

WHERE ARE WE NOW UNDER THE CJA 2003?

Introduction

Background

1. The purpose of this paper is to track significant changes to the law since the CJA 2003 was enacted, and to consider the impact of those changes on the criminal law process. The reader is requested to reflect on the question whether we are moving closer towards an inquisitorial system of criminal justice.
2. Other speakers have prepared papers on sentencing, disclosure, and appeals, and therefore it is not proposed to comment in these pages on changes in the law that have been covered by them.
3. One aim of the Act is to improve the management of cases and to “ensure that criminal trials are run more efficiently and to reduce the scope for abuse of the system” (*Explanatory Notes*, para.5). Two further aims were (i) to encourage professionals operating inside the criminal justice system, and (ii) to focus on outcomes and to revise rules relating to process that were judged not only to be unnecessary but impeded the search for truth.¹ Thus, in its White Paper, the Government states:
“[the] process will be geared towards getting to the truth, convicting the offender as early as we possibly can, and minimizing opportunities for anyone to impede efforts to achieve that. We will put the victims, who suffer most from crime, at the heart of the system and do everything we can to support and inform them, and we will respect and protect the witnesses without whom the CJS would not function” (para.0.2).
4. The Government was not slow to echo the words of Sir Robin Auld, who wrote in his *Report of the Criminal Courts Review*:
“To the extent that the prosecution may legitimately wish to fill possible holes in its case once issues have been identified by the defence statement, it is understandable why as a matter of tactics a defendant might prefer to keep his case close to his chest. But that is not a valid reason for preventing a full and fair hearing on the issues canvassed at the trial. A criminal trial is not a game under which a guilty defendant should be provided with a sporting chance. It is a search for truth in accordance with the twin principles that the prosecution must prove its case and that a defendant is not obliged to inculcate himself, the object being to convict the guilty and acquit the innocent. Requiring a defendant to indicate in advance what he disputes about the prosecution case offends neither of those principles.”
5. The above passage has found its way into more than one decision of the Court of Appeal as that Court endeavours to kick into the long grass the tactic of ‘ambushing’ one’s opponent: see *Gleeson* [2003] EWCA Crim 3357; *Mohindra* [2004] EWHC 490 (Admin); *Meakin* [2006] EWHC (Admin) 1067.
6. In order to “convict more of the guilty” the government stated its intention to bring about the following changes:
 - To improve defence and prosecution **disclosure** by increasing incentives and sanctions to ensure compliance;
 - To allow the use of reported evidence (‘**hearsay**’) where there is a good reason, such as where a witness cannot appear personally;
 - To allow for **trial by judge alone** in serious and complex fraud trials, some other complex and lengthy trials or where the jury is at risk of tampering; and
 - To extend the **availability of preparatory hearings** to ensure that serious cases such as drug trafficking as well as complex ones can be properly prepared. (*Executive Summary*)

¹ Consider the remarks of the Home Secretary on Radio 4, the *Today programme*, November 22, 2003 at 8:30am; see *Hansard*, HC, Vol. 413, col.1025 (November 20, 2003) and see the Government’s White Paper “*Justice for All*” Cm.5563 (2002).

7. The Government's proposals included altering the nature of the criminal trial by:
 - Allowing the court to be informed of a defendant's **previous convictions** where appropriate;
 - Removing the **double jeopardy rule** for serious cases if compelling new evidence comes to light;
 - To give witnesses greater access to their **original statements** at trial;
 - To give the **prosecution the right of appeal** against rulings which terminate the prosecution case before the jury decides; and
 - To increase the proportion of the population eligible for **jury service**."
8. It will be remembered that the government departed from the Law Commission's proposals for reforming rules relating to bad character evidence (set out in chapter 1 to Part 11 of the 2003 Act), but it largely followed the Commission's proposals in connection with hearsay evidence (chapter 2 to Part 11).²

The attitude of the courts

9. All of the aforementioned proposals led to many heated debates within and outside Parliament. Not only have all these proposals been given legislature effect, but also, for their part, the Courts have responded decisively to carry out the will of government.
10. Some commentators, including myself, thought that the Courts would apply the bad character provisions restrictively and that they would apply the hearsay provisions of the Act very much as the Law Commission envisaged.
11. There were early indications that the Court of Appeal (Criminal Division) felt that the government had not gone far enough in chapter 2 to Part 11 and that it preferred to see the enactment of a simple hearsay rule "putting the judge in charge of what evidence is admissible" and giving the judge "responsibility of ensuring that the jury use the evidence in an appropriate manner".³

² Although changes to the rules of hearsay evidence largely follow the recommendations of the Law Commission in its Final Report (No.245; Ch.2 to Pt 11 of the 2003 Act), the Government steered its own course in relation to many other reforms introduced by the Act. Rules relating to evidence of bad character, as set out in Ch.1 to Pt 11 of the 2003 Act, often depart from the proposals of the Law Commission in its *Consultation Paper* (No.141), and in its *Final Report and draft Bill* (Report No.273).

For background information relating to those provisions of the 2003 Act that deal with (i) court procedure, (ii) the allocation of court business, (iii) rules on disclosure by the prosecution and by the defence, (iv) the right of appeal for the prosecution against judicial decisions relating to criminal trials, and (v) the power to retry a person acquitted of certain very serious offences if there is new and compelling evidence of an accused's guilt, see the *Review of the Criminal Courts of England and Wales* (Sir Robin Auld, 2001); the *Report of the Royal Commission on Criminal Procedure*, Cmnd.8092 (1981); the *Report of the Royal Commission on Criminal Justice* Cm.2263 (1983); the *Fraud Trials Committee Report* (HMSO, 1986); the *Report of the Joint Home Office/Cabinet Office Review of PACE* (2002); *Prosecution Appeals Against Judges' Rulings* (Law Commission, Consultation Paper No.158); *Double Jeopardy and Prosecution Appeals* (Law Commission, Report No.267); *Double Jeopardy* (Law Commission Consultation Paper No.156); *Evidence of Bad Character in Criminal Proceedings* (Law Commission Report No.273); *Evidence in Criminal Proceedings: Hearsay and Related Topics* (Law Commission Report No.245).

³ In the House of Lords, Lord Ackner drew their Lordships' attention to a paper written by the then Lord Chief Justice (Lord Woolf) and deposited in the Library at the House of Lords. In that paper, Lord Woolf wrote:

"What happens now in civil proceedings is that a judge has a general discretion to determine how matters are to be proved. The judge has to exercise the discretion in the interests of justice. He is assisted in doing this, because the probative value of the evidence depends upon its nature and source. If it is not first-hand evidence, then it has the disadvantage that it has not been tested by cross-examination. Whether this matters depends on the circumstances".

He added:

"If we have got to the stage where it is considered that it is safe to allow juries to hear hearsay evidence, then we must be accepting that they can be trusted to use that evidence in accordance with the directions of the judge. Instead of the detailed and complex provisions which are contained in Chapter 2, what is needed is a simple rule putting the judge in charge of what evidence is admissible and giving him the responsibility of ensuring that the jury use the evidence in an appropriate manner".

12. A further sign that the Courts wished to move towards an inclusionary approach to at least hearsay evidence, came in *Levin* [2004] EWCA Crim 408 where the Court of Appeal held that in confiscation proceedings the ordinary rules of criminal evidence did not apply:
- “...the confiscation hearing was an extension of the sentencing hearing, and was more in the nature of civil proceedings, though we prefer a description that the confiscation hearing is an extension of the sentencing hearing, and therefore criminal in nature, but that by virtue of the 1993 Act⁴ the civil procedure is correctly adopted and applied....In our judgment, it is apparent from the foregoing that since the coming into force, in February 1995, of the 1993 amendments to the 1988 Act, there has been a sea change in the conduct of confiscation proceedings, which are now to be viewed, as Parliament intended through the prism of those amendments”

Rapidly emerging case law regarding bad character

13. Practitioners found themselves thrown into the deep waters of chapter 1 to Part 11 sooner than most had expected, and ahead of the date announced by the Home Office in its Press Release: see *Bradley* [2005] 1 Cr App R 24.⁵ The Court held that Part 11 of the 2003 Act is procedural and does not alter the substantive law, but alters “only the rules as to the evidence by which guilt may be proved”. It therefore held that the starting point for considering from what date the new provisions apply, is that which relates to procedural provisions.⁶
14. Part 11 of the Act *is* procedural, but the impact of chapter 1 of that Part has been profound. The anticipated flood of appeals to the Court of Appeal has come to pass, but the provisions have been interpreted and applied in ways that has resulted in few appeals against conviction succeeding.
15. Although many recent cases say little that is new on matters of principle, they usefully illustrate how the statutory provisions are to be applied. We have now reached the stage that in a significant number of cases the results are predictable, if not a foregone conclusion. When the Court is heard to say that a submission is “completely doomed”,⁷ one wonders how long it will be before the Court declines to hear cases that manifestly involve no new principle. In *Renda* [2005] EWCA Crim 2826, the Court fired a warning shot that this might be a reality when it said:
- “The creation and subsequent citation from a vast body of so-called “authority”, in reality representing no more than observations on a fact specific decision of the judge in the Crown Court, is unnecessary and may well be counterproductive. This legislation has now been in force for nearly a year. The principles have been considered by this Court on a number of occasions. The responsibility for their application is not for this Court but for trial judges.”
16. A number of appeals amount to no more than a submission that the trial judge ought to have excluded evidence of bad character but, on its own, such a submission is unlikely to succeed. A stronger appeal is one where the judge fails adequately to direct the jury of the relevance and purpose of receiving evidence of the appellant’s bad character: see *Purcell* [2006] EWCA Crim 1264; *Randall* [2006] EWCA Crim 1413; *Fryer and Tedstone* [2006] EWCA Crim 1530.
17. It was often said in Parliament, that chapter 1 to Part 11 was intended to enact an “inclusionary approach” to bad character evidence. Thus the *Explanatory Notes* state that the 2003 Act takes “an inclusionary approach to a defendant's previous convictions and other misconduct or disposition, under which relevant evidence is admissible but can be excluded in certain circumstances if the court

⁴ That is to say, the Criminal Justice Act 1993.

⁵ The press release stated that “The provisions will cover all types of offences and will apply to all cases in which charges are laid on or after 15th December”

⁶ In *Makanjuola* [1995] 2 Cr.App.R. 469 at 472 Lord Taylor of Gosforth C.J. said: "The general rule against the retrospective operation of statutes does not apply to procedural provisions (see Bennion, *statutory Interpretation* (2nd ed), p 218 and the cases there cited). Indeed, the general presumption is that a statutory change in procedure applies to pending as well as future proceedings."

⁷ *Williams* [2006] EWCA Crim 2052

considers that the adverse affect that it would have on the fairness of the proceedings requires this”.⁸ In my commentary to the Act (*Current Law Statutes Annotated*), I questioned whether the statutory scheme is inclusionary. I maintain that, in essence, it is exclusionary. The reason is that s.98 defines “bad character” widely – and this was deliberately done to ensure that fact-finders did not receive bad character evidence unless it passed through one of the gateways specified in the Act. Unhappily, the point was lost on some Members of Parliament who tinkered with the original definition of bad character believing, mistakenly, that the definition was too wide and would allow too much evidence being adduced.⁹

18. However, Part 11 increasingly takes on the *appearance* of enacting an inclusionary approach towards bad character evidence. Two factors have contributed to the creation of this image. First, the Courts have shown their willingness to open the gateways in a wide range of circumstances. Secondly, the Courts appear to be interpreting the words “to do with the alleged facts of the offence” rather widely [see s.98(a)] with the result that conduct which one might have thought would be held behind the gateways, actually falls outside Part 11 and which is potentially admissible (subject to the test of relevancy and subject to s.78 PACE): see for example, *Malone* [2006] EWCA Crim 1860; *Machado* [2006] EWCA Crim 1804, *Benguit* [2005] EWCA Crim 1953, and *Edwards and others* [2005] EWCA Crim 3244. Unfashionable as it has become to say this, there is a risk that the Courts have been too ready to move away from the past, and to embrace the notion that fact-finders (lay and professional) can be trusted to correctly evaluate bad character evidence but who actually walk along one of the paths of forbidden reasoning (i.e. moral or reasoning prejudice).¹⁰

Is chapter 1 to Part 11 influencing outcomes?

19. In the experience of this commentator, the bad character provisions are influencing the outcomes. One defendant decided to plead guilty following a pre-trial ruling by the judge that the defendant’s drug convictions were admissible on a charge of drug trafficking. In another case, the jury returned to court having invited the judge to clarify the relevance of the defendant’s convictions and whether there was anything else that they should know about them. In another case, the fact that D1 had two convictions for robbery and two for attempted robbery whereas D2 was treated as a person of good character, might explain why the jury convicted D1 but could not agree on D2 on a charge of robbery.
20. It is too early to say whether the new scheme is causing injustice. There is no doubt that the Court of Appeal is doing what it can to ensure that in cases where the complaint involves bad character evidence, a conviction is safe, but injustice can remain concealed and undetected for a long period of time.

Bad character applications

21. Practitioners need to be vigilant to ensure that the information that they receive is correct (this is easier said than done). Evidence of bad character may take several forms, e.g. by admission, by a memorandum of conviction, by way of information recorded on a computer print out, or microfiche. Experience has shown that defendants often do not accurately remember the precise details of their (perhaps long and appalling) criminal records; police records are not necessarily correct (e.g. where an offence is inaccurately described), and case papers might be missing or they might have been destroyed: see *Shields* [2006] EWCA Crim 1532.
22. A number of problems typically arise when it is proposed to adduce bad character evidence:
- (i) How many acts or convictions are relied on?

⁸ Para.365, Explanatory Notes, 23rd December 2003.

⁹ See *Current Law Statutes (Annotated) The Criminal Justice Act 2003*; and see para.54 of a paper written by Professor John Spencer QC for the JSB (April 2005).

¹⁰ Law Commission (Law Com No 273) *Evidence Of Bad Character In Criminal Proceedings*

- (ii) Is it merely the fact of conviction that is relied on, or it is proposed to adduce evidence concerning the circumstances of the offending acts too? See *Fryer and Tedstone* [2006] EWCA Crim 1530.¹¹
 - (iii) How much information should the fact-finders receive about the defendant's convictions?
 - (iv) To what extent may a defendant (or a non-defendant witness) explain the circumstances resulting in a conviction? Is it permissible for a defendant to adduce a written 'basis of plea', or to adduce evidence contained in a Pre Sentence Report, or to call a witness who testified in the earlier case? Might such matters be resolved by way of a *voir dire*?
 - (v) What should the court do if a defendant claims that he entered a guilty plea on a misconceived basis, or because it was expedient to plead guilty but he is in fact innocent?
 - (vi) If bad character evidence is admitted through one gateway, is it open to the jury to use it for another purpose? See *Highton* [2005] EWCA Crim 1985.
23. Given the above, it is obviously important that the parties are put in a position of being able to prepare their cases properly, and this highlights the need for notices to be carefully drafted (see *Purcell* [2006] EWCA Crim 1264). Notice need to be drafted in good time: see *Bovell* [2005] 2 Cr App R(S) 27, and *Humphris* [2005] EWCA Crim 2030 and see *Ainscough (Zane Roy)* [2006] EWCA Crim 694. Proper disclosure is obviously important.
24. The courts are robust in their approach. They will not lightly allow defendants to go behind the fact of their convictions or to allow a previous conviction to be re-litigated in the trial.
25. It is also plain that evidence of bad character will be admissible even if the details are "unpleasant". In *Smith (James)* [2006] EWCA 1355, the Court said:
"It is suggested that to put, as she also did, that the appellant prayed on the elderly or to draw attention to the age of the victims was unfair because it would generate sympathy for the victim in the case with which the jury was concerned and animosity towards the appellant for his callous behaviour in the past. There is, of course, always a balance to be struck, but it can never be a rule that because the offence the court is dealing with is unpleasant, let us take for example sex abuse of a young child, details of equally unpleasant offences which have a probative value to the offence being tried cannot be admitted because the details are unpleasant."
26. The absence of a written notice to adduce bad character evidence, or a notice that is deficient, is not fatal to an application to adduce that evidence: consider *Smith (James)* [2006] EWCA Crim 1355, *Malone* [2006] EWCA Crim 1860.
27. A failure to comply with time limits is relevant to a court's assessment of the fairness of the proceedings, or to decide whether a hearing ought to be adjourned to enable further enquires to be made. The judge has an unfettered discretion regarding applications to extend time limits, see *Robinson v Sutton Coalfield Magistrates' Court* [2006] EWHC 307 (Admin).
28. The Court of Appeal has reminded practitioners that it is "not helpful and frequently distinctly unhelpful", to reason from the law which applied before the 2003 Act came into force: *Littlechild* [2006] EWCA Crim 2126.

¹¹ The Court quoted with approval the observations of the single judge (Fulford J) "Evidence of this kind is not limited to mere rehearsal of the terms of the offences, the dates of the convictions and the sentences, but can cover a reasonable and properly circumscribed description of what the offences involved. In this instance the prosecution went into a certain amount of detail by way of cross-examination, which in turn led to some long answers and explanations on the part of Tedstone. However, it is unarguable that the cross-examination was unduly prolonged or rendered the trial unfair, particularly - as Tedstone volunteered - he is a 'career criminal'. Given the nature of the attack that had been made by the defendants and the extent of his convictions, the cross-examination by prosecuting counsel was of appropriate length."

What is “bad character evidence”?

29. This is defined by s.98 of the 2003 Act as follows [emphasis added]:

“References in this Chapter to evidence of a person's "bad character" are to evidence of, or of a disposition towards, misconduct on his part, other than evidence which-

(a) has **to do with the alleged facts of the offence** with which the defendant is charged, or

(b) is evidence of misconduct **in connection with the investigation or prosecution of that offence.**”

30. “Misconduct” is defined in s.112(1), and means “the commission of an offence or other reprehensible behaviour”.

31. It is plain that evidence of mental illness is not evidence of “bad character”: see *Tine* [2006] EWCA Crim 1788. The Court stated that:

“Psychiatric illness is plainly not bad character. It may lead to a disposition towards misconduct which would amount to bad character, but that was not what counsel sought to introduce. If the judge was saying that the psychiatric history of a witness is always irrelevant, that is clearly wrong. Sometimes psychiatric evidence will be irrelevant to credibility; sometimes it may be very relevant. However, this court would certainly agree that cross-examination of a witness about his or her psychiatric history should not be permitted unless there is some basis for doing so.”

32. It is now well established that “bad character” evidence will usually take the form of convictions, but it may include evidence that offences have been committed but which has not resulted in prosecution still less in conviction. That the defendant (or non-defendant witness) performed acts that involved offences committed by him (whether resulting in a conviction or otherwise). In this connection, consider cases such as *Willis* (unreported, 29 January 1979); *Thrussell* (unreported, 30 November 1981); *Madden* [1986] Crim LR 804; *Bagga* (unreported, 21 May 1986); *Groves* [1998] Crim LR 200, and see *Ilomuanya* [2005] EWCA Crim 58 and the detailed commentary by Professor David Ormerod regarding that case [2006] Crim L.R.000 in which he states that

“It is interesting to note that in the case of *Van Nguyen* [2005] EWCA Crim 1985, under the new Act, the Court of Appeal held that evidence of D’s previous record for shoplifting to feed his drugs habit ought not to have been admitted at his trial for cultivating cannabis. The prosecution sought to rely on it to demonstrate his likely knowledge of what was being grown, it did not demonstrate that fact”.

33. Facts resulting in an acquittal might also be admissible: *Z* [2000] 2 AC 483.

34. Section 98(a) is capable of being interpreted restrictively or widely. It must be stressed that evidence that falls within s.98(a) or (b) takes the evidence outside Ch.1 to Pt 11 of the 2003 Act (note the words “other than”).

35. For reasons explained below, it is important to distinguish between conduct that has “to do with the alleged facts of the offence” [s.98(a)] and conduct that falls within the definition of “important explanatory evidence” [ss.100 and 101(1)(c)].

36. The effect of section 98(a) and (b), is illustrated by the *Explanatory Notes* (para.357):

“ . . .if the defendant were charged with burglary, the prosecution's evidence on the facts of the offence - any witnesses to the crime, forensic evidence etc - would be admissible outside the terms of these provisions. So too would evidence of an assault that had been committed in the course of the burglary, as evidence to do with the facts of the offence. Evidence that the defendant had tried to intimidate prosecution witnesses would also be admissible outside this scheme as evidence of misconduct in connection with, as appropriate, the investigation or the prosecution of the offence, as would allegations by the defendant that evidence had been planted. However, evidence that the defendant had committed a burglary on another occasion or that a witness had previously lied on oath would not be evidence to do with the facts of the

offence or its investigation or prosecution and would therefore be caught by the definition in section 98 and its admissibility would fall to be dealt with under the Act's provisions.”

37. The above illustration does not reveal the full reach of s.98. Paragraphs (a) and (b) have their origin in the Law Commission's recommendations in its *Final Report* (No.273, paras 1.12 and 10.4). The Paragraphs relate to evidence that is part of the narrative of the offence (Report No.273, para.10.6). Thus, if during a burglary, the defendant is alleged to have smashed a window to a house to gain entry, the fact that the defendant is not charged with criminal damage does not prevent that evidence from being adduced on a charge of burglary. Similarly, evidence that the defendant was in the unlawful possession of a firearm, at the moment he is alleged to have stolen money from a bank, may be adduced to prove a charge of robbery despite the absence of a specific count relating to the firearm. However, the fact that a person habitually and unlawfully carries a firearm in a public place might be relevant “important explanatory evidence”, for the purposes of s.100, or s.101.
38. It is helpful to separate “important” from the concept of “explanatory evidence”. As to the latter, the evidence should explain other evidence. As to the former, the evidence is important if the fact finder would find it difficult or impossible to understand the evidence in the case without it. Paragraphs 360–361 of the *Explanatory Note* (December 2003) give some insight into what Parliament has in mind:
- “360. The term “explanatory evidence” is used to describe evidence which, whilst not going to the question of whether the defendant is guilty, is necessary for the jury to have a proper understanding of other evidence being given in the case by putting it in its proper context. An example might be a case involving the abuse by one person of another over a long period of time. For the jury to understand properly the victim's account of the offending and why they did not seek help from, for example, a parent or other guardian, it might be necessary for evidence to be given of a wider pattern of abuse involving that other person.
361. For evidence to be admissible as “important explanatory evidence”, it must be such that, without it, the magistrates' or jury would find it impossible or difficult to understand other evidence in the case - section 100(2). If, therefore, the facts or account to which the bad character evidence relates are largely understandable without this additional explanation, then the evidence should not be admitted. The explanation must also give the court some substantial assistance in understanding the case as a whole. In other words, it will not be enough for the evidence to assist the court to understand some trivial piece of evidence.”
39. In his paper for the JSB (“*Evidence of Bad Character*”),¹² Professor John Spencer Q.C. mentions the potential overlap between evidence that “has to do with the alleged facts of the offence” and evidence that is admissible as “important explanatory evidence” under s.101(1)(c), but he states that “in practice nothing of any legal significance depends on which of these two routes it is by which the evidence comes in”. On the other hand, one should keep in mind that the definition of “bad character” was deliberately widely defined in order to bring evidence of such character within the scheme of Part 11. If the evidence sought to be adduced, comes within the definition of “important explanatory evidence” [s.101(1)(c)] then arguably that is a reason for concluding that it does not fall within the s.98(a) exception.
40. It is respectfully submitted that the courts should resist the temptation to view s.98(a) as a straightforward way of putting the judge in charge of what evidence is admissible. This is *not* what

¹² April 2005, para.67: “It presumably also covers other criminal acts which were committed by way of preparation: for example, in a murder case, the theft or illegal purchase of the weapon. At one further remove, it would presumably also cover an earlier criminal act which was the reason why the later crime took place: for example, where a defendant beat his wife, a neighbour reported him to the police, and the defendant later assaulted the neighbour out of revenge. In this situation, there is a potential overlap between evidence that “has to do with the alleged facts of the offence” – and hence is admissible because it falls outside the definition of bad character evidence – and evidence that falls inside the ban, but is admissible as “important explanatory evidence” under section 101(1)(c). In practice, nothing of any legal significance depends on which of these two routes it is by which the evidence comes in.”

the Court of Appeal was suggesting should happen when it made the following helpful observations in *Edwards* [2005] EWCA Crim 3244:

“Often the first enquiry is whether it is necessary to go through the ‘bad character’ gateways at all. In this regard, section 98 is not to be overlooked. It excludes from the definition of bad character evidence which ‘has to do with the alleged facts of the offence’ or evidence ‘of misconduct in connection with the investigation or prosecution of that offence’. While difficult questions can arise as to whether evidence of background or motive falls to be admitted under those exclusions in section 98 or requires consideration under section 101(1)(c), it does not follow that merely because the evidence fails to come within the section 101 gateways it will be inadmissible. Where the exclusions in section 98 are applicable the evidence will be admissible without more ado.”

Examples of the exception in s.98(a)

41. In *Malone* [2006] EWCA Crim 1860, M was convicted of murder. The appeal centred on a document, which M forged, that purported to be a report from an enquiry agent instructed by M to follow the deceased. It purported to record visits made by the deceased to various pubs and clubs, and it was a document that M put to her. There was an issue whether, after the disappearance of the deceased, M had laid a false trail as to what had happened to her. At trial, the prosecution successfully argued that the document was admissible under s.98(a) of the CJA 2003 as evidence of bad character “to do with the alleged facts of the offence”. The judge ruled in favour of the prosecution. On appeal, the respondent’s then counsel conceded that if he had been prosecuting counsel at trial, he would have applied to admit the evidence under s.101(1)(d). The court held that the evidence was capable of being admitted under s.98(a) and s.101(1)(d) depending on how the Crown put its case.¹³

42. In *Machado* [2006] EWCA Crim 1804, M was convicted of robbery and of having with him an article with a blade in a public place. M wished to assert that V had offered to supply him with drugs and that V had taken an ecstasy tablet. It would seem that M wished to use the evidence to support his case that he had not pushed him but that V fell over. The trial judge ruled that this was not misconduct that had “to do with the alleged facts of the offence with which the defendant is charged”. The Court of Appeal held that the learned judge was in error. The Court said [emphasis added]:

“The question that arises before us therefore is whether, taking those ordinary English words, the evidence sought to be adduced in this case is evidence that has to do with the alleged facts of the offence. What the appellant wished to give evidence of in this case, (and if that had been allowed to be put evidence would have come from others) was evidence relating to the very circumstances in which this offence had occurred. *All the matters were in effect contemporaneous to and closely associated with the alleged facts of the offence.* It seems to us, looking at the facts of this case and applying the simple English of the provision that these matters were to do with the alleged facts of the offence. They were, therefore, not evidence of

¹³ “... evidence of this sort was capable of being admitted under section 98A. The prosecution case was based on circumstantial evidence. Its case was that the matrimonial difficulties between the appellant and his wife caused him to flare up and kill her. The evidence of his actions before her disappearance showed a build up to a situation which led to him killing her. As such evidence of matrimonial difficulties, the intensity of the effect of these difficulties on the appellant and how he dealt with them before she disappeared could, in our judgment, have been admissible as evidence going directly to show with other circumstantial evidence that he had committed the offence. As such it was capable of being evidence “to do with the alleged facts of the case” in the same way as evidence to show a conspiracy or a joint venture would be admissible under section 98A.

49. However...the judge referred to the prosecution's submission that the evidence threw a bright light on the appellant's behaviour in the period after the deceased's disappearance.....the way the prosecution used the evidence was in keeping with the evidence being admissible under section 101(1)(d) rather than section 98A.

50. We have therefore gone on to consider whether that evidence was admissible under section 101(1)(d). We have no doubt that it was.....In our judgment, it was evidence in respect of an issue between the appellant and the prosecution, namely the issue of whether, after her disappearance, the appellant was seen to lay a false trail as to what had happened to her. The issue was whether in relation to that conduct he was telling the truth. We are of the opinion that if the judge had been asked to rule on its admissibility under section 101(1)(d), the result would have been no different..”

bad character. In the course of argument that conclusion was not seriously disputed by the Crown.”

43. As a matter of simple English one might have thought that M’s evidence did amount to evidence of V’s “bad character” or “reprehensible behaviour”, but the court’s conclusion avoided having to deal with s.100(1)(b) – i.e. substantial probative value and of substantial importance in the context of the case as a whole.
44. In *Benguit* [2005] EWCA Crim 1953, B was convicted of murder. P contended that B was a “knife carrier”. The Court said that this was evidence of “bad character” and that it did not come within s.98(a) because “...the evidence was not to establish so much that the appellant had the knife on him that day, but to establish that he was the sort of person who carried a knife. That seems to us to mean that it was evidence of bad character in a general sense and was insufficiently related to the actual offence itself as to be evidence admissible under section 98”.

Non-defendants bad character

45. Section 100 of the CJA 2003 provides that:

Non-defendant's bad character

- (1) 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
 - (c) all parties to the proceedings agree to the evidence being admissible.
- (2) For the purposes of subsection (1)(a) evidence is important explanatory evidence if-
- (a) without it, the court or jury would find it impossible or difficult properly to understand other evidence in the case, and
 - (b) its value for understanding the case as a whole is substantial.
- (3) In assessing the probative value of evidence for the purposes of subsection (1)(b) the court must have regard to the following factors (and to any others it considers relevant)-
- (a) the nature and number of the events, or other things, to which the evidence relates;
 - (b) when those events or things are alleged to have happened or existed;
 - (c) where-
 - (i) the evidence is evidence of a person's misconduct, and
 - (ii) it is suggested that the evidence has probative value by reason of similarity between that misconduct and other alleged misconduct, the nature and extent of the similarities and the dissimilarities between each of the alleged instances of misconduct;
 - (d) where-
 - (i) the evidence is evidence of a person's misconduct,
 - (ii) it is suggested that that person is also responsible for the misconduct charged, and
 - (iii) the identity of the person responsible for the misconduct charged is disputed,the extent to which the evidence shows or tends to show that the same person was responsible each time.
- (4) Except where subsection (1)(c) applies, evidence of the bad character of a person other than the defendant must not be given without leave of the court.
46. Notwithstanding that s.100 refers to “evidence” and not “questions” or “an allegation”, the section is clearly intended to restrict cross-examination that is calculated to undermine the credibility of a non-defendant witness.
47. In *Riley* [2006] EWCA Crim 2030, R was convicted of a s.18 wounding. R wished to adduce evidence about an incident that had taken place between himself and V on a date before the alleged

assault. R also wished to cross-examine V about that incident. The judge refused that application. The court held that the judge had fallen into error (but the appeal was dismissed nonetheless).¹⁴

48. See also *Machado* [2006] EWCA Crim 1804, above.

The requirement for leave

49. In my commentary to section 100(4)¹⁵ I wrote that nothing in that provision gives any guidance as to the factors that a court might properly take into account when granting or refusing leave. As to that, Professor Spencer QC replied “This raises the question: what is the basis on which the court grants leave? Does section 100(4) give the judge a general discretion, or is his duty limited to deciding whether the tests laid down by section 100 are satisfied or not? As the basic test set out in section 100(1) is elaborated in detail by subsections (2) and (3), it seems probable that Parliament simply meant the judge to check that the conditions set out in section 100 are met – in which case the section is not open to criticism for offering insufficient guidance.”¹⁶ On reflection I am sure that Professor Spencer QC is right. Note that the Court of Appeal in *Riley* remarked “...in our view subsection (4) of section 100 does not give a judge discretion to refuse to admit evidence once he is satisfied that the criteria under section 100 are satisfied”.

Defendant’s bad character

50. As anticipated, little difficulty has arisen in the application of gateways (1)(a) and (b) to s.100 of the 2003 Act but there are now a considerable number of decisions by the Court of Appeal concerning the application of the remaining five gateways.

Important matter in issue between the defendant and the prosecution

51. The leading case remains *Hanson* [2005] 2 Cr App R 21. It is a judgment (in unabridged form) that all criminal law practitioners should have to hand in court.

52. Section 101(1)(d) has to be read together with s.103. The cases that have troubled the courts most often are those that involve a consider of s.103, i.e. whether the defendant has a propensity to commit offences of the kind with which he is charged (see, for example, *De Vos* [2006] EWCA Crim 1688, para.30), or whether the defendant has a propensity to be untruthful (see, for example, *Purcell* [2006] EWCA Crim 1264).

53. Note that section 101 together with s.103, is not limited to propensity because s.103(1) uses the word “include” i.e. it *includes* propensity but it is not confined to propensity: and see *Highton* [2005] EWCA Crim 1985 (para.9). A “matter in issue” might be whether the accused knew that what was afoot was the unlawful importation of a controlled drug into the United Kingdom. The issue is not rooted in propensity, but in the fact that a defendant’s reprehensible behaviour might be relevant and admissible to rebut a defence of lack of knowledge. It is important to note that the *Willis* line of cases did not develop as part of the similar fact rule: see, for example, *Sokialiois* [1993] Crim LR

¹⁴ The Court said: “It seems to us at least arguable that this material was important explanatory evidence within the terms of section 100(2) and that it had substantial value for understanding the case as a whole. There is some support for that in academic writings and in *Archbold*. However, even if not admissible under this section, in our view it was relevant to the appellant’s defence in two ways. First, the issue in the case was who attacked who first. In our judgment, this evidence was capable of showing that the complainant was the aggressor: that is what he had done in January 2004. It was for the same reason important in the context of the case as to who was telling the truth....We would wish to do nothing to discourage a judge, when this sort of application is made and in which there is some force, from adopting a sensible procedure by way of admissions to see that relevant material is before the jury. However, in this case, it seems to us that the judge really had no discretion to prevent the appellant’s counsel from cross-examining Mr Fielding in relation to the earlier incident and, if it was thought proper to do so, from calling independent evidence. In the result, we are satisfied that this evidence was admissible through the gateway provided by section 100 of the Criminal Justice Act 2003.”

¹⁵ Current Law Statutes (Annotated), The Criminal Justice Act 2003, Sweet & Maxwell.

¹⁶ Paragraph 102, *Evidence of Bad Character*, April 2005.

872, and see *Groves* [1998] Crim LR. 200. In *Archbold* 2005 [chp.25-471] it is said that: “The overriding consideration is whether the evidence has sufficient probative force: the test is whether common sense makes the combination of the direct evidence (e.g. finding of drugs in luggage) and the indirect evidence (e.g. finding of drugs at defendant's house) ‘inexplicable on the basis of coincidence’.” The passage was cited (with implicit approval) in *Groves*, and in *Yalman* [1998] 2 Cr.App.R. 269, but see *Balogun* [1997] Crim LR 500, and more recently *Ilomuanya* [2005] EWCA Crim 58. This line of authority has not been broken by the enactment of chapter 1 to Part 11 of the 2003 Act. Such evidence is arguably admissible under s.101(1)(d) and s.103, but it ought not be admissible by straining the language of s.98(a).¹⁷

54. In *Williams* [2006] EWCA Crim 2052, W was convicted of the murder of his long-term partner, V. She had been strangled. There was a long history of domestic strife that included serious violence towards the deceased including rows on the night of her death. V had complained of two previous occasions when W allegedly tried to strangle her. The prosecution was permitted to adduce evidence that W behaved violently towards X who had been W’s earlier long-term partner. She complained that W had sought to strangle her on a few occasions but she never reported those acts to police. The question was whether the evidence was relevant to W’s intention on the basis that the issue was not whether he was responsible for V’s death. The court had no doubt that the evidence was properly admitted under s.101(1)(d). The court’s reasons were that:

“The...material, if true, established that this particular appellant was prone to a continuing propensity, long-standing, not only to use violence against his female partners, but also and specifically to use violence of the type which resulted in the death of the deceased when he strangled her. That evidence had to be considered as a whole.”

Matter in issue

55. Professor Spencer QC, makes the interesting point that there seems to be a difference in the meaning of the phrase “matter in issue” as it appears in s.101 and s.103.¹⁸ This is not something that this commentator considered when he wrote his annotations for *Current Law Statutes (Annotated)*. Rather, he was of the view that “matter in issue” means “a matter in dispute between the parties” and that the meaning was the same across s.101 and s.103. The point remains open. It is true that were a defendant to say that he accepts that he/she has a propensity to burgle then arguably his convictions for burglary ought not be admitted because the matter is not “in issue”. Whether those who drafted ss.101 and 103 had Professor Spencer’s analysis in mind is unclear. It is conceivable that Parliament assumed that an accused would not admit to having a propensity to be untruthful, or a propensity to commit offences “of the kind with which he is charged” – particularly where having such a propensity makes it more likely that he is guilty of the offence charged. What is the position if a defendant is charged with committing a robbery with a loaded firearm, but he has numerous convictions for robbery not using a weapon (e.g. handbag snatching)? He admits that he has a propensity to rob but he denies that he has a propensity to rob with the use of a firearm. Does *his* propensity to rob without a weapon “make it no more likely that *he* is guilty of the offence” charged? The language of section 103 does not provide an easy answer. It speaks of offences “of the kind” with which the defendant is charged, which might be an offence “of the same *description*” or “of the same *category*”.

56. In *Wilkinson* [2006] EWCA 1332, the point was taken that, in a case where D disputes that the alleged offence took place at all (i.e. that nobody committed the acts complained of), a distinction is

¹⁷ See also Fortson, *Misuse of Drugs: Offences, Confiscation, and Money Laundering* (5th ed., 2005, Sweet & Maxwell).

¹⁸ “...A “matter in issue” normally means “a specific question of fact on which the prosecution and defence disagree,” and that is the sense in which the phrase appears to be used 101(1)(d). But in 103(1)(a), it is used in a looser sense. There, it does not seem to mean a matter which the prosecution has decided to allege and the defence has decided to deny. Instead, it seems to mean “one of those matters which the court ought to take into account when reaching its decision.” In other words, it seems to have been put there with the aim of making the court, when deciding the general question of the defendant’s guilt or innocence, consider whether or not he has a propensity to commit the sort of offence for which he is on trial. This shift of meaning gives rise to (at least) two arguments that, if accepted, would limit the effect of the provision.” [para.121]

to be drawn between “more likely that he is *guilty* of the offence” and (what was claimed to be the issue in the case) “more likely that the *offence* took place”. The Court could see “no merit in the distinction”. The argument was ingenious but if correct this would mean that a precondition for admitting evidence of propensity is proof that the offending acts took place. Such a refinement would be a recipe for muddle.

Using a conviction to support identification

57. In *Randall* [2006] EWCA Crim 1413, the Court of Appeal, without deciding the point, expressed a provisional view that in an appropriate case, and by virtue of sections 101(1)(d) and 103 of the 2003 Act, evidence of relevant propensity is now capable of supporting identification evidence when it would not have done before the 2003 Act: and see *Isichei* [2006] EWCA Crim 1815 in which a conviction was used as a “connecting factor” to the identify the appellant as a participant in the offence charged¹⁹.

False impression

58. In *Ullah* [2006] EWCA Crim 2003, U was interviewed by police and he gave to them a prepared written statement in which he represented that “I have never acted dishonestly and have been meticulous in respect of my business dealings”. The prosecution successfully applied to adduce evidence of U’s bad character under s.101(1)(f). U appealed complaining that at the time the prosecution made its application “no evidence had been adduced at trial by them”. The Court held, somewhat tersely, that the submission “borders on the absurd”. The judge, it said, “was entitled to rule that the applicant had told a deliberate lie in an effort to dissuade the police from prosecuting him. Despite (and we bear in mind) the fact the police knew of his previous conviction, quite clearly it was a deliberate lie. The only real inference that can be drawn from it is that the applicant was attempting to mislead the prosecution and/or the jury”.

59. Section 101(1)(f) must be read in conjunction with section 105. Section 105(3) states that a defendant shall not be treated as responsible for the making of an assertion (that is to say, an assertion which “is apt to give the court or jury a false or misleading impression about the defendant”)²⁰ if he withdraws it or disassociates himself from it. What would be the position if D – realising that he might be at risk of a conviction being made known to a court – quickly said “actually, I am not relying on that prepared statement and I withdraw it”?

60. In *Weir* [2005] EWCA Crim 2866, the Court of Appeal accepted that a simple denial of the offence or offences alleged cannot, for the purposes of section 101(1)(f), be treated as a false impression given by the defendant:

“The appellant put himself forward as a man who not only had no previous convictions but also enjoyed a good reputation as a priest, particularly at Tooting, where he had previously been employed, and was the victim of a conspiracy hatched up by members of the Mauritian community at Thornton Heath. That...opened the gateway...but ...section 105(6)...states that evidence is admissible under section 101(1)(f) “only if it goes no further than is necessary to correct the false impression”. We accept that is a statutory reversal of the previous common law position that character is indivisible (*R v Winfield* [1939] 27 Cr A R 139)...”

61. In *Iqbal* [2006] EWCA Crim 1302, the Court of Appeal held that assertions made in a Defence Case Statement do not to engage gateway (f) - or at least they are unlikely to do so:

¹⁹ “In our view, and paying all due allowance to the complexities introduced into this area of law by the 2003 Act, this was not a direction as to propensity -- quite the reverse. It was expressly a direction as to identification through the medium of a connecting factor so as to place *Isichei* in a discrete category of person interested in cocaine, so as to tie it to the girls' evidence as to the mention of cocaine by one of their assailants. However you look at it, the connecting factor is one in which the prosecution sought to find a way to support the evidence of identification: not a propensity to commit robbery or assault.”

²⁰ See section s.105(1)(a).

“The respondent argues that the appellant's defence statement provided pursuant to section 5 of the Criminal Procedure and Investigations Act 1996 contains or may contain an express or implied assertion giving the court or a jury a misleading impression about him. Reference was made to assertions contained in that document which gave the appellant's explanation for his DNA being deposited quite innocently on this knotted package which contained heroin. Even if what is contained in a defence case statement can amount to an assertion made by a defendant in the proceedings, the document in reality is setting out the contentions of the defence in relation to a fundamental issue in the case, the nature of his defence and the matters of fact upon which he takes issue. This, in the court's judgment, is not an impression about him, let alone a false or misleading one without begging the very question which the jury would have to determine.”

“Makes it no more likely”

62. Professor John Spencer QC may be right when he says²¹ that it was to deal with cases where the core facts are not in dispute e.g. where the only question is whether the admitted acts caused death, that the government inserted into s.103(1)(a) the words “except where his having such a propensity makes it no more likely that he is guilty of the offence”.²² Vera Baird M.P. gave an explanation that perhaps goes rather wider than this when she said “The provision certainly countenances the possibility that propensity is sometimes relevant but, at other times, the existence of a propensity, provable by previous convictions, is not relevant to whether the defendant committed the offence or not” [*Hansard*, 2 Apr 2003 : Column 1004].
63. In 2004, Colin Tapper wrote “this qualification so far from being a safeguard is so stringent in its exemption that it will hardly ever be capable of establishment, given minimal ingenuity by the prosecution”.²³
64. It is possible to construe this exception as meaning that evidence of propensity ought not to be admitted if there are facts that significantly undermine its probative value e.g. where D admits that he has a propensity to burgle but he demonstrates to the court that the ‘hallmark’ of his previous offending is absent on the facts of the case that is being tried. This construction gains some strength from *Beverley* [2006] EWCA 1287. In that case, B was convicted of conspiracy to import cocaine. The Court stated, in relation to B’s conviction in 1999 for possessing cannabis intending to supply it, and having assumed that propensity to commit offences of the kind charged was established, that “we are extremely doubtful whether on the facts that propensity makes it more likely that the appellant committed the conspiracy offence” for the following reasons:
“...although it involved intent to supply, it concerned a form of dealing wholly different in scale and nature from this conspiracy. It concerned cannabis not cocaine; far less a kilo of cocaine. There was no analogue to the sophisticated arrangements in this case for importing the drugs by air with the assistance of a courier/air hostess. This is a case in which, in our judgment, fairness and a proper application of the Act of 2003 required the judge to refuse the Crown's application.”
65. Note the case of *Adams* [2006] EWCA Crim 2013 – possession of heroin intending to supply it – A’s convictions for three offences of attempting to supply controlled drugs and one offence of supplying a controlled drug were held to be properly admitted in evidence.

Matter in issue between defendant and co-defendant

66. A case that is peppered with twists and turns in relation to bad character evidence is *De Vos* [2006] EWCA Crim 1688. D had two convictions in Holland for drug trafficking. On a trial for importing 20 kilograms of heroin into the United Kingdom, the judge declined to allow the prosecution to adduce those convictions in evidence through one of the gateways set out in s.101 of the 2003 Act.

²¹ See para.125, Evidence of Bad Character.

²² And note the similar wording in s.103(1)(b) in the context of a propensity to be untruthful.

²³ [2004] Crim.L.R. 533, The Criminal Justice Act 2003 (3) Evidence of Bad Character.

However, D was tried with a co-accused AD, and as the court remarked, the reality of this case was that the evidence of the appellant's previous convictions did not go simply to his truthfulness; they went to whether he was implicated in the drug smuggling enterprise. The Court said [emphasis supplied]:

“...the appellant said that he was the innocent dupe of people who must have included Attah-Donkar, since Attah-Donkar had said it was too dangerous to receive the box in open view. For his part Attah-Donkar said that he had been the innocent dupe of others....As far as Mr Attah-Donkar was concerned, it was plainly more likely that he was innocent if the appellant was guilty. The truthfulness of the appellant was in this case in issue only as an ancillary matter to whether he was telling the truth when he said, in effect, that it was Attah-Donkar who was the drug smuggler rather than him. The issue between these co-defendants for the purposes of section 101(1)(e) was, which is the dupe? The appellant's previous convictions for doing very much the same thing in the past were clearly admissible on that issue. *Indeed, it seems to us that they might well have been admissible had the application been made by Mr Attah-Donkar whether or not Attah-Donkar was cross-examined in the way that he was on the behalf of the appellant.*”

67. As the Court pointed out, D was fortunate not to have the same evidence admitted on behalf of the Crown.

To what extent is character indivisible?

68. The pre 2003 Act view was that bad character is indivisible: see *R v Winfield* [1939] 27 Cr A R 139. But, the rules of the common law are abolished by s.99 of the Act, and see *Weir* [2005] EWCA Crim 2866.

69. As the Court of Appeal remarked in *Highton* [2005] EWCA Crim 1985 “...the width of the definition in s.98 of what is evidence as to bad character suggests that, wherever such evidence is admitted, it can be admitted for any purpose for which it is relevant in the case in which it is being admitted”. Relevance and fairness are the two key considerations here. The court noted:

“...a distinction must be drawn between the *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. It is true that the reasoning that leads to the admission of evidence under gateway (d) may also determine the matters to which the evidence is relevant or primarily relevant once admitted. That is not true, however, of all the gateways. 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 with which the defendant is charged.”

70. In *De Vos* [2006] EWCA Crim 1688, the Court discussed on the use of bad character evidence when assessing a defendant’s credibility as a witness:

“Bad character evidence may, of course, serve under the Act different purposes. There are some cases where what evidence of bad character demonstrates is a propensity in the accused to be untruthful. That is the expression used by the Act. It is not infrequently referred to in shorthand form as an issue of credibility. However in most, if not all, cases the relevance of a defendant's propensity to be untruthful is to whether or not he committed the offence, that is to say whether he is or is not to be believed in what he says in his defence. In other cases bad character evidence goes directly to establish propensity to commit the kind of offence now charged, because, in lay terms, the defendant has done something sufficiently similar before. In those cases also his credibility will very often be in issue, at least where he either gives evidence or gives significant answers in interview to the police. But in these cases the point about the bad character evidence is that independently of any ability to demonstrate a propensity in the defendant to be untruthful, it is capable of demonstrating directly a propensity to do what is charged.

71. Bad character evidence may indeed serve more than one purpose but it is easy to lapse into pre-2003 Act thinking, i.e. that character is seamless and indivisible. There clearly is a distinction between a propensity to be untruthful and a propensity to be dishonest: see *Hanson*. Even if it cannot be shown that the person concerned has a propensity to be untruthful, evidence of bad character may be relevant when fact finders are seeking to resolve conflicting accounts between witnesses. In *George* [2006] EWCA Crim 1652, bad character evidence was adduced where G had made an attack on the character of his brother. The Court said,
- “...the evidence was admitted, as it always could have been admitted, pursuant to the Civil Evidence Act 1898. The evidence was admissible not to show propensity but so that the jury could assess the accusations he had made against his brother in the light of the character of the source of those accusations. The jury could weigh, on the one hand, this appellant's criminal career against the criminal career of his elder brother (one year older) who had far fewer convictions, one for gross indecency some time later but had settled down and led, once he had achieved adulthood, a wholly creditworthy life living with his wife and children.”
72. The trial judge directed the jury in terms often heard before Part 11 of the 2003 Act came into force;
- “.. if, but only if, you think it right and fair you may take your knowledge of the character of the defendant into account when deciding whether or not his evidence to you was untruthful. It's trite to say, isn't it members of the jury, that a person with bad character may be less likely to tell the truth than a person of impeccably good character? But, of course, it doesn't mean or follow that he, the defendant, is incapable of telling the truth...You will also want to bear in mind that the really serious offences of dishonesty, of burglary here, were committed by him a very long time ago when he was a youth, so you must decide to what extent, if at all, his character helps you when judging the truthfulness of his evidence.”
73. The appellant submitted that, in the above passage, the judge failed to distinguish between dishonesty and credibility. The Court disagreed, holding that where bad character evidence is adduced to establish a propensity, a distinction between offences of dishonesty and evidence of untruthfulness must be maintained. However, where such evidence is adduced pursuant to s.101(1)(g), no such distinction arises.
74. It is submitted that in the ordinary way, and provided s.101(1)(g) has not been triggered, a judge ought not to give the familiar pre-2003 Act bad character direction concerning the defendant's credibility (i.e. as a witness or when the jury is considering answers given by a defendant when questioned). In *Hanson* [2005] 2 Cr App R 21, the matter was left open:
- “We have not heard full argument as to whether it is right or indeed necessary to give a credibility direction where evidence of bad character has been admitted under this Act, nor as to whether the nature of the direction should be dependent on the gateway through which the evidence has been admitted. But, in this case,²⁴ the defendant's credibility was so inextricably bound up with whether he had committed the offences that no sustainable criticism can be made of this aspect of the summing-up.”

Hearsay evidence

75. The flow of cases, to the Court of Appeal, in connection with chapter 2 to Part 11 of the 2003 Act is gathering pace – but it has been a rather sluggish start: see *Xhabri* [2005] EWCA Crim 3135, *Joyce* [2005] EWCA Crim 1785; *Skinner* [2005] EWCA Crim 1439; *Singh* [2006] EWCA Crim 660; *K and another* [2006] EWCA Crim 197; *Maher* [2006] EWHC 1271 (Admin); *Taylor* [2006] EWCA Crim 260; *CPS v CE* [2006] EWCA Crim 1410; *Robinson v Sutton Coalfield Magistrates' Court* [2006] EWHC 307 (Admin); *J (Graham)* [2006] EWCA Crim 1939; *Isichei* [2006] EWCA Crim 1815.

²⁴ Pickstone's appeal.

76. Given the papers that have been written by others, for the purpose of this series of lectures,²⁵ it is unnecessary to do more here than to highlight a few points.

The safety valve – a route of first resort or last resort?

77. Despite the complexity of the statutory scheme, the courts sometimes appear to invoke s.114(1)(d) of the 2003 Act as a gateway of first resort rather than last resort, or to use it as a ‘fall back’ position.²⁶ In the event that the Court of Appeal decides that the admission of hearsay evidence was in the interests of justice, it will not lightly quash a conviction on the grounds that the alternative basis for admitting the evidence involved mistaken reasoning. Nevertheless, in *Maher*, Levenson J emphasised the importance of identifying the appropriate route of admissibility:

“Although the purpose of the hearsay provisions set out in Chapter 2 of Part 2 of the Criminal Justice Act 2003 was undeniably to relax the previously strict rules against the admission of hearsay, it is important to underline that care must be taken to analyse the precise provisions of the legislation and ensure that any route of admissibility is correctly identified. In any case of multiple hearsay, that should be done in stages so that each link in the multiple chain can be tested.”

Hearsay provisions and the ECHR

78. The hearsay provisions are ECHR compliant. In *Xhabir*, the Court said [emphasis supplied]:
“The discretion granted by section 114 is not restricted to the admission of a hearsay statement the maker of which is not available for cross-examination. To the extent that Article 6 would be infringed by admitting such evidence, the court has a power to exclude the evidence under section 126 and a duty so to do by virtue of the Human Rights Act. There can thus be no question of section 114 being incompatible with the Convention.”

79. The Court added:
“As to the contention that the judge, by admitting the hearsay evidence, infringed Article 6, there is no merit in this either. Article 6(3)(d) is one of the provisions designed to secure “equality of arms”. The hearsay provisions of the 2003 Act apply equally to prosecution and defence, so there is no inherent inequality of arms arising out of those provisions. *Article 6(3)(d) does not give a defendant an absolute right to examine every witness whose testimony is adduced against him.* The touchstone is whether fairness of the trial requires this.”

80. An illustration of the above is *CPS v CE* where the only evidence against the defendant was an out-of-court video interview with the complainant who was unfit to attend court due to her mental or bodily condition (section 116(2)(b)). The trial judge, whose ruling was upheld by the Court of Appeal, concluded that the facts of the case came within s.116(4) and that it would not be fair to admit the evidence. It seems that the complainant was reluctant to testify through fear, but the Court dealt with this as follows:

“It was accepted before the judge that, although the complainant would not give evidence at a trial through fear, the fear had not been intentionally induced by the defendant so as to keep her away. The possible qualification of *Luca v Italy* which this court considered in *Sellick*²⁷ did not arise therefore, although Mr Houlder makes the general point that the case is one where the complainant would not give evidence through fear of the respondent.”

81. Where a witness expresses an unwillingness to be available for cross-examination, or is apparently unable to testify, the court should allow the parties to make (or even be required to make) reasonable enquiries as to the circumstances giving rise to the difficulty: see, for example, *K and C*. Note also *Robinson v Sutton Coalfield Magistrates’ Court* [2006] EWHC 307 (Admin).

²⁵ Professor David Ormerod has extensively, and lucidly, written commentaries on this subject.

²⁶ See, for example, *Taylor* [2006] EWCA Crim 260.

²⁷ [2005] EWCA Crim 651.

Has the common law rule re hearsay been abolished

82. The common law rule against the admissibility of hearsay is abolished by “the clear express terms to that effect of section 118”: see *Singh* [2006] EWCA Crim 660 rejecting the view expressed by Professor Uglow in *Archbold News* Issue 5 (May 23rd 2005).

Double Jeopardy

83. Part 10 of the 2003 Act, which came into force on the 4th April 2005, is concerned with the retrial of a person previously acquitted by a court of competent jurisdiction, in respect of whom the decision of the court would ordinarily be regarded in law as “final”.
84. By “final” we mean that all ordinary procedures in the jurisdiction that originally tried that person, have been exhausted including appeals. A defendant who has been acquitted (or convicted) may not be tried again for the same offence. In English law, this is known as the “*autrefois rule*”, but in other systems, the principle is better understood as “*ne bis in idem*”.
85. The justification for the existence of the rule has frequently be stated to be that there should be finality in criminal proceedings so that all should know where they stand: that a defendant should be entitled to build a future that is not put in jeopardy by the risk of renewed proceedings; that a defendant should not be harassed by the threat of renewed proceedings; that law enforcement agencies and the criminal trial process should be encouraged to “get it right the first time”; that the principle of double jeopardy is a “significant strand of the limits on a State’s moral authority to censure and punish through criminal law” (*per* Paul Roberts, “*Acquitted Misconduct Evidence and Double Jeopardy Principles from Sambasivam to Z*” [2000] Crim. L.R. 952).
86. The Runciman Royal Commission on Criminal Justice did not recommend a general right of appeals against acquittals, but it did recommend a limited power to reopen an acquittal if new evidence emerged in all cases in which the sentence for the offence would be at least three years’ imprisonment (“*Double Jeopardy*”, Law Commission; Consultation Paper 156, 1999).
87. The Home Affairs Committee of the House of Commons, Third Report (“*Double Jeopardy*”, session 1999–2000) also recommended a change in the law to relax the rule, in cases where the offence charged carried a statutory maximum of life imprisonment.
88. The Law Commission, in its final Report (2001, Law, Commission No.267) revised its opinions and recommended that the Court of Appeal should have power to quash an acquittal and order a retrial, in cases of murder, genocide (discounting ‘reckless killing’) (Pt VIII, para.1) in which there was new, reliable, and compelling, evidence of the guilt of the accused.
89. Confining the power only to murder was strongly criticised by Lord Justice Auld in his *Review of the Criminal Courts of England and Wales* (see Ch.12, paras 58–63). In its White Paper “*Justice For All*” (2002, para.4.63) the Government made it clear that its reforms would go “wider than the proposal that change should be limited to murder and certain allied offences”. The Government did not adopt the recommendation of the Law Commission that the personal consent of the Director of Public Prosecutions should be obtained before applying to the Court of Appeal for an acquittal to be quashed on the grounds of new evidence, in cases where “an application is in the public interest and a retrial is fully justified” (see Law Commission 267, para.4.98).²⁸

²⁸ The response to the Law Commission Consultation Paper 156, suggest that members of the public, the legal profession, and the judiciary, were divided on the issue as to whether there should be an exception to the *autrefois acquit* rule on the grounds of new evidence (see para.4.6, Final Report, Law Commission 267). Police and prosecuting authorities were in favour. Academic legal opinion was also divided: see for example, “*Rethinking Double Jeopardy*”, Professor Ian Dennis [2000] Crim. L.R. 933; “*Acquitted Misconduct Evidence and Double Jeopardy Principles*”, Paul Roberts [2000] Crim. L.R. 952; “*Reform of The Double Jeopardy Law*”, Professor Adrian Keene, *The Times*, May 20, 2003.

90. It is against that background that the Government has enacted Part 10 in keeping with proposals in its white paper “*Justice For All*”. Part 10 is only concerned with the re-investigation and retrial of final acquittals. The Act applies to any “qualifying offence” (listed in Pt 1 of Sch.5, s.75(8)) and includes murder, manslaughter, rape, attempted rape, the trafficking in class A controlled drugs, specified war crimes, and acts of terrorism. Cases that may be retried are thus determined by the offence in question, and not by the maximum penalty that may be imposed.
91. On the 10th November 2005, the DPP gave his consent for the case of *William Dunlop* to be referred to the Court of Appeal (Criminal Division).
see http://www.cps.gov.uk/news/pressreleases/archive/2005/158_05.html
92. The Court of Appeal set aside the acquittal, and in September 2006 *Dunlop* pleaded guilty to murder.²⁹
93. It was announced on the 15th September 2006 that the case of *Russell Bishop* (‘babes in the wood’) would not be referred to the Court of Appeal.³⁰ It was also reported that the family might be considering a “private prosecution”: such a bid seems doomed to fail given s.76(3) of the Act [need for the consent of the DPP to refer a case to the Court of Appeal].

Territorial jurisdiction and acquittals in foreign courts.

94. Part 10 applies to England and Wales (and with some modifications to Northern Ireland: see s.96), but not as yet to Scotland. Part 10 is of retrospective application: s.75(6). It will also apply in respect of an acquittal in proceedings heard in a foreign jurisdiction if the conduct relied on would have amounted to, or included, the commission of a Sch.5 offence in the United Kingdom (see ss.75(4) and (5)).
95. The Law Commission, in its Final Report, noted that Art.20(3) of the “Rome statute of the International Criminal Court” permits a second trial albeit on the same facts, where the first trial was “designed to shield a suspect from prosecution elsewhere, or was not independent, impartial, or consistent with an intent to bring the perpetrator to justice” (para.6.14). The Law Commission therefore thought it appropriate to adopt a similar criterion in English law. It also recommended that an acquittal by a foreign court should not be regarded as subject to the *autrefois acquit* rule if the result was based solely on the fact that the alleged offence was committed outside the territorial jurisdiction of that court (para.6.20).
96. It will be seen that Part 10 of the Act does not specifically give statutory effect to these recommendations: s.75 (4) is more open-ended. Presumably, the thinking is that in respect of a foreign acquittal, neither the Director of Public Prosecutions nor the Court Appeal would be party to the quashing of an acquittal, and the ordering of a retrial, without at least having regard to the factors the Law Commission took into account in support of its recommendations. Without the benefit of s.76(4)(c) the Government would have been exposed to criticism that its failure to specify in the Act the basis on which a foreign acquittal might be quashed, and a retrial ordered, proved to be something of a political handicap in its negotiations with foreign powers regarding proposals for closer co-operation on law-enforcement issues, and the mutual recognition of decisions and judgments in criminal matters.
97. The *ne bis in idem* principle is hallowed in many jurisdictions as a significant safeguard against excessive action by one State to reach out and punish nationals of another State. Central to many international instruments are the twin components of mutual trust, and confidence, in the legal systems of States to which the instruments relate. Invariably, those two components are analysed in

²⁹ In the year 2000, *Dunlop* pleaded guilty to two charges of perjury concerning the evidence that he gave at his trial for murder. His appeal against sentence was dismissed on the 23rd November 2000 and a transcript of that judgment is available on *Casetrack*.

³⁰ Radio 4.

the context of minimum procedural safeguards and standards that must exist in each participating State.

98. There remains some risk that s.75(4) will be analysed as incorporating too few limitations. On the other hand, it may be said that Part 10 is ECHR compliant, in that Art.4(2) of Protocol 7 does not prevent “the reopening of the case in accordance with the law and penal procedure of the State concerned, if there is evidence of new or newly discovered facts, or if there has been a fundamental defect in the previous proceedings”. Thus Part 10 provides a legal route by which earlier proceedings might be reopened but does not empower prosecuting authorities to launch fresh proceedings without limitation.
99. Similarly, it might be said that Part 10 does not offend Art.14(7) of the *United Nations International Convention on Civil And Political Rights* if that Article permits a “resumption” of criminal proceedings (*General Comment, 13/21, of The UN Human Rights Committee*; see para.3.6, Law Commission 267).
100. The real difficulty about ss.75(4) and (5), may be in the politics of a statutory approach that appears to allow the Court of Appeal to overturn an acquittal of a foreign court on grounds wider than the Law Commission recommended, and which lacks international comity. In practice it will surely be exceedingly rare for a court to overturn an acquittal of a foreign court.
101. There might be circumstances under the 2003 Act in which it might be easier to reopen an acquittal of a foreign court than an acquittal obtained in an English Court. What would be the position if the Court Appeal were to find that a foreign court did not take into account material held in England, that (for whatever reason) was not passed on to investigators in the other State?

Role of the DPP in connection with foreign acquittals

102. It will be noted that s.76(4)(c) requires the Director of Public Prosecutions to give his consent only if satisfied that any trial pursuant to an order under Pt 10 would not be inconsistent with obligations of the United Kingdom under Arts 31 and 34 of the Treaty of the European Union relating to the principle of *ne bis in idem*.
103. It is important to have regard to the limits of the *autrefois acquit/convict* (or *ne bis in idem*) principle. In English law, the plea is available when the offence “embraces both the facts which constitute the crime and the legal characteristics which make it an offence. For the doctrine to apply, it must be the same offence both in fact and in law” (Lord Devlin, *Connelly v DPP* [1964] A.C. 1254), although it seems that the facts need only be substantially the same: see *R. v Beedie* [1998] Q.B. 356, and see Law Commission 267, Part 2.
104. An acquittal, or conviction, does not become *res judicata* until all ordinary domestic legal proceedings, and remedies, have been exhausted. Accordingly, an order for a retrial following the quashing of a conviction, or remitting a case to the magistrates’ court and the quashing of an acquittal, is currently permitted in English law.

Trial by judge alone

105. Sections 44-48 came into force on the 24th July 2006: *The Criminal Justice Act 2003 (Commencement No.13 and Transitional Provision) Order 2006*. These provisions relate to cases where there is a danger of jury tampering.
106. Section 43 (certain fraud cases to be conducted without a jury) has not been brought into force. A draft SI that would have brought s.43 into force in January 2006 was not proceeded with.

Jury tampering

107. The court has no power under section 44 to make an order of its own motion. There must be a real and present danger that tampering would take place [s.44(4)] and (notwithstanding steps that might be taken to prevent jury tampering) the likelihood that it would take place would be so substantial as to make it necessary in the interests of justice for the trial to be conducted without a jury [s.44(5)].
108. Section 44(6) helpfully provides examples where the section might be invoked. An application under s.44 must be made at a preparatory hearing [s.45(2)] and the parties must be given an opportunity to make representations with respect to the application [s.45(3)]. This prevents the prosecution making an application under s.44 *ex parte*, but it is not clear to what extent the court is entitled to act on information that is sensitive, and which would not normally be in the public interest to disclose to the defence or third parties.
109. An appeal is available to the prosecutor, or to the defence, under section 45(5) or section 45(9) depending on whether the preparatory hearing was directed under the Criminal Justice Act 1987, or the 1996 Act.
110. Section 46 has been described as the companion to s.44, but s.46 actually deals with a different situation, namely, where tampering “appears to have taken place”. The safeguards to the defence in s.46(2), against ‘whispering’ and idle talk, do not apply in relation to pre-trial determinations made under s.45.
111. Section 46 should be read in conjunction with s.47 that provides a right of appeal to the Court of Appeal (Criminal Division) from an order made under s.46(3) [order to continue with the trial without a jury], or made under s.46(5) [new trial ordered to be conducted without a jury]. Section 46 should be contrasted with s.44. The latter relates to a pre-trial situation if there were a “real and present danger” that jury tampering would take place [s.44(4)]. Section 46 applies if jury tampering has occurred.
112. The language of s.46(1) is mildly misleading. The section applies if a judge is minded to discharge the jury because jury tampering “appears to have taken place” [s.46(1)(b)]. It might have been preferable for that subparagraph to have read “he is satisfied that jury tampering has taken place” - which is precisely what s.46(3)(a) requires to be established.
113. The phrase “appears to have taken place” existed in the Bill, as originally printed on the November 21, 2002, at a time when the measure was intended to apply in cases where jury tampering “has, or appears to have, occurred” [*Explanatory Notes*, November 29, 2002, para.212]. Subsections (3)(a) and (b) were added late in the day to remove ambiguities that then existed as to the scope of the section [see *Hansard*, HL, Vol. 413, col.2066 (November 20, 2003); HC Amendment No.36D–36G]. Even in its present form, nothing is said in s.46 as to the standard of proof the trial judge must apply for the purpose of determining whether jury tampering “has taken place”.
114. The judge must give the parties to the proceedings notice of his intention to discharge the jury, and to provide reasons, and to afford the parties the opportunity to make representations (s.40(2)).
115. Note that s.46 is engaged only if a judge is minded to discharge the jury. It does not address what the judge should do when he/she first learns of an allegation of jury tampering.

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APPENDIX ‘A’
COMMENCEMENT DATES

Based on information provided by the government of the United Kingdom
This is not intended for court purposes. Always refer to the source material.

Provision	Commencing	S.I. No.	Comments
Sections 1, 2, 4, 6 to 8, 11 and 12 and Schedule 1 (amendments of Police and Criminal Evidence Act 1984)	20.1.2004	2004/81	
Section 3 (arrestable offences)	29.1.2004	2004/81	
Section 5 (partially)(drug testing for under-eighteens);to the extent not already in force	1.8.2004 1.12.2005	2004/1867 2005/3055	
Section 9 (taking fingerprints without consent)	5.4.2004	2004/829	
Section 10 (taking non-intimate samples without consent)	5.4.2004	2004/829	
Sections 13, 15(3), 16, 17, 18, 19 to 21 (bail)	5.4.2004 4.4.2005	2004/829 2005/950	
Sections 22 to 24 (conditional cautions)	3.7.2004	2004/1629	
Section 25 (conditional cautions, code of practice)	29.1.2004	2004/81	
Sections 26 and 27 (partially)(conditional cautions)	3.7.2004	2004/1629	
Section 28 and Schedule 2 (partially) and section 31 (charging etc)	29.1.2004 3.7.2004	2004/81 2004/1629	
Sections 32, 33(2), 36 to 38 and 39 (disclosure)	4.4.2005 15.7.2005	2005/950 2005/1817	
section 33(1) (defence disclosure), in so far as it inserts subsection (5C) of section 5 of the 1996 Act [<i>this provision has effect only in relation to alleged offences in relation to which—</i> <i>(a) a criminal investigation within the meaning of section 1(4) of that Act began—</i> <i>(i) in England and Wales on or after 4th April 2005; or</i> <i>(ii) in Northern Ireland on or after 15th July 2005; and</i> <i>(b) the duty to give a defence statement in accordance with section 5(5) of that Act arises on or after 24th July 2006.]</i>	24.7.2006	2006/1835	
Section 40 (code of practice for police interviews of witnesses notified by accused)	5.4.2004	2004/829	
Section 41 (allocation of offences triable either way)(partially) and Schedule 3 (partially)	4.4.2005 9.5.2005	2005/950 2005/1267	
Section 42 (mode of trial for certain firearms offences: transitory arrangements)	22.1.2004	2004/81	
Section 44 (jury tampering);	24.7.2006	2006/1835	
Section 45 (procedure for applications), in so far as it applies to applications under section 44	24.7.2006	2006/1835	
Section 46 (discharge of jury because of jury tampering);	24.7.2006	2006/1835	
Section 47 (appeals);	24.7.2006	2006/1835	
Section 48 (further provision about trials without jury), in so far as it applies to trials ordered under section 44 or 46	24.7.2006	2006/1835	
Section 49 (rules of court)	29.1.2004	2004/81	
Section 55 (rules of court)	29.1.2004	2004/81	
Sections 57 to 61, 67 to 74 (prosecution appeals)	29.1.2004 4.4.2005	2004/81 2005/950	Sections 57 to 61, 67 to 72 and 74 (prosecution appeals) came into force on the 4 th April 2005.
Sections 75 to 96 and Schedule 5 (retrial for serious offences)	29.1.2004 4.4.2005 18.4.2005	2004/81 2005/950	Section 93 (rules of court) came into force on the 29 th January 2004. Sections 75 to 92, 94 and 95 (retrial for serious offences) came into force on the 4 th April 2005. Section 96 (application of Part 10 to Northern Ireland) came into force on the 18 th April 2005.
Section 97 (application of Criminal Appeal Acts)	7.3.2005	2005/373	

Provision	Commencing	S.I. No.	Comments
Sections 98 to 113 and Schedule 6 (evidence of bad character)	29.1.2004 15.12.2004, 1.1.2005	2004/81 2004/3033	Sections 98 to 110, and 112 (evidence of bad character) came into force on the 15 th December 2004; Section 113 and Schedule 6 (evidence of bad character: armed forces) came into force on the 1 st January 2005.
Sections 114 to 136 (hearsay evidence) and Schedule 7 (hearsay evidence: armed forces)	29.1.2004 4.4.2005	2004/81 2005/950	Sections 114 to 131 and 133 to 136 (hearsay evidence) came into force on the 4 th April 2005.
Section 139 to 141 (use of documents to refresh memory)	5.4.2004	2004/829	
Sections 142 to 150, 152, 153, 156 to 160; 162 to 166	7.3.2005 4.4.2005	2005/373 2005/950	Sections 142 to 150, 152, 153, 156 to 160, 162 to 166, (general provisions about sentencing) (in the case of sections 158, 159 and 174 in so far as they are not already in force) came into force on the 4 th April 2005.
Sections 167 and 168 (partially) and 169 to 173 (sentencing and allocation guidelines)	27.2.2004	2004/81	Sections 167, 168(3) to (5), and 169 to 173 (sentencing and allocation guidelines) came into force on the 27 th February 2004.
Section 174 (duty to give reasons for, and explain effect of, sentence)	5.4.2004 4.4.2005	2004/829 2005/950	Section 174 (in so far as it was not already in force) came into force on the 4 th April 2005.
Section 175 (duty to publish information about sentencing)	4.4.2005	2005/950	
Section 176 (interpretation of Chapter 1)	5.4.2004	2004/829	
Sections 177, 179 and 180 (community orders) and Schedule 8 (breach, revocation or amendment of community order) and Schedule 9 (transfer of community orders to Scotland or Northern Ireland)(all partially and subsequently all for remaining purposes)	4.4.2005 4.4.2007	2005/950 2005/950	Sections 177, 179 and 180 (community orders) in force on the 4 th April 2005.
Section 178 (power to provide for court review of community orders)	7.3.2005	2005/373	
Sections 182 to 187 and Schedule 10 (prison sentences of less than 12 months)(all partially)	26.1.2004	2003/3282	i.e. Section 182(1) and (3) to (5) (licence conditions). Section 183(1) to (7) and (9); Sections 184 to 186 (restrictions on power to make intermittent custody order; intermittent custody; licence conditions; further provisions relating to intermittent custody). Section 187 and Schedule 10 (revocation or amendment of order).
Sections 189 to 194 (suspended sentences); Schedule 12 (breach or amendment of suspended sentence order, and effect of further conviction) and Schedule 13 (transfer of suspended sentence orders to Scotland or Northern Ireland).	4.4.2005	2005/950	Sections 189 to 194 (suspended sentences) in force on the 4 th April 2005.
Sections 195, 196 (partially), 197 to 203, 204 (partially), 205 to 212, 213 (partially), 214, 215, 216 (partially), 217 to 220 and Schedule 14, and sections 221 to 223 (further provisions about orders under Chapters 2 and 3).	26.1.2004 7.3.2005 4.4.2005	2003/3282 2005/373 2005/950	Section 195 (interpretation of Chapter 3). Sections 199 to 204(1) to (3) and (6), and 205 to 213(1) to (3)(a) and (d) (requirements available in case of all offenders) in so far as they are not already in force, came into force on the 4 th April 2005.
Sections 224 to 236 (dangerous offenders); Schedule 15 (specified offences for the purposes of Chapter 5 of Part 12); Schedule 16 (Scottish offences specified for the purposes of section 229(4)); Schedule 17 (Northern Ireland offences specified for the purposes of section 229(4)) and Schedule 18 (release of prisoners serving sentences of imprisonment or detention for public protection)	4.4.2005	2005/950	
Sections 237 to 243 (release on licence :preliminary), 244 (partially) and 245 to 249, 250 to 251 (partially), 252 to 256, 257 (partially), 258 to 261, 263, 264 (partially), 265, 267 to 268 (release on licence) and Schedule 19 (parole board: supplementary provisions)	26.1.2004 7.3.2005 4.4.2005	2003/3282 2005/373 2005/950	Sections 237 to 244(1), (2) and (3)(a) and (d), 246 to 250(1) and (4) to (7), 252 to 257 (except 257(2)(c)), 258 to 261, 263, 264 (1) to (3), (6) and (7), 265, and 268

Provision	Commencing	S.I. No.	Comments
			(release on licence), in so far as they are not already in force, came into force on the 4 th April 2005.
Section 262 and Schedule 20 (prisoners liable to removal from the United Kingdom: modifications of Criminal Justice Act 1991)	14.6.2004	2004/829	
Section 278 and Schedule 23 (deferment of sentence)	4.4.2005	2005/950	
Section 279 and Schedule 24 (drug treatment and testing requirement in action plan order or supervision order)(partially)	1.12.2004	2004/3033	
Section 284 and Schedule 28 (increase in penalties for drug-related offences)	29.1.2004	2004/81	Section 284 and Schedule 28 (increase in penalties for drug-related offences) came into force on the 29 th January 2004.
Section 285 (increase in penalties for certain driving-related offences)	27.2.2004	2004/81	
Section 286 (increase in penalties for offences under section 174 of the Road Traffic Act 1988)	29.1.2004	2004/81	
Sections 287 to 293 (firearms offences) and Schedule 29 (sentencing for firearms offences in Northern Ireland)	22.1.2004	2004/81	
Sections 294 to 297 (offenders transferred to mental hospital)	20.1.2004	2004/81	
Section 299 and Schedule 30 (disqualification from working with children)	1.5.2004	2004/829	
Section 300 and Schedule 31 (default orders)(partially)	7.3.2005	2005/373	
Section 301 (fine defaulters: driving disqualification)(partially)	7.3.2005	2005/373	
Section 302 (execution of process between England and Wales and Scotland)	26.1.2004 4.4.2005	2003/3282 2005/950	
Section 303 (sentencing: repeals)(partially)	4.4.2005	2005/950	
Section 304 and Schedule 32 (amendments relating to sentencing)(partially)	26.1.2004 22.1.2004 4.4.2005	2003/3282 2004/81 2005/950	
Section 305 (interpretation of Part 12)	26.1.2004 4.4.2005	2003/3282 2005/950	
Section 306 (detention of suspected terrorists)	20.1.2004	2004/81	
Section 307 (enforcement of regulations)	21.7.2005	2005/1817	
Sections 308 to 312 (miscellaneous provisions about criminal proceedings)	4.4.2005	2005/950	
Sections 313 and 314 (extension of investigations by Criminal Cases Review Commission in England and Wales and Northern Ireland)	1.9.2004	2004/1629	
Section 315 (appeals following reference by the Criminal Cases Review Commission)	4.4.2005	2005/950	
Sections 316 and 317 (power to substitute conviction of alternative offence on appeal in England and Wales and Northern Ireland)	1.9.2004	2004/1629	
Section 318 (substitution of conviction on different charge on appeal from court-martial)	1.9.2004	2004/1629	
Section 319 (appeals against sentence in England and Wales)	4.4.2005	2005/950	
Section 320 (offence of outraging public decency triable either way)	20.1.2004	2004/81	
Section 321 and Schedule 33 (jury service)	5.4.2004	2004/829	
Sections 322 and 323 (individual support orders)	1.5.2004	2004/829	
Section 324 and Schedule 34 (parenting orders and referral orders)	27.2.2004	2004/81	
Sections 325 to 327 (arrangements for assessing etc risks posed by sexual or violent offenders)	5.4.2004	2004/829	
Section 328 and Schedule 35 (criminal record certificates: amendments of Part 5 of the Police Act 1997)(partially)	29.1.2004 4.3.2006	2004/81 2006/751	
Section 329 (civil proceedings brought by offenders)	20.1.2004	2004/81	

Provision	Commencing	S.I. No.	Comments
Section 331 and Schedule 36 (further minor and consequential amendments)(partially)	5.4.2004 1.9.2004 15.12.2004 1.1.2005 4.4.2005 15.7.2005	2004/829 2004/1629 2004/3033 2005/950 2005/1817	
section 331 (further minor and consequential amendments) in so far as it relates to the provisions referred to in paragraph (h);	24.7.2006	2006/1835	
[para.(h)] Part 4 of Schedule 36 (minor and consequential amendments), in so far as it relates to England and Wales	24.7.2006	2006/1835	
Section 332 and Schedule 37 (repeals)(partially)	20.1.2004, 29.1.2004, 27.2.2004 5.4.2004 15.12.2004 4.4.2005 15.7.2005 14.3.2006	2004/81 2004/829 2004/3033 2005/950 2005/1817 2006/751	
Section 333 and Schedule 38 (supplementary and consequential provision, etc.)(partially)	27.2.2004 4.4.2005	2004/81 2005/950	