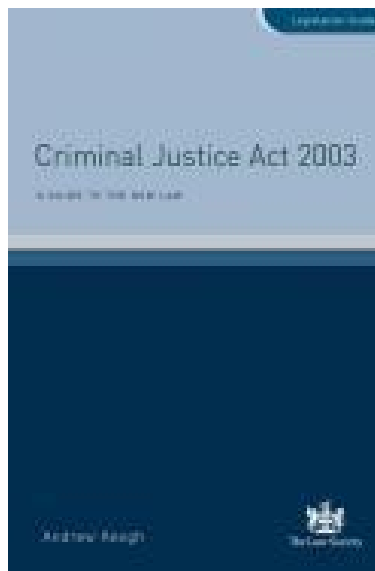


Evidence of Bad Character under the Criminal Justice Act 2003

An introduction

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Why is training needed on bad character evidence?

The Act introduces a completely new scheme for the introduction of bad character evidence. Existing statutory and common law rules cease to have effect.

Part II of the Criminal Justice Act 2003 came in to force on 15 December 2004. The Act abolishes common law, and most statutory rules relating to bad character and replaces them with a single, coherent statutory scheme. The Act is far-reaching, particularly section 103 which provides for the admissibility of bad character in support of a propensity to commit like offences.

The Act sets out different rules and tests in relation to the following:

- Bad character of persons other than the defendant
- Defendant's bad character
- Co-defendant's bad character

This part of the Act remains contentious, with Lord Thomas of Gresford moving the following motion in the Lords on 14 December 2004:

"...this House calls on Her Majesty's Government to reconsider the policy furthered by the Order which undermines the presumption of innocence, will lead to wrongful convictions, and will thereby destroy public confidence in the criminal justice system".

The motion was defeated, leading to the propensity provisions (explained below) coming in to force.

Is the law now in force or are there transitional provisions?

There is a dispute as to how the provisions apply.

The relevant part of the Act came in to force on 15 December 2004. Section 141 of the Act states that “no provision of this part has effect in relation to criminal proceedings begun before the commencement of that provision”. Criminal proceedings is defined in section 112(1) as “criminal proceedings in relation to which the strict rules of evidence apply”.

There is some dispute as to what this definition means. It was taken directly from a Law Commission report on bad character, but regrettably the Commission did not clarify either its meaning or intent.

The choices are as follows:

1. The Act applies to offences charged or summonsed on or after 15 December 2004. This gives “proceedings” a wide and inclusive definition. This is the definition favoured by most commentators on the Act. The Home Office in a response to CrimeLine dated 23 December 2004, supported this interpretation; or:
2. The Act applies to *trials* that begin on or after 15 December 2004, regardless of whether they were charged before that date. I am aware that some at the Judicial Studies Board are of the view that this definition is correct. Support for this can be found by the fact that the

statutory instrument bringing these provision in to force also brings in to force part 5 of schedule 37, which has the effect of repealing section 1(3) Criminal Evidence Act 1898. The effect of this repeal is to remove the main statutory provisions for the admission of bad character evidence; accordingly it must be the case that as of 15 December 2004, all bad character evidence is regulated by the 2003 Act. This interpretation has already been applied in one case which has been appealed.

What about trials part-heard on 15 December 2004?

Even though the existing provisions were abolished on 15 December 2004, they still have effect for trials taking place during that period, by virtue of section 16 Interpretation Act 1978.

It therefore remains uncertain as to how the provisions apply.

What exactly is evidence of bad character?

Evidence of bad character is far wider than simply proof of previous convictions.

Bad character is evidence of, or a disposition towards, the commission of an offence or other reprehensible behaviour (ss 98 and 112(1)).

Offences are self-explanatory and are well understood and used as evidence of bad character under existing law.

Reprehensible behaviour

Even at common law, bad character other than previous convictions has been admissible, but rarely used. Under the new Act this head of bad character may see something of a renaissance. Clearly there will be some difficulty with this type of evidence, as one man's reprehensible behaviour may not correspond with another's analysis of the situation. Is committing adultery reprehensible behaviour for example?

Examples of "reprehensible behaviour" might include:

- Poor disciplinary record as a sportsman (R v Marsh (1994) Crim LR 52).
- Disobeyance of civil orders (for example injunctions in matrimonial proceedings).
- Evidence of an anti social behaviour order

Exceptions

- (1) Evidence which has to do with the commission of the offence charged falls outside the Act. Such evidence has always been admissible, for obvious reasons, and will continue to be so admissible (s98 (1)).
- (2) Evidence of misconduct in connection with the prosecution or investigation of the offence. Such evidence might be resisting arrest for example. This type of evidence has always been inadmissible unless directly relevant to a fact in issue. By excluding such evidence from the general definition of bad character, Parliament has preserved the present position (s98 (2)), i.e. that such evidence will rarely be admissible.
- (3) In relation to a defendant aged over 21 years, evidence of his conviction for an offence committed when under the age of 14 is not

admissible unless both of the offences are triable only on indictment and the court is satisfied that the interests of justice require the evidence to be admitted (s 108(2)). The previous partial prohibition on using juvenile convictions under section 16(2) and (3) of the Children and Young Persons Act 1963 is repealed.

Judicial discretion

In addition to the statutory provisions relating to admission and exclusion of evidence, nothing in the Act affects the power to exclude evidence under section 78 of PACE 1984 (House of Lords, *Hansard*, 19 November 2003, col. 1988) and s 126(2) of the Act. The Act also preserves an absolute power of the court to exclude evidence at its discretion, notwithstanding the fact that it would be otherwise admissible under the Act (s 126(2)(b)). These important safeguards were fought for very hard during the passage of the bill through Parliament.

BAD CHARACTER OF PERSONS OTHER THAN THE DEFENDANT

The court cannot give leave for the admission of bad character evidence against a person other than the defendant unless the evidence is important explanatory evidence, or has substantial probative value in relation to a matter which is a matter in issue in the proceedings, and is of substantial importance in the context of the case as a whole. The court need not be asked to give leave if all parties agree to the evidence being admissible (s 100(1)(c)).

Evidence with important explanatory value

Evidence falls into this category if the court or jury would find it impossible or difficult properly to understand other evidence in the case, and its value for understanding the case as a whole is substantial (s 100(2)). The evidence is not in itself probative of any fact in issue, but nonetheless is important if the case is to be understood fully in context.

An example of this kind of evidence, used by the Law Commission is:

“Thus, for example, in a case of intra-familial abuse, it was not only abusive behaviour by the defendant on occasions other than that charged which was valuable in explaining the case as a whole to the jury, but also abusive behaviour by other members of the family.”

Evidence going to a matter in issue

Evidence in this category must have substantial probative value in relation to the matter in issue and be of substantial importance in the context of the case as a whole.

In assessing probative value the court must have regard to the following factors (and any others it thinks relevant) (s 100(3)):

- The nature and number of events, or other things, to which the evidence relates;
- When those events or things are alleged to have happened, or existed;
- In the case of evidence of misconduct, which is said to have probative value by reason of similarity between that conduct and other alleged misconduct, the nature and extent of the similarities and the dissimilarities between each of the alleged instances of misconduct.

- In the case of misconduct, when it is alleged that the person is also responsible for the offence charged, and the identity of the person responsible for the misconduct is disputed, the extent to which evidence shows or tends to show that the same person was responsible each time.

Substantial probative value

It is clear that past misconduct can be probative of the propensity of persons to act in the same way in the future but the probative value of a single incident for example is capable of being over-estimated. The Act therefore imports a “substantial” test in relation to probative value. Previous misconduct is likely to impact on a witness’s general credibility, but since little significance if any can be attached to general credibility, such a route to admissibility needs to be treated with extreme caution. Of more importance is credibility in relation to an issue in the case – for example why a person would lie about a particular incident, as opposed to why they should generally be disbelieved (the boy who cried wolf test).

Steps have been taken in relation to sex cases to limit such questioning (see later), the reasoning for which is outlined above, and explained in the speech of Lord Steyn in *Re A* [2001] UKHL 25, para 27:

“Nevertheless, it has to be acknowledged that in the criminal courts of our country, as in others, outmoded beliefs about women and sexual matters lingered on. In recent Canadian jurisprudence they have been described as the discredited twin myths, viz “that unchaste women were more likely to consent to intercourse and in any event, were less worthy of belief”: *R v Seaboyer* (1991) 83 DLR (4th) 193, 258, 278C *per* McLachlin J. Such generalised, stereotyped and

unfounded prejudices ought to have no place in our legal system. But even in the very recent past such defensive strategies were habitually employed. It resulted in an absurdly low conviction rate in rape cases. It also inflicted unacceptable humiliation on complainants in rape Cases.”

Questioning which has little if any probative value, but may have the effect of undermining the case against the accused is the type of questioning that this Act seeks to prevent once and for all. Under the Act, questioning in relation to the following scenario would not be admissible:

“W is a middle-aged woman, who is raped by an acquaintance. D says she consented. The police explain to her that, when she gives evidence, which she must for the prosecution to succeed, she might be asked about a 20-year old shoplifting conviction. Neither her husband nor her children nor her friends know about this conviction. The fear that it would be mentioned in public is enough to dissuade her from giving evidence.”

The prohibition is not about protecting the sensibilities of witnesses per se, but about ensuring that the answer to the question is capable of properly advancing the defence case, and not at the expense of improperly distorting the fact-finding process.

In making the application for leave, an advocate would have to point to the features of the evidence which support the argument that the evidence is substantially relevant – for example, how recent was any alleged misconduct, and how similar to any misconduct alleged in relation to the facts of the offence charged (which may include the giving of false evidence as to those facts).

Applying the rigour of requiring the advocate to satisfy the court of the enhanced level of relevance (substantial probative value) would mean that evidence going to the “specific credibility” of a witness (that is, evidence which suggests that the witness has an incentive to lie *on this occasion*) would be more likely to have the required level of relevance than evidence which merely suggests that the witness *might* lie if he or she *did* have an incentive to do so.

Further examples given by the Law Commission are:

D is charged with theft. W, who was D's employee at the time of the alleged offence, is a witness who will give incriminating evidence which a jury could hardly accept without convicting D. The bad character evidence in question is the fact (not disputed by the prosecution) that, in her previous job, four years before the time of D's alleged offence, W was dishonest in her expenses claims. D says that the witness is incompetent and therefore mistaken. It is hard to conceive that the evidence would be admissible under the enhanced test. Alternatively, D is charged with theft, and wishes to ask W about an allegation that she was dishonest in her previous job. In this example, D's case is that W is lying, not incompetent. The fact that in the relatively recent past she has been guilty of dishonesty at the work place might well surmount the test of enhanced relevance.

A third variation: D is charged with theft and wishes to ask W about an allegation of dishonesty 10 years previously, or in a non-work context. The court might well take the view that it did not pass the enhanced relevance test.

Substantial importance in the context of the case as a whole

This is the second limb of the admissibility test and is of crucial importance. It may well be that the fact may have substantial relevance to the credibility of a person whose credibility is in issue, and thus to the matter in issue on which she gives evidence, although that matter is not of substantial importance in the context of the case as a whole. If the matter on which she gives evidence is of only marginal relevance to the central issues in the case, then no amount of relevance to her credibility can ever amount to *substantial* importance in the context of the case as a whole.

Sexual Offence cases

Nothing in the Act alters the operation of section 41 Youth Justice and Criminal Evidence Act 1999. However, once leave is given under section 41 for questions in relation to previous sexual behaviour to be asked, the advocate must then make an application for the evidence to be admissible under section 100 of the Criminal Justice Act 2003 if the sexual behaviour cited also amounts to bad character (unlikely in most cases unless it could properly be classed as reprehensible behaviour (s112(1))).

Of course, if leave is refused under section 41 that is the end of the matter.

Is the test Human Rights Act compliant?

The view of the Law Commission, who drafted the sections on which the Act is based commented:

“It follows, from the decision in *A*, that a requirement of enhanced relevance for bad character evidence would risk infringing Article 6 *only* if the required level of relevance were set so high that evidence sufficiently probative to be necessary for a fair trial might nevertheless fail to satisfy it. This result could be avoided by formulating the requirement in such a way that it will *inevitably* be satisfied

whenever the exclusion of the evidence might render the trial unfair. We therefore do not accept that the introduction of a test of enhanced relevance would necessarily risk infringing Article 6. That risk can be eliminated if the test is properly formulated and applied.”

DEFENDANTS BAD CHARACTER

Evidence of the defendant’s bad character is only admissible if and only if (s101):

- All parties agree to its admissibility
- 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
- Evidence with important explanatory value
- Evidence going to a matter in issue between the defendant and prosecution
- Substantial probative value in relation to an important matter in issue between the defendant and a co-defendant
- Evidence to correct false impression
- Attack on another person’s character

Evidence with explanatory value

Evidence falls within this category of admissibility if the court or jury would find it impossible or difficult properly to understand other evidence in the case, and that the value of the evidence for the understanding of the case as a whole is substantial (s 102).

It is disappointing that Parliament rejected clause 7(3) and (4) of the Law Commission's draft bill on character evidence which imported a protection in relation to prejudicial evidence. The Law Commission suggested that explanatory evidence that was prejudicial (and much of it would be) should only be admitted if the interests of justice required its admission having considered the prejudice and the value of the evidence for the understanding of the case as a whole. The Law Commission stated that this extra safeguard was needed to secure a fair, rational and consistent approach to the inclusion of such evidence.

As this section stands the rule is no different from the old law.

Evidence going to an important matter in issue between defendant and prosecution

Only prosecution evidence can fall within this section (s103 (6)). This section is potentially far reaching and allows for the admission of bad character evidence to show that the defendant has a propensity to commit offences of the kind with which he is charged and be untruthful. Evidence of similar fact would be admissible under this section, going to prove the core issue(s) between the defendant and prosecution. Evidence of bad character because it is an essential element of the offence with which he is charged will remain admissible (e.g. for an offence under section 21 of the Firearms Act 1968). Evidence under section 27(3) of the Theft Act 1968 is retained as is section 1(2) of the Official Secrets Act 1911.

The reason that this Act goes much further than simply codifying the Common Law is that it makes propensity a fact in issue in all cases, thereby opening the door for the admission of previous convictions.

Applications to exclude

The court must not admit evidence under section 101(1)(d) if on a defence application to exclude 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. The court must have particular regard to the length of time between the matters to which that evidence relates and the matters which form the subject of the offence charged (s 101(4)).

Propensity to commit offences

A propensity to commit offences of the kind with which he is charged can be proved (without prejudice to any other way of doing so) by evidence that he has been convicted of an offence of the same description or category as the one with which he has been charged (s 103(2)). A court can exclude such evidence if satisfied that the length of time since the conviction for the like offence would make it unjust for it to be admitted (s 103(3)).

An offence of the same description is one which would be written in the same terms in a charge or indictment (s 103(4)(a)). Categories of offence are to be defined by order of the Secretary of State (s 103(4) (b)). The relevant offences are contained in Appendix A, and at the time of writing extend to offences of dishonesty and sexual offences.

Evidence of bad character to support propensity is of no relevance and should not be admitted where such a propensity makes it no more likely that he is

guilty of the offence (s 103(1)(a)). An example of this might be where the defendant admits an assault on someone in relation to a murder allegation but argues that causation is not made out.

Application of the section

It is unclear as to the intended effect of this section as Government ministers were unable to clarify its operation in any meaningful way when pressed. In Parliamentary debate it was queried whether it went any further than placing similar fact evidence on a statutory footing. As outlined above this section does go much further than simply codifying the law in relation to similar fact. The question for judges, who have been educated in a system where evidence of propensity has never been admissible, is how to apply these new principles. If a person has one conviction for burglary would that be admissible on a burglary charge? The following examples illustrate the issues.

X has one conviction for burglary. The offence was committed on 1 January 1999.

Case 1: X is being tried for a burglary allegedly committed on 10 January 2004. Evidence of propensity unlikely to make it more likely that he is guilty of the offence.

Case 2: X is being tried for a burglary allegedly committed on 2 January 1999 at a location near to the address burgled previously. Evidence of propensity likely to be admitted

X has 20 convictions for dwelling house burglary.

Case 1: X is being tried for a burglary of industrial premises during the course of which specialist equipment is stolen. Defence may well be able to argue that propensity to burgle does not make it more likely that he committed this offence as he has never stolen from non dwellings and the previous convictions do not show that he is any more likely to be involved in the burglary of premises in order to steal specialist items.

Case 2: X is being tried for a dwelling house burglary allegedly committed 2 years after his last conviction for burglary. Evidence of propensity likely to be admitted.

Case 3: X is being tried for a dwelling house burglary allegedly committed 10 years after his last conviction for burglary. It is this kind of case that will raise real difficulties for judges.

Human Rights Implications

When the qualifying propensity offences were being debated in the House of Lords on 14 December 2004, the House was apprised of a report by the Joint Committee on Human Rights, which had written to the Secretary of State on 7 December 2004 to communicate the view that the propensity provisions remained non-compliant with article 6 ECHR. The Government rejected this argument.

Baroness Scotland said the following:

"I am happy to reassure the House that the Government's view is that the order is compatible with the right to a fair trial in Article 6(1) of the European Convention on Human Rights. Our position, put simply, is that the order can and must be used in a way that is compatible with human rights. I use the auxiliary "must" advisedly because by Section 6 of the Human Rights Act 1998 the judge in any trial is under a

clear statutory duty to act compatibly with the convention rights. Those rights include, of course, the right to a fair trial. The judge must, therefore, apply the order so as to achieve that end.

We note the Joint Committee's suggestion that the order is theoretically capable of leading to an unfair trial, but we would make two points about that suggestion. First, the Joint Committee is not saying that the order is incapable of leading to a fair trial; merely that it might not do so. In the Government's view, that analysis overlooks Section 6 of the Human Rights Act.

My second point is that we do not accept that the order will in any case mean an unfair trial. The categories contained in the order are simply for guidance to the court. The fact that an offence falls within one of the categories does not mean that evidence of bad character is automatically to be admitted on that account, or at all. That is because the judge retains the discretion to exclude such evidence under Sections 101(3), 103(3), and 112(3)(c) of the Act, as well as under the general exclusionary power in Section 78 of the Police and Criminal Evidence Act, which I have already mentioned. At the risk of labouring the point, the judge will be bound by the Human Rights Act to exercise his or her discretion in a way that is compatible with the convention rights. “

The report of the Joint Committee on Human Rights is referenced in full at Appendix B, and will form important material for practitioners wishing to challenge this part of the Act.

Propensity to be untruthful

The Act makes propensity to be untruthful a fact in issue in all cases. Once again this provision was discussed and rejected by the Law Commission who stated:

“We take the view, however, that the defendant’s general propensity to be untruthful is not a matter which it would be fair to allow the prosecution to assert as part of its case against the defendant. Where the defendant simply denies the truth of some or all of the prosecution’s evidence in relation to the offence charged, and makes no attempt to attack anyone else’s credibility, we think it virtually inconceivable that evidence of the defendant’s general untruthfulness could ever have sufficient probative value to outweigh the risk of prejudice.”

The types of character evidence that might support such propensity would be convictions for perjury or deception offences. A conviction for theft would not necessarily qualify as the act of stealing does not equate to a propensity to tell lies. Query though evidence that a defendant has been convicted of an offence having denied it and given evidence. Such evidence may well be admissible.

If untruthfulness is not to be part of the prosecution case such evidence cannot be admitted. If the defence was one simply of causation, or whether even if the facts were true it would amount to a defence, such evidence will have no relevance (s 103(1)(b)).

MATTER IN ISSUE BETWEEN A DEFENDANT AND A CO-DEFENDANT

Evidence in relation to a matter in issue between a defendant and a co-defendant, including propensity to be untruthful is admissible under the Act.

Propensity evidence in relation to untruthfulness is only admissible if the nature of his defence is such as to undermine his co-defendant's defence (s 104(1)), but other relevant evidence (such as general propensity does not need such an attack in order to render it admissible). This presents a key departure away from the old system where a co-defendant was protected from evidence relating to propensity if his shield were retained.

Such evidence is only admissible if adduced by the co-defendant or by a witness invited to give that evidence in cross-examination by the co-defendant (s 104(2)). This prevents the prosecution from adducing bad character where the issue is one between co-defendants only.

This rule is not simply a re-enactment of section 1(f)(iii) of the Criminal Evidence Act 1898, as there are a number of key differences:

- (a) The evidence must have substantial probative value in relation to an important issue in dispute (s 101(1) (e)). Judge's will need to balance very carefully the previous almost unfettered right to introduce bad character in this scenario against this Act's more restrictive scheme. The enhanced relevance test is discussed at para 7.10 above. It ought to be remembered that the issue in dispute will not always be limited to credibility, particularly in many 'cut throat' defence cases, where one party has previous conviction for like offending and the other does not. In such instances propensity (to commit the offence, or an argument that one accused is more likely than another to have committed it) can be very much in issue, as confirmed by the House of Lords in R v Randall [2003] UKHL 69. Practitioners should be aware that save where such propensity is the issue in dispute the co-defendant need not have undermined the defendant's case, in terms of the old law there need be no 'loss of shield'.
- (b) In the case of evidence relating to propensity to be untruthful, the defendant must have undermined the case of the co-accused (the old shield requirement). This does not apply to evidence relating to other matters including a propensity to commit the offence in question, if relevant.
- (c) The prosecution cannot avail itself of the section (effectively overruling cases such as R v Seigley (1911) 6 Cr App R 106).

(d) The defendant need not give evidence in order for the evidence to be admitted; the co-defendant would be entitled to adduce the evidence regardless. Whilst it has been argued that since the admission of such evidence is most often to go toward undermining credibility, and that is not in issue where a defendant does not give evidence, that argument was recognised by the Government as being too restrictive in nature. The defendant who does not give evidence will nonetheless put his credibility in issue in relation to out of court statements or by the general nature of his defence.

EVIDENCE TO CORRECT FALSE IMPRESSION

The prosecution (and only the prosecution (s 105(7)) can adduce evidence of bad character to correct a false impression given by a defendant (s 105). A false impression is defined as an express or implied assertion that is apt to give the court or jury a false or misleading impression about the defendant. The evidence adduced must have probative value in correcting the false assertion.

Making the assertion

The assertion can be made in the proceedings (and is not reliant on the defendant having given evidence of the fact himself), on being questioned under caution before charge or upon being charged (or informed he might be prosecuted for the offence).

Assertions can be made in the proceedings by the defendant, a witness on his behalf, as a result of a question asked by the defendant intended to elicit the

answer, or in an out of court statement adduced by the defendant during the proceedings.

An assertion can be made by way of conduct as opposed to evidence.

Conduct includes appearance or dress, and would arguably mean that a defendant who turned up to court in a suit could face having evidence of bad character admitted.

Withdrawing the assertion

Section 105(3) allows a defendant to withdraw or disassociate himself from an assertion, and if he does so shall not be treated as having made the assertion. The disassociation may be partial.

Conditions to be satisfied

Before such evidence can be admitted the court must be sure that the evidence of bad character has probative value in correcting the false or misleading impression. The evidence should go no further than that which is necessary to correct the false impression (s 105(6)).

Scope of the section

This provision is similar to section 1f (ii) of the Criminal Evidence Act 1898, save that the defendant is not protected from having such evidence adduced by reason of avoiding the witness box.

ATTACK ON ANOTHER PERSON'S CHARACTER

An attack on another's character can be adduced by the accused or a legal representative appointed under section 38(4) of the Youth Justice and Criminal Evidence Act 1999. Such an attack can also be made when being

questioned under caution before charge, or upon being charged or officially warned that he may be prosecuted.

What amounts to an attack on character?

An attack on character is evidence to the effect that the person has committed an offence (which might be alleged to be the charge the defendant is facing) or has behaved, or is disposed to behave in a reprehensible way (s 106 (2)).

It does not matter that the person attacked is not a witness in the proceedings; it can be seen that this section goes considerably further than section 1f(ii) of the Criminal Evidence Act 1898.

Exclusion of such evidence

The defendant can apply for such evidence to be excluded under section 101(3) if its admission would have an adverse affect on the fairness of the proceedings.

STOPPING THE CASE WHERE EVIDENCE CONTAMINATED

A court can order the acquittal of a defendant, or a retrial, if evidence of bad character evidence has been admitted and later found to be contaminated.

Only evidence adduced under sections 101(1)(c) to (g) can be excluded under this section, but a judge is not prevented from using any other exclusionary power. The contamination must be such that any resulting conviction would be unsafe given the importance of the contaminated evidence in relation to the case (s 107(1)).

Similar provisions apply in relation to determining whether the defendant did an act or made an omission, in accordance with section 4A(2) of the Criminal Procedure (Insanity) Act 1964.

Meaning of contaminated

A person's evidence can be contaminated in two ways:

- (1) Where as a result of an agreement or understanding between the person and one or more others, the evidence is false or misleading in any respect, or is different from what it would otherwise have been, or
- (2) Where as a result of the person being aware of anything alleged by one or more others who are, or could be, witnesses in the proceedings, the evidence is false or misleading in any respect, or is different from what it would otherwise have been.

These provisions deal with collusion, which can be a particular feature of sexual offence cases, and general contamination as a result of witnesses being in possession of information they should not be aware.

Rules of Court

Forms have now been prescribed for applications to admit bad character evidence, along with relevant rules of court. Crown Court rules are at Appendix C, Magistrates' Court rules at Appendix D.

Appendix A – Propensity, categories of offences

EXPLANATORY NOTE

(This note is not part of the Order)

Section 103(2)(b) of the **Criminal Justice Act 2003** provides that a defendant's propensity to commit offences of the kind with which he is charged may (without prejudice to any other way of doing so) be established by evidence that he has been convicted of an offence of the same category as the one with which he is charged.

Section 103(4)(b) provides that two offences are of the same category as each other if they belong to the same category of offences prescribed for the purposes of that section by an order made by the Secretary of State.

The categories prescribed by this Order are theft and sexual offences (persons under the age of 16). Each category consists of offences of the same type.

PART 1

THEFT CATEGORY

1. An offence under section 1 of the Theft **Act** 1968^[2] (theft).
2. An offence under section 8 of that **Act** (robbery).
3. An offence under section 9(1)(a) of that **Act**^[3] (burglary) if it was committed with intent to commit an offence of stealing anything in the building or part of a building in question.
4. An offence under section 9(1)(b) of that **Act** (burglary) if the offender stole or attempted to steal anything in the building or that part of it.
5. An offence under section 10 of that **Act** (aggravated burglary) if the offender committed a burglary described in paragraph 3 or 4 of this Part of the Schedule.

6. An offence under section 12 of that **Act**[4] (taking motor vehicle or other conveyance without authority).
7. An offence under section 12A of that **Act**[5] (aggravated vehicle-taking).
8. An offence under section 22 of that **Act** (handling stolen goods).
9. An offence under section 25 of that **Act** (going equipped for stealing).
10. An offence under section 3 of the Theft **Act** 1978[6] (making off without payment).
11. An offence of-
 - (a) aiding, abetting, counselling, procuring or inciting the commission of an offence specified in this Part of this Schedule; or
 - (b) attempting to commit an offence so specified.

PART 2

SEXUAL OFFENCES (PERSONS UNDER THE AGE OF 16) CATEGORY

1. An offence under section 1 of the Sexual Offences **Act** 1956[7] (rape) if it was committed in relation to a person under the age of 16.
2. An offence under section 5 of the Sexual Offences **Act** 1956[8](intercourse with a girl under thirteen).
3. An offence under section 6 of that **Act**[9] (intercourse with a girl under sixteen).
4. An offence under section 7 of that **Act**[10] (intercourse with a defective) if it was committed in relation to a person under the age of 16.
5. An offence under section 10 of that **Act** (incest by a man) if it was committed in relation to a person under the age of 16.
6. An offence under section 11 of that **Act** (incest by a woman) if it was committed in relation to a person under the age of 16.
7. An offence under section 12 of that **Act**[11] (buggery) if it was

committed in relation to a person under the age of 16.

8. An offence under section 13 of that **Act**[12] (indecenty between men) if it was committed in relation to a person under the age of 16.

9. An offence under section 14 of that **Act** (indecent assault on a woman) if it was committed in relation to a person under the age of 16.

10. An offence under section 15 of that **Act** (indecent assault on a man) if it was committed in relation to a person under the age of 16.

11. An offence under section 128 of the Mental Health **Act** 1959[13] (sexual intercourse with patients) if it was committed in relation to a person under the age of 16.

12. An offence under section 1 of the Indecency with Children **Act** 1960[14] (indecent conduct towards young child).

13. An offence under section 54 of the **Criminal Law Act** 1977[15] (inciting a girl under 16 to have incestuous sexual intercourse).

14. An offence under section 3 of the Sexual Offences (Amendment) **Act** 2000[16] (abuse of a position of trust) if it was committed in relation to a person under the age of 16.

15. An offence under section 1 of the Sexual Offences **Act** 2003[17] (rape) if it was committed in relation to a person under the age of 16.

16. An offence under section 2 of that **Act** (assault by penetration) if it was committed in relation to a person under the age of 16.

17. An offence under section 3 of that **Act** (sexual assault) if it was committed in relation to a person under the age of 16.

18. An offence under section 4 of that **Act** (causing a person to engage in sexual activity without consent) if it was committed in relation to a person under the age of 16.

19. An offence under section 5 of the Sexual Offences **Act** 2003 (rape of a child under 13).

20. An offence under section 6 of that **Act** (assault of a child under 13 by penetration).

21. An offence under section 7 of that **Act** (sexual assault of a child under 13).

22. An offence under section 8 of that **Act** (causing or inciting a child under 13 to engage in sexual activity).

23. An offence under section 9 of that **Act** (sexual activity with a child).

24. An offence under section 10 of that **Act** (causing or inciting a child to engage in sexual activity).

25. An offence under section 14 of that **Act** if doing it will involve the commission of an offence under sections 9 and 10 of that **Act** (arranging or facilitating the commission of a child sex offence).

26. An offence under section 16 of that **Act** (abuse of position of trust: sexual activity with a child) if it was committed in relation to a person under the age of 16.

27. An offence under section 17 of that **Act** (abuse of position of trust: causing or inciting a child to engage in sexual activity) if it was committed in relation to a person under the age of 16.

28. An offence under section 25 of that **Act** (sexual activity with a child family member) if it was committed in relation to a person under the age of 16.

29. An offence under section 26 of that **Act** (inciting a child family member to engage in sexual activity) if it was committed in relation to a person under the age of 16.

30. An offence under section 30 of that **Act** (sexual activity with a person with a mental disorder impeding choice) if it was committed in relation to a person under the age of 16.

31. An offence under section 31 of that **Act** (causing or inciting a person with a mental disorder impeding choice to engage in sexual activity) if it was committed in relation to a person under the age of 16.

32. An offence under section 34 of that **Act** (inducement, threat, or deception to procure activity with a person with a mental disorder) if it was committed in relation to a person under the age of 16.

33. An offence under section 35 of that **Act** (causing a person with a mental disorder to engage in or agree to engage in sexual activity by inducement, threat or deception) if it was committed in relation to a person under the age of 16.

34. An offence under section 38 of that **Act** (care workers: sexual activity with a person with a mental disorder) if it was committed in relation to a person under the age of 16.

35. An offence under section 39 of that **Act** (care workers: causing or inciting sexual activity) if it was committed in relation to a person

under the age of 16.

36. An offence of-

- (a) aiding, abetting, counselling, procuring or inciting the commission of an offence specified in this Part of this Schedule; or
- (b) attempting to commit an offence so specified.

Appendix B – Joint Committee on Human Rights report on ECHR compatibility of the propensity provisions

For a copy of this report:

www.crimeline.info/characterchr.pdf

Appendix C – Crown Court Rules

Rule 23E Crown Court Rules 1982 (as amended):

23E. - (1) A party who wants to introduce evidence of a non-defendant's bad character or who wants to cross-examine a witness with a view to eliciting that evidence, under section 100 of the Criminal Justice Act 2003 ("the 2003 Act"), must apply in Form BC1 and the application must be received by the appropriate officer of the Crown Court and all other parties to the proceedings -

(a) not more than 14 days after the prosecutor has complied or purported to comply with section 3 of the Criminal Procedure and Investigation Act 1996^[4] (disclosure by the prosecutor); or

(b) as soon as reasonably practicable, where the application concerns a non-defendant who is to be invited to give (or has given) evidence for a defendant.

(2) A party who receives a copy of an application under paragraph (1) may oppose that application by giving notice in writing to the appropriate officer of the Crown Court and all other parties to the proceedings not more than 14 days after receiving that application.

(3) A prosecutor who wants to introduce 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 of the 2003 Act (defendant's bad character), must give notice in Form BC2 to the appropriate officer of the Crown Court and all other parties to the proceedings not more than 14 days after -

(a) the committal of the defendant; or

(b) the consent to the preferment of a bill of indictment in relation to the case; or

(c) the service of notice of transfer under section 4(1) of the Criminal Justice Act 1987^[5] (notices of transfer) or under section 53(1) of the Criminal Justice Act 1991^[6] (notices of transfer in certain cases involving children); or

(d) where a person is sent for trial under section 51 of the Crime and Disorder Act 1998^[7] (sending cases to the Crown Court) the service of copies of the documents containing the evidence on which the charge

or charges are based under paragraph 1 of Schedule 3 to that Act.

(4) A co-defendant who wants to introduce 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 of the 2003 Act must give notice in Form BC2 to the appropriate officer of the Crown Court and all other parties to the proceedings not more than 14 days after the prosecutor has complied or purported to comply with section 3 of the Criminal Procedure and Investigations Act 1996.

(5) A defendant's application to exclude bad character evidence must be in Form BC3 and received by the appropriate officer of the Crown Court and all other parties to the proceedings not more than 7 days after receiving a notice given under paragraph (3) or (4).

(6) A defendant entitled to receive a notice under this rule may waive his entitlement by so informing the Crown Court and the party who would have given the notice.

(7) The Crown Court may -

(a) allow a notice or application required under this rule to be given in a different form, or orally; or

(b) shorten a time-limit under this rule or extend it even after it has expired,

if it is in the interests of justice to do so.

(8) Where this rule requires a notice or application to be given or sent it may, with the consent of the addressee, be sent by fax or other means of electronic communication.

(9) References in this rule to a form is a reference to a form set out in Schedule 14 or a form to the like effect."

Forms:

FORM BC1

Application for leave to adduce non-defendant's bad character

(Section 100 of the Criminal Justice Act 2003)

<i>Details required</i>	<i>Notes</i>
1. Details of applicant	
Name:	
Address:	
Name of prosecuting agency (if relevant):	
2. Case details	
Case reference numbers:	
Name of judge:	
Date the trial or proceedings is due to start or started:	
Name of defendant(s):	
Charges:	<i>Give brief details of those charges to which this application applies.</i>
3. Details of this application	
Please provide the following details	
(a) the particulars of the bad character evidence including how it is to be introduced or elicited in the proceedings. This should also include the names of the relevant non-defendant and all other relevant witnesses; and	<i>Section 100 of the 2003 Act.</i>
(b) the grounds of admissibility under section 100 of the 2003 Act.	<i>Please attach any relevant documentation.</i>
4. Extension of time	
Are you applying for an extension of time for service? (yes/no).	
If so please provide details.	

Signed:	
Dated:	

FORM BC2

Notice of intention to adduce bad character evidence

(Section 101 of the Criminal Justice Act 2003)

<i>Details required</i>	<i>Notes</i>
1. Details of party giving notice	
Name:	
Address:	
Name of prosecuting agency (if relevant):	
2. Case details	
Case reference numbers:	
Date the trial or proceedings is due to start or started:	
Name of defendant(s):	
Charges:	<i>Give brief details of those charges to which this application applies.</i>
3. Details of this Notice	
To the named defendant:	
You are hereby given notice that bad character evidence, particulars of which are detailed below, is to be adduced or elicited in these proceedings.	
The particulars of that bad character evidence are as follows:	<i>In this section state:</i>
	<i>(a) a description of the bad character evidence and how it is to be adduced or elicited in the proceedings (including the names of any relevant witnesses); and</i>
	<i>(b) the grounds for the admission of evidence of the defendant's bad character</i>

	<i>under section 101 of the 2003 Act;</i>
	<i>(c) why the admission of that evidence is in the interests of justice, where section 108 of the Act applies (evidence of conviction when under 14 used in proceedings for offence committed as an adult).</i>
	<i>Please attach any relevant documentation.</i>
4. Extension of time	
Are you applying for an extension of time for service? (yes/no).	
If yes, state your reasons.	
Signed:	
Dated:	

FORM BC3

Application to exclude evidence of the defendant's bad character

(Sections 101 and 108(2) of the Criminal Justice Act 2003)

<i>Details required</i>	<i>Notes</i>
1. Details of the defendant	
Name:	
Address:	
Date of Birth:	
If you are in custody, please give your Prison Index No. and address where detained:	
2. Case details	
Case reference numbers:	
Name of judge:	

Date the trial or proceedings is due to start or started:	
Charges:	
Date that you were served with the notice that bad character evidence is to be adduced in these proceedings:	
3. Details of the application	
Include the following information:	
(a) why the admission of bad character evidence would have such an adverse effect on the fairness of the proceedings that the court should not admit it;	<i>Note that an application to exclude this evidence under section 101(3) of the 2003 Act can only be made if you have been notified of a party's intention to adduce this evidence under subsection 101(1)(d) (it is relevant to an important matter in issue between the defendant and the prosecution) or subsection 101(1)(g) (that the defendant has made an attack on another person's character).</i>
(b) details as to the length of time between the matters to which the bad character evidence relates and the matters which form the subject of the offence charged;	<i>Section 101(4) of the 2003 Act.</i>
(c) if you are applying for the exclusion of this evidence on grounds other than section 101(3) of the 2003 Act, please set out such objections.	
4. Offences committed by the defendant when a child	
If you are applying to exclude evidence of a previous conviction for an	<i>Section 108(2) of the 2003 Act.</i>

offence when under the age of 14, state	
(a) whether the offence for which you received a conviction when under the age of 14 was an offence triable only on indictment; and	
(b) why it would not be in the interests of justice for that bad character evidence to be admitted.	
5. Extension of time	
Are you applying for an extension of time for service? (yes/no).	
If so, state your reasons.	
Signed:	
Dated:	

".

Appendix D – Magistrates' Court Rules

Rule 72A Magistrates' Courts Rules 1982 (as amended):

72A. - (1) A party who wants to introduce evidence of a non-defendant's bad character or who wants to cross-examine a witness with a view to eliciting that evidence, under section 100 of the Criminal Justice Act 2003 ("the 2003 Act"), must apply in the prescribed form and the application must be received by the justices' chief executive and all other parties to the proceedings -

(a) not more than 14 days after the prosecutor has complied or purported to comply with section 3 of the Criminal Procedure and Investigation Act 1996^[4] (disclosure by the prosecutor); or

(b) as soon as reasonably practicable, where the application concerns a non-defendant who is to be invited to give (or has given) evidence for a defendant.

(2) A party who receives a copy of an application under paragraph (1) may oppose that application by giving notice in writing to the justices' chief executive and all other parties to the proceedings not more than 14 days after receiving that application.

(3) A prosecutor who wants to introduce evidence of a defendant's bad character or who wants to cross-examine a witness with a view to eliciting such evidence, under section 101 of the 2003 Act (defendant's bad character), must give notice in the prescribed form to the justices' chief executive and all other parties to the proceedings at the same time as he complies or purports to comply with section 3 of the Criminal Procedure and Investigations Act 1996.

(4) A co-defendant who wants to introduce 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 of the 2003 Act, must give notice in the prescribed form to the justices' chief executive and all other parties to the proceedings not more than 14 days after the prosecutor has complied or purported to comply with section 3 of the Criminal Procedure and Investigations Act 1996.

(5) A defendant's application to exclude bad character evidence must be in the prescribed form and received by the justices' chief executive and all other parties to the proceedings not more than 7 days after receiving a notice under paragraph (3) or (4).

(6) A defendant entitled to receive a notice under this rule may waive his entitlement by so informing the magistrates' court and the party who would have given the notice.

(7) The magistrates' court may -

(a) allow a notice or application required under this rule to be given in a different form, or orally; or

(b) shorten a time-limit under this rule or extend it even after it has expired,

if it is in the interests of justice to do so.

(8) Where this rule requires a notice or application to be given or sent it may, with the consent of the addressee, be sent by fax or other means of electronic communication."

Forms:

Application for leave to adduce non-defendant's bad character

(Section 100 of the Criminal Justice Act 2003)

<i>Details required</i>	<i>Notes</i>
1. Details of applicant	
Name:	
Address:	
Name of prosecuting agency (if relevant):	
2. Case details	
Case reference numbers:	
Date the trial or proceedings is due to start or started:	
Name of defendant(s):	
Charges:	<i>Give brief details of those charges to which this application applies.</i>
3. Details of this application	
Please provide the following details	
(a) 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 relevant witnesses); and	<i>Please attach any relevant documentation.</i>
(b) the grounds for the admission of evidence of a non-defendant's bad character under section 100 of the 2003 Act.	
4. Extension of time	
Are you applying for an extension of time for service? (yes/no).	
If so please provide details.	
Signed:	

Dated:	
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FORM

Notice of intention to adduce bad character evidence

(Section 102 of the Criminal Justice Act 2003)

<i>Details required</i>	<i>Notes</i>
1. Details of party giving notice	
Name:	
Address:	
Name of prosecuting agency (if relevant):	
2. Case details	
Case reference numbers:	
Date the trial or proceedings is due to start or started:	
Name of defendant(s):	
Charges:	<i>Give brief details of those charges to which this application applies.</i>
3. Details of this Notice	
To the named defendant;	
You are hereby given notice that bad character evidence, particulars of which are detailed below, is to be adduced or elicited in these proceedings.	
The particulars of that bad character evidence are as follows:	<i>In this section include:</i>
	<i>(a) a description of the bad character evidence and how it is to be adduced or elicited in the proceedings (including the names of any relevant witnesses); and</i>
	<i>(b) the grounds for the admission of evidence of the defendant's bad character under section 101 of the</i>

	<i>2003 Act.</i>
	<i>Please attach any relevant documentation.</i>
4. Extension of time	
Are you applying for an extension of time for service? (yes/no).	
If yes, state your reasons.	
Signed:	
Dated:	

FORM

Application to exclude evidence of the defendant's bad character

(Sections 101 and 108(2) of the Criminal Justice Act 2003)

<i>Details required</i>	<i>Notes</i>
1. Details of the defendant	
Name:	
Address:	
Date of Birth:	
If you are in custody, please give your Prison Index No. and address where detained:	
2. Case details	
Case reference numbers:	
Date the trial or proceedings is due to start or started:	
Charges:	
Date that you were served with the notice of the intention to adduce bad character evidence in these proceedings:	
3. Details of the application	
This section must include the following information:	
(a) why the admission of the bad character evidence would have such an adverse effect on the fairness of the proceedings that the court should not admit it.	<i>Note that an application to exclude this evidence under section 101(3) of the 2003 Act can only be made if you have been notified of a party's intention to adduce this evidence under subsection 101(1)(d) (it is relevant to an important matter in issue between the defendant and the prosecution) or subsection 101(1)(g) (that the defendant has made an attack on another person's character).</i>
(b) details as to the length of	<i>Section 101(4) of the 2003 Act.</i>

time between the matters to which the bad character evidence relates and the matters which form the subject of the offence charged.	
(c) if you are applying for the exclusion of this evidence on grounds other than section 101(3) of the 2003 Act, please set out such objections.	
4. Extension of time	
Are you applying for an extension of time for service? (yes/no).	
If so, state your reasons.	
Signed:	
Dated:	