may, however, consider adducing the previous convictions under 101(d) to demonstrate a propensity to untruthfulness.

The leading case under section 101(1)(f) to correct a false or misleading statement is *Ullah* [2006] EWCA Crim 2003.

In *Ullah* the defendant was charged with conspiracy to defraud. During interview he had stated that he had not, in either his capacity as an individual or as a director of a reputable solvent company, acted dishonestly. He further stated that he was meticulous in his business dealings. He said 'that is what I have told the police from the first question and this is what I say today.' At trial, before the interview was adduced in evidence, the prosecution adduced evidence of the defendant's single previous conviction for obtaining property by deception.

On appeal it was held that the trial judge was correct in admitting evidence of the defendant's previous conviction under section 101(1)(f). Moreover, the defence's submission on appeal that at the time the evidence of the previous conviction was admitted, the taped interview containing the assertion had not been adduced did, in the view of the Appeal court judges, 'border on the absurd.'

Attack on another person's bad character (section 101(1)(g))

7.62 Under section 101(1)(g) a defendant's bad character will become admissible when there has been an attack on another's person character. This can happen in one of three ways:

- The defendant adduces evidence attacking the other person's character (section 106(1)(a));
- D (or their legal representative appointed under section 38(4) of the Youth Justice and Criminal Evidence Act 1999 to cross-examine a witness in D's interests) asks questions in cross-examination that are intended to elicit such evidence, or are likely to do so (section 106(1)(b));
- The defendant imputes the other person's character when questioned under caution or on being charged or officially informed D may be prosecuted (section 106(1)(c)). This means that it will be important that the police include such an attack in the record of taped interview.

This approach fits with section 100 of the Act.

7.63 Evidence attacking the other person's character is defined as evidence to the effect that the other person has committed an offence or has behaved, or is disposed to behave, in a reprehensible way (section 106(2)). This is particularly wide and what behaving in a 'reprehensible way' means will vary from generation to generation. For the meaning of 'in a reprehensible way', see 2.3.

7.64 Bad character evidence will be admissible against a defendant who has made an attack upon any other person's character, whether or not a defendant chooses to give evidence.

7.65 It is not necessary that the person attacked should be a witness in the proceedings, or a deceased victim, or a person whose hearsay statement is admitted in evidence, or even that the individual should be named. For example, an attack on another person's character will include the defendant alleging that an unknown person or an associate D refuses to name committed the crime.

7.66 Where the court determines that an attack has taken place, evidence of the defendant's bad character becomes admissible (but only by the prosecution under section 106(3)).

- 7.67 Section 101(1)(g) is subject to the court's discretion to exclude bad character, on application by a defendant, on the grounds that it would have such an adverse effect on the fairness of the proceedings that the court ought not to admit it (section 101(3)).
- 7.68 As under common law, there is no requirement in the Act that the attack on the other person's character should be untrue or unfounded. This is an important rule because it prevents the court from becoming embroiled in deciding collateral issues of the truth or otherwise of the defendant's allegations. However, where it can be shown that those allegations are true, then the court may exercise its discretion and exclude the evidence of bad character on the basis that it is fair to do so.
- 7.69 Under the Criminal Evidence Act 1898 if a defendant lost their 'shield', the evidence of bad character was only relevant to the defendant's credibility as a witness and not to the issue of guilt. Evidence under subsection (1)(g) will primarily go to an issue of credit. It is important to note, however, that the Act does not specify that the evidence should only go to credit, but bad character evidence may also be relevant to the issue of guilt. The Explanatory Notes to the Act provide:

It is expected that judges will explain the purpose for which the evidence is being put forward and direct the jury about the sort of weight that can be placed on it.

- 7.70 In response, case law has sought to clarify the true meaning of section 101(1)(g). *Highton, Van Nguyen and Carp* [2006] 1 Cr App R 7 states at paragraph 10:

We... conclude that a distinction must be drawn between admissibility of evidence of bad character, which depends upon it getting through one of the gateways, and the use to which it may be put once it is admitted. The use to which it may be put depends upon the matters to which it is relevant rather than upon the gateway through which it was admitted. ...In the case of gateway (g), for example, admissibility depends on the defendant having made an attack on another person's character, but once the evidence is admitted, it may, depending on the particular facts, be relevant not only to credibility but also to propensity to commit offences of the kind which the defendant is charged.

Subsequent case law (*Nelson* [2006] EWCA Crim 3412) also suggests that an attack on another person's character is not admissible simply because it would trigger the admission of the defendant's bad character. The attack must be relevant to an issue in the case.

8 PRACTICE AND PROCEDURE

Procedure

- 8.1 Part 11 of the 2003 Act will have a radical effect on the way cases are reviewed and prosecuted. Evidence of a defendant's bad character will play a much greater part in the investigation and prosecution of cases than it did under the previous law. It is likely to form an essential part of the evidence against a defendant because bad character is now not only relevant to credit but also relevant to the issue of guilt.

- 8.2 The police will need to obtain details of a defendant's bad character including previous convictions, the facts of those convictions, the nature of any defences used in the previous cases, and whether the defendant pleaded guilty or was found guilty. Following *Hanson* and *Long* investigation teams will now need to provide information such as cases papers and witness statements as the courts are now encouraged to look beyond the initial conviction. In some cases this may require tracing previous victims and witnesses to give first-hand evidence in court.

A new MG form has been developed for police officers to complete and pass to the prosecutor. See also **1.4 Evidence of Previous Convictions**.

- 8.3 Evidence of bad character will need to be passed to the prosecutor at the earliest opportunity, and preferably at the pre-charge stage.
- 8.4 The prosecutor will need to consider the bad character evidence, identify the relevant matters in issue and decide whether it will form part of the prosecution case against the defendant.
- 8.5 The prosecutor must assess the bad character evidence together with all other evidence and apply the Code for Crown Prosecutors. Where the only evidence against a defendant is that of D's bad character, a prosecution must not take place.
- 8.6 In deciding whether to serve notice of an intention to adduce bad character evidence, the prosecution should always seek to serve the notice where one of the circumstances set out in section 101(1) is satisfied. Where the court has discretion to exclude such evidence under section 101(1)(d) and (g), prosecutors should serve notice to adduce bad character evidence – unless it is highly likely that the court would exclude it under section 101(3).
- 8.7 If the defence do not agree the details of the bad character, then this will need to be proved in the normal way such as by a certificate of conviction, relying on section 74 of PACE 1984 or calling witnesses proving the bad character.

Making the application

- 8.8 The Criminal Procedure Rules 2005, Part 35 deals with the procedure of adducing bad character evidence in the crown court and the magistrates' court. The procedure, time limits and forms are the same for both courts.
- 8.9 If the prosecution proposes to adduce evidence of a defendant's bad character under section 101, or proposes to cross-examine a witness with a view to eliciting such evidence, they must serve notice on the defendant in the prescribed form (section 111(2)). Once the notice is served and so long as the evidence falls within one of the circumstances of section 101, then it is admissible unless, on the application by the defendant under section 101(1)(d) or (g), the court excludes such evidence on the grounds of fairness.
- 8.10 This notice must be served in a magistrates' court at the same time as the prosecutor complies, or purports to comply, with section 3 of the CPIA. In a case to be tried in the crown court this must be not more than fourteen days after, inter alia, the committal of the defendant, or the consent to the preferment of a bill of indictment in relation to the case. See Rule 35.4 for further details.

The details required in the notice are:

- The name and address of the party giving the notice;
- The details of the case;
- A description of the bad character evidence and how it is to be adduced or elicited (including the names of any relevant witnesses);
- The grounds for the admission of evidence under section 101;
- If appropriate, an application for an extension of time.

8.11 Once the prosecution has served the notice, the defendant has to apply to exclude the evidence of bad character within fourteen days of receiving the notice. The application to exclude bad character evidence must contain:

- Name and address of the defendant;
- Details of the charges and the date when notice of intention to adduce bad character evidence was served;
- Why the admission of the bad character evidence would give such an adverse effect on the fairness of the proceedings that the court should not admit it;
- The details as to the length of time between matters to which bad character evidence relates and the matters which form the subject of the offence charged;
- An application to exclude evidence on any other ground other than the fairness test section 101(3), (eg, whether the evidence is important explanatory evidence or if the evidence gives a false or misleading impression);
- An application for an extension of time if appropriate.

8.12 A co-defendant who wants to adduce evidence of a defendant's bad character or who wants to cross-examine a witness with a view to eliciting that evidence under section 101 must give notice in the form set out in the Practice Direction not more than fourteen days after the prosecutor complies with section 3 of the CPIA. The defendant has fourteen days after the receipt of the notice to apply to exclude such evidence. The only basis on which a defendant may exclude such evidence is where the evidence does not satisfy the test, namely that it is of substantial probative value to an important matter in issue. The court has no power to exclude the evidence on the ground of fairness.

8.13 A defendant may apply to exclude bad character evidence against them. They must apply in the prescribed form not more than fourteen days after receiving a notice given under rules 35.4 or 35.5.

8.14 The defendant has power to waive their entitlement to notice if they inform the court and the party who would have given notice.

8.15 The court may allow an oral notice or application and extend or shorten any time limit even if it has expired, if it is in the interests of justice to do so. This allows the prosecution to apply to adduce the evidence of bad character where, for example, the defendant gives a false impression in court or where he attacks a prosecution witness in court.

8.16 There are different time limits that apply to proceedings in the Court of Appeal (see the Criminal Procedure Rules, Part 68).

- 8.17 The Criminal Procedure Rules permit notices and applications to adduce bad character evidence to be made prior to trial, but they may and likely will be dealt with at the trial. The defence may seek to persuade the magistrates to disqualify themselves because they may be prejudiced having become aware that the defendant has previous misconduct. The arguments against this defence application include: the court must be made aware of bad character evidence in the course of such applications to make sense of them; magistrates are judges of both fact and law, and case law (*R v Sang* [1980] AC 402) has established that as they have always been responsible for determining issues of admissibility, they must know what evidence it is proposed to adduce; and that the 2003 Act has as its starting point an inclusionary approach to the evidence of bad character.

9 STOPPING CONTAMINATED CASES (SECTION 107)

- 9.1 Section 107 deals with circumstances in which bad character evidence has been admitted, but it later emerges that the evidence is contaminated. That is to say it has been affected by an agreement with other witnesses or by hearing the views or evidence of other witnesses so that it is false or misleading.
- 9.2 Section 107 provides that a court may stop a case where evidence of bad character has been adduced under any of the paragraphs (c) to (g) and it later appears that the evidence has been contaminated so that any resulting conviction would be unsafe. The power applies to a trial before a jury (section 107(1)) or where a jury is required to decide whether a person, who is deemed unfit to plead, did the act or omission charged under the Criminal Procedure (Insanity) Act 1964 (section 107(3)). Section 107(4) makes it clear that the section does not affect any existing court powers in relation to ordering an acquittal or discharging a jury.
- 9.3 Common law powers exist for a judge to withdraw a case from the jury at any time following the close of the prosecution case, such as no case to answer. Section 107 supplements those powers by conferring a duty on the judge to stop the case if the contamination is such that, considering the importance of the evidence to the case, a conviction would be unsafe (section 107(1)(b)). This is intended to be a stringent test and if the judge were to consider that a direction to the jury along the lines in *R v H* [1995] 2 AC 596 that if they are not satisfied that the evidence can be relied on as free of contamination then they cannot rely on it against the defendant, would be sufficient to deal with any potential difficulties, then the case should not be withdrawn from the jury.
- 9.4 The reason why section 107 only applies to trials by judge and jury is that fact-finders, other than juries, will be sufficiently disciplined to evaluate the evidence correctly and to disregard the contaminated evidence. They will then reach a finding on the basis of any other evidence that remains.
- 9.5 Having stopped the case the judge may consider that there is still sufficient uncontaminated evidence against the defendant to merit a retrial; or they may consider that the prosecution case has been so weakened that the defendant should be acquitted (section 107(1)). If the judge orders an acquittal then the defendant is also to be acquitted of any other offence for which they could have been convicted, provided that the judge is satisfied that the contamination would affect a conviction for that offence in the same way (section 107(2)).

- 9.6 Evidence is contaminated where it is false or misleading in any respect, or is different from what it would otherwise have been (section 107(5)). This must be as a result of an agreement or understanding between the person and one or more others, or because the person is aware of anything alleged by one or more others whose evidence has, or may, be given in the proceedings.
- 9.7 *Renda et al* [2006] 1 Cr App R 24 reinforces the intention of the Act and states that counsel should not attempt to argue for the exclusion of evidence on the grounds of contamination when they are simply repeating arguments already put forward against the admission of the evidence under any section 101 (a) – (g). *Renda* states that:

Section 107 deals with a particular situation where the evidence of ‘bad character’ has been admitted and proves to be false or misleading in the circumstances described in s107(5). Unless the case falls squarely within that statutory provision, the Court of Appeal, Criminal Division is the appropriate court in which the correctness of the judge’s decision should be questioned.

The leading case in this area is *R v Card* [2006] EWCA Crim 1079 in which the evidence of two child witnesses under 13 years of age (a brother and sister) was contaminated by a conversation between the children and their mother. This conversation took place after they had been subject to alleged sexual abuse by the defendant, but before the family discussion at which they made the complaint and before the police arrived. It was argued that the mother had told both the children what to say and that she told the male child about sexual abuse that she claimed also to have suffered. Under section 107 the trial judge is required to make a finding of fact and in this case the judge failed to do so.

Allowing the appeal the Court of Appeal decided it was plain and unequivocal that the girl’s evidence was different from what it would otherwise have been as a result of the conversations with her mother, it was inescapable that the boy’s evidence too was different from what it would otherwise have been if he had not been present during the same conversation as his sister. Since contamination was established the judge was in error not to have applied s107.

10 OFFENCES COMMITTED BY A DEFENDANT WHEN A CHILD (SECTION 108)

- 10.1 Section 16(2) of the Children and Young Persons Act 1963 imposed a complete embargo on any reference in criminal proceedings to any offence in respect of which the defendant, aged 21 years or over, was convicted while under the age of 14 years. Section 108 provides that section 16(2) and (3) cease to have effect, which means that the absolute bar to referring to previous convictions of a defendant under 14 years is lifted. However, admissibility will depend on two factors. Firstly, that the previous conviction and the present charge are offences triable only on indictment; secondly, that the court has to be satisfied that it is in the interests of justice to admit such evidence.

11 ASSUMPTION OF THE TRUTH (SECTION 109)

- 11.1 It is general practice for the courts to assume that the relevance of the evidence, or its probative value in relation to its admission, is true solely for the purpose of determining the admissibility issue. Section 109(1) places this practice on a statutory basis.
- 11.2 The court need not assume that the evidence is true if it appears to the court, on the basis of the material before it, or of any evidence it hears, that no court or jury could reasonably find it to be true (section 109(2)).

12 COURT'S DUTY TO GIVE REASONS (SECTION 110)

- 12.1 Where a court rules that evidence is evidence of a person's bad character, or makes a ruling under sections 100 and 101, or where the judge stops the case where the ruling is that the evidence is contaminated, the court must state its reasons for doing so in open court. Where the ruling relates to the magistrates' court, the ruling and the reasons for it must be entered into the court's register.

ANNEX A

CASE EXAMPLES

CASE EXAMPLE 1 (HANDLING)

D is arrested in possession of hi-fi equipment stolen in the course of a burglary committed the previous week. D states he bought it from a man in the pub called Jon four days previously, and that he had no reason to believe that it was stolen. D has convictions for theft, assault, driving while disqualified and handling stolen goods ('two counts'). These convictions were all within the last five years and one of the two convictions was for handling related to a television set stolen in the course of a burglary.

The important matter in issue between the prosecution and the defence is D's knowledge or belief that the hi-fi equipment was stolen.

Section 103(1) includes at (a) the question of whether the defendant has a propensity to commit offences of the kind with which he is charged. The convictions for theft and handling should be admissible as it seems unlikely that a court would find that because of the length of time since the convictions, or for any other reason, it would be unjust for them to be included.

The same convictions for theft and handling, being offences of dishonesty, could also show a propensity to be untruthful. The convictions for assault and driving while disqualified do not appear to be admissible, although if it could be shown that D lied during the course of these offences, this could be reconsidered.

Although section 27 Theft Act has not been repealed, the procedure under the Criminal Justice Act 2003 should be used, not the procedure under the 1968 Theft Act.

D goes to trial and on the day of trial Jon comes to court and says he did indeed sell the hi-fi to D, which had been given to him by his brother who did not want it. The prosecution request a short adjournment while the OIC establishes that Jon has convictions for assault, driving while disqualified and possession of class B drugs with the intent to supply. Section 100 applies to non-defendants' bad character, which can only be admitted under limited circumstances. The defence do not agree to its admission, as it is not important explanatory evidence, does not have probative value in relation to a matter in issue (ie, D's honest belief and Jon's truthfulness), and it does not show similarity between that misconduct and any misconduct in these proceedings. If Jon had pleaded guilty to his convictions, they would not be admitted. If, however, Jon had pleaded not guilty but was found to have lied during proceedings, then the convictions may be admissible as the issue is Jon's credibility.

CASE EXAMPLE 2 (SEXUAL ASSAULT)

A doctor is charged with sexual assault against a patient. He denies that any indecency took place. Two separate patients in the last five years had made similar complaints resulting in separate trials. On both occasions the doctor was acquitted.

The important matter in issue between the defendant and the prosecution is whether V is telling the truth. Can the past allegations be admitted? Bad character is evidence of, or a disposition towards, misconduct on D's part, other than evidence which has to do with the alleged facts of the offence with which D is charged. The previous complainants can come to court to give evidence of D's conduct towards them (as in *R v Z*). It defies belief that it is just an unlucky coincidence that this number of patients would make up this kind of allegation independently of each other. Their evidence would show that D had 'a propensity to commit offences of the kind with which he is charged' (section 103 (1)(a)). It is, therefore, relevant.

The court would then have to assess whether there is a risk that the admission of the previous complaints would have such an adverse effect on the fairness of the proceedings that they ought not to be admitted. There is a risk that a jury would pass straight from the evidence of the previous complaints to a conclusion of guilt on this occasion without placing it properly in context. It is anticipated that a court would conclude in view of the considerable probative value on the central issue in the case, it would be fair for the evidence to be admitted, notwithstanding the risk that it may be applied prejudicially. Not to admit it would deny fact-finders evidence, without which they would be severely hampered, in assessing the truth of the respective intending accounts. The evidence can be properly weighed, along with other evidence, with the assistance of an appropriate direction or reminder of the proper approach.

If the complainants had come forward twenty years previously, then the court might consider that, 'by reason of the length of time since the conviction, or for any other reason, that it would be unjust for it to apply in his case' (section 103(3)).

CASE EXAMPLE 3 (SHOPLIFTING)

D is arrested for theft from a shop. She has three convictions for theft from shops committed within the three years preceding the date of the alleged offence. Are her convictions admissible?

The situation is that D is seen putting the item in her bag and leaving the shop without paying for it. On being challenged she says she has made an honest mistake, due to being stressed, distracted or forgetful.

This issue is the credibility of D's defence of an honest mistake. The fact that she has stolen from shops three times within the preceding three years tends to make it more likely that she has done so this time, and less likely that her defence is true. The previous convictions clearly go to an important matter in issue.

In addition, if D has advanced a similar explanation on a previous occasion, then it is likely to be untrue on this occasion and will be admissible (subject to the discretion to exclude).

The next consideration is if D makes an application to exclude the evidence, whether the court would exclude it because it would be fair to do so (section 101(3)). The court must have particular regard to the length of time between the offence charged and previous convictions (section 101(4)).

The risk of prejudice in such a case will be that the fact-finders might give her past record undue weight. In the situation where D has left the shop without paying and has given an explanation, the evidence against D is fairly strong and the evidence of previous convictions can be admitted without necessarily distorting the fact-finders reasoning by causing them to convict her essentially because of her record. The risk of giving it undue weight is either none or negligible. If a risk exists at all, the evidence is so germane to the issue in the case that the fact-finders would be denied material central to their deliberations on the truthfulness of her explanation if it were not admitted. Thus, the court would not exclude the evidence under section 101(3).

On the other hand, if the store detective had 'jumped the gun' and challenged her when she had placed the item in her bag but had not yet left the shop because she is still shopping and had other goods in a trolley, then D's previous convictions are unlikely to be admitted. The surrounding evidence of dishonesty is weak. The prosecution case would depend overwhelmingly on the fact of the previous convictions. There is such a risk that the fact-finders would only find guilt by giving her previous convictions undue weight that it would not be fair to admit them.

CASE EXAMPLE 4 (SHOPLIFTING/IDENTIFICATION)

W, a shopkeeper, witnesses a person taking an item from his shop. The suspect runs off. W gives a general description to the PC. The PC believed that D, a known shoplifter with a number of recent theft convictions, matched the description and on that basis arrested him.

W identifies D at an ID parade as the shoplifter. D denies it was him.

Are D's previous convictions admissible?

The issue is whether W is correct in his identification

This is a relevant matter in issue (section 101(1)(d)). D has a propensity to commit this type of crime (section 103(1)) and his convictions support W's identification. The prosecution serve notice to adduce D's recent previous convictions for theft.

The defence apply to exclude the evidence. While there is the risk that such evidence would be given undue weight by fact-finders going from D's previous convictions to a conclusion of guilt, the risk of its not being put in its proper context would be low and, given its place as central to an issue in the case, the court would probably admit the evidence.

If, on the other hand, W had not picked out D on an ID procedure as the offender, the only evidence against D would be D's previous convictions showing D's propensity to commit offences of the same kind. Clearly, there is insufficient evidence to charge D. Cases should not be prosecuted solely on the basis of previous misconduct.

CASE EXAMPLE 5 (TWOC)

D is arrested on fingerprint evidence found in a stolen vehicle. He declines to answer questions and in interview claims to have been given a lift by persons unknown, unaware that the car was stolen.

D has one previous conviction for TWOC recorded three months prior to the incident.

D is charged with knowingly allowing himself to be carried in a vehicle taken without consent.

Is D's previous conviction admissible?

The issue in case is whether D knew when he was in the car that it had been taken without consent. The argument would be that because D had a previous conviction for being in a stolen vehicle, that conviction is relevant on this issue. The evidence is that he had no knowledge of the owner and had no legitimate reason to have been in the car. The evidence of his previous conviction will be part of the evidence as a whole on the question of whether the fact-finders are sure that his explanation of his innocent, unknowing presence in a stolen vehicle is false. Thus, D's previous conviction is admissible under section 101(1)(d).

The next question for the prosecutor is whether the court, on application by D, would exercise its discretion to exclude the previous conviction under section 101(3).

While there might be some risk of prejudice that the fact-finders would go straight from the previous conviction to a finding of guilt, the evidence of D's previous conviction is so embedded in the issue of the case that the risk is slight. On the other hand, to deny fact-finders this information would handicap their ability to consider his explanation in the light of all the relevant circumstances. Therefore, it is likely that the court would not exclude the evidence.

The prosecution, therefore, needs to serve a notice of intending to adduce evidence of D's bad character. This must be done at the same time that the prosecutor complies with primary disclosure. The defendant has fourteen days from receipt of primary disclosure to apply to exclude the evidence.

If D were acquitted, despite the evidence of the previous conviction having been admitted, but is arrested a month later, his fingerprint evidence having been found again in another stolen vehicle, and he gives the same account as before, his previous presence in a stolen vehicle would be admissible, as well as the fact that he was acquitted. This is because it makes the same defence less credible a second time around.

CASE EXAMPLE 6 (ROY WHITING)

D was accused of the murder of a child under 13 years of age. The evidence was that the child had been abducted by the driver of a white van. D was a registered sex offender whose previous convictions included one for abduction of a child of a similar age, within the same region using a motor vehicle. In that case, D had not enticed the child but had abducted her by force.

The evidence against D included forensic evidence linking the child to the vehicle. There was also evidence that the child had not been enticed but had been forcibly abducted. There was no explanation from D about the forensic evidence, or how it had found its way into the van. D put up an alibi defence, unsupported by witnesses.

At trial the Judge refused leave to admit the evidence of the previous conviction, apparently on the basis that it was not sufficiently probative: it was not 'strikingly similar'.

Would the situation be different now?

The conviction plainly passes the test of being of relevance to an important matter in issue between the prosecution and defence. It also shows a propensity to commit offences of the kind with which he is charged. The court would need to be satisfied that the admission would not have such an adverse effect on the fairness of the proceedings that it ought to exclude it.

In this case there was overwhelming forensic evidence, so the case would not rest solely on the previous conviction. It is more likely that his previous conviction would have been admitted under these new provisions than under the previous law. It can be argued that to deny the fact-finders this important piece of evidence is to give them a distorted view of the real case against D, rather than allowing them to consider the similarities between the two cases.

CASE EXAMPLE 7 (POSSESSION OF DRUGS WITH INTENT TO SUPPLY)

D is arrested in possession of fifteen ecstasy tablets. He states they are for his own use. He has two previous convictions for supplying cannabis and one for supplying ecstasy, all within the last five years.

The important matter in issue between the prosecution and the defence is the intention to supply, as possession is not disputed. The previous convictions for supplying drugs are relevant to show that D has a propensity to commit offences of the kind charged. Moreover, as all the convictions are within five years, they are unlikely to be excluded on the grounds that it would be unjust because of their age.

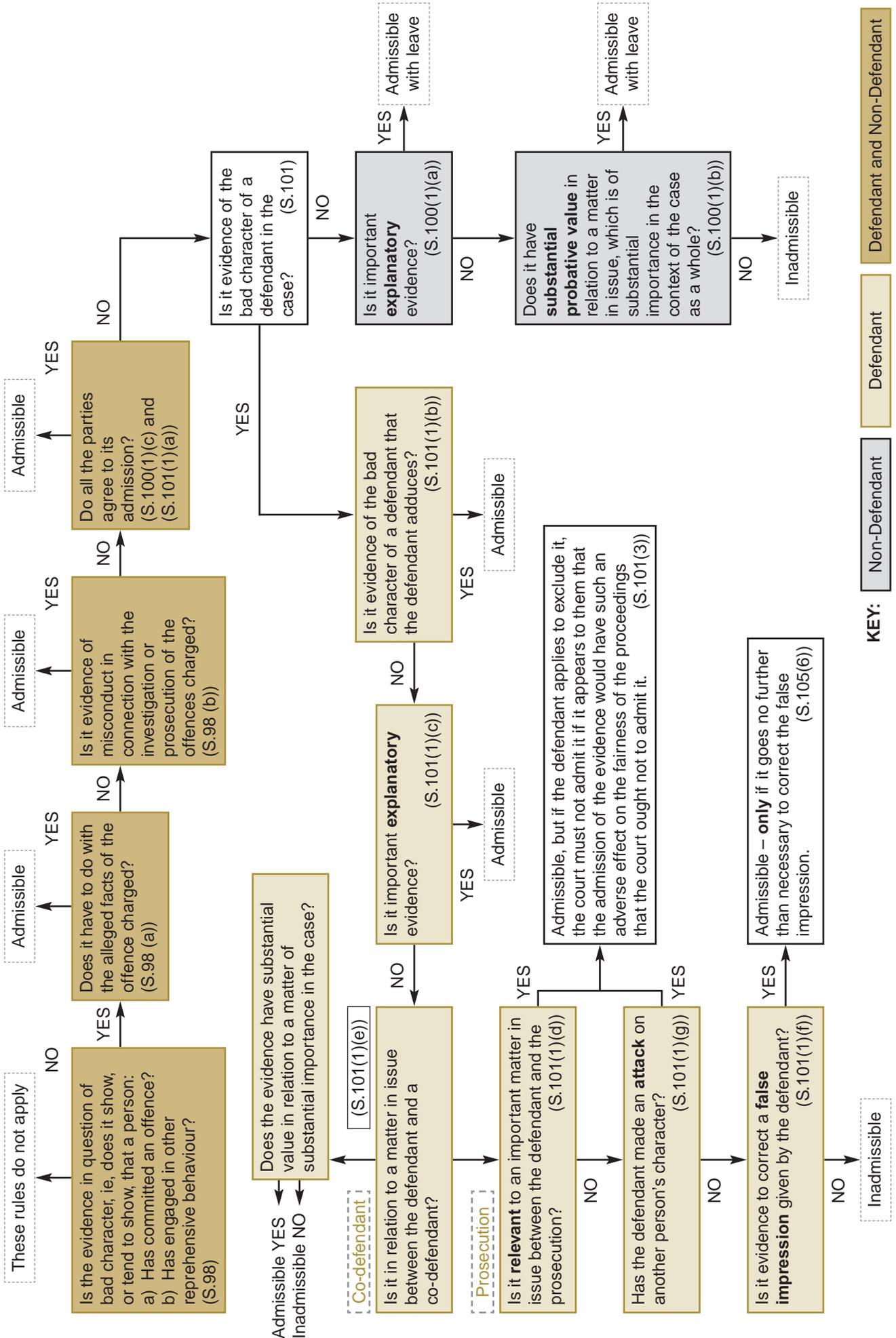
Would a court admit the supply of cannabis conviction or just the one for the supply of ecstasy? If D pleaded not guilty, then the convictions could be admitted to show his propensity to be untruthful; if he had claimed on each previous occasion that the drugs were for his own personal use, then it would be necessary to go further and establish if the convictions related to small-scale social sharing, or whether large quantities, indicative of dealing, were involved. Small-scale supply may only indicate a general involvement in the drugs scene and so would be excluded under section 101(3).

If D was arrested in a nightclub, where the circumstances point to him being able to supply a ready market, his previous conviction is of substantial probative value. If D was arrested at home, with none of the usual drug dealers' paraphernalia present, then there would be a risk the evidence of previous supplying would so overwhelm the minimal amount of evidence for drug dealing that its admission would have such an adverse effect on the fairness of the proceedings that the court ought to exclude it.

ANNEX B

FLOWCHART OF BAD CHARACTER EVIDENCE

Flowchart of Bad Character Evidence



KEY:

Non-Defendant

Defendant

Defendant and Non-Defendant

APPENDIX 4

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