THE LAW COMMISSION

EVIDENCE IN CRIMINAL PROCEEDINGS: PREVIOUS MISCONDUCT OF A DEFENDANT

CONTENTS

	Paragraph	*Page*
PART I: INTRODUCTION		1
The background to this consultation paper	1.1	1
Our approach	1.6	2
The relevance of the European Convention on Human Rights	1.10	3
The function of the law of evidence in criminal cases	1.13	4
The issues	1.15	5
The research	1.20	6
Method of working	1.24	8
The structure of this paper	1.27	9
The present law	1.28	9
Guiding principles	1.31	9
Options for reform	1.34	9
Adducing bad character evidence in chief	1.37	11
The 1898 Act	1.41	12
Assertions of good character	1.42	12
Imputations against prosecution witnesses	1.44	12
Cross-examination of a co-accused	1.47	13
Miscellaneous topics	1.50	14
Summary	1.55	15
Appendices	1.56	15
PART II: THE PRESENT LAW (I): ADDUCING BAD CHARACTER EVIDENCE IN CHIEF		16
Summary	2.2	16
When similar fact evidence may be adduced by the prosecution	2.7	17
Early developments in similar fact evidence	2.14	19
Post-*Boardman* developments	2.30	27
DPP v P	2.35	29
What is the present test of admissibility?	2.45	32
What is the relevance now of striking similarity?	2.47	33

	Paragraph	*Page*
What characteristics does evidence have to have for it to be "strikingly similar"?	2.49	34
Can evidence of propensity be admitted as similar fact evidence?	2.51	34
How can similar fact evidence be used to rebut a defence?	2.55	35
Should the prosecution have to wait and see what defence is to be relied upon before adducing similar fact evidence?	2.61	38
Is there a special rule for sexual offences against persons of the same sex, or children?	2.63	39
Can evidence of sexual orientation be taken outside the exclusionary rule and admitted simply on the grounds of relevance?	2.65	39
Do the courts have a discretion to exclude similar fact evidence?	2.67	39
What degree of proof is required for similar fact evidence?	2.68	40
Background evidence and evidence forming part of the same transaction: an exception to the similar fact evidence rule?	2.70	40
Bad character evidence adduced by a co-accused	2.85	45
Joinder and severance	2.92	47
Similar facts	2.95	49
Sex offences – a special category?	2.99	51

PART III: THE PRESENT LAW (II): SPECIAL CASES WHERE BAD CHARACTER EVIDENCE IS ADMISSIBLE IN CHIEF 54

When previous misconduct is an element of an offence	3.2	54
Section 1(2) of the Official Secrets Act 1911	3.4	55
Section 27(3) of the Theft Act 1968	3.8	56
The application of section 27(3)	3.9	56
The justification for section 27(3)	3.18	59
Children under 14	3.23	60

PART IV: THE PRESENT LAW (III): ADDUCING BAD CHARACTER EVIDENCE IN CROSS-EXAMINATION (THE 1898 ACT) 62

The meaning of section 1(f)		
"shall not be asked, and if asked, shall not be required to answer"	4.6	64
"committed or been convicted of or been charged with any offence other than that wherewith he is then charged"	4.8	64
"or been convicted of … any offence other than that wherewith he is then charged"	4.9	64
The relationship between section 1(e) and section 1(f)	4.12	65
Section 1(f)(i)	4.14	66
The first limb of section 1(f)(ii): asserting good character	4.17	67
What is an assertion of good character?	4.22	68
Character is indivisible	4.27	69
Assertions of character other than good character	4.29	70

	Paragraph	*Page*
Cross-examination of witnesses (other than the defendant) who give evidence of the defendant's good character	4.31	70
Evidence in rebuttal	4.32	70
The second limb of section 1(f)(ii): casting imputations against prosecution witnesses	4.33	71
The pre-conditions	4.40	72
Rape cases	4.46	74
Judicial discretion	4.48	76
Similarity of offences	4.51	77
Where the convictions do not reveal dishonesty	4.53	78
Defence necessarily involving imputations	4.54	78
The duty of the judge to warn the defence	4.57	79
Cross-examination by a co-accused under the second limb	4.58	80
Section 1(f)(iii): attacking a co-defendant	4.59	80
The conditions of section 1(f)(iii)		
"has given evidence"	4.62	81
"against any other person charged in the same proceedings"	4.65	82
When section 1(f)(iii) is invoked	4.72	83
Section 1(f)(iii) and separate trials	4.76	84
The procedure before cross-examination	4.80	85
How much detail about the previous misconduct is permitted in cross-examination?	4.81	86
Resolving disputes about the facts behind previous convictions	4.85	87
PART V: THE PRESENT LAW (IV): SPECIAL CASES WHERE BAD CHARACTER EVIDENCE IS INADMISSIBLE		89
Section 16(2) of the Children and Young Persons Act 1963	5.2	89
Spent convictions	5.4	90
Alleged misconduct which has previously resulted in an acquittal	5.13	93
PART VI: GUIDING PRINCIPLES (I): THE PROBATIVE VALUE OF BAD CHARACTER EVIDENCE		95
The cogency of evidence of previous misconduct	6.3	95
The meaning of "relevance"	6.7	97
The psychological research	6.10	97
Is the unitary concept of "character" justified?	6.23	101
What connection is there between a criminal record and truthfulness on oath?	6.30	104
What use are juries likely to make of evidence of previous convictions?	6.35	105
Relevance to propensity	6.39	106

	Paragraph	*Page*
Relevance to credibility	6.41	107
The differing meanings of credibility	6.42	107
The credibility of statements made otherwise than in oral evidence	6.43	107
The inherent credibility of a defence	6.44	108
The credibility of a defence when put forward by a particular defendant	6.45	108
The credibility of witnesses	6.47	109
The relevance of previous convictions to credibility	6.50	110
The nature of the previous convictions	6.51	110
The age of the previous convictions	6.64	115
The number of previous convictions	6.65	115
The significance of a previous plea or verdict	6.66	116
The significance of similar unusual defences	6.71	117
The distinction between guilt and credibility	6.74	117
Assertions of good character	6.76	118
Imputations against prosecution witnesses	6.78	118
The difficulty of distinguishing between guilt and credibility	6.80	119
Provisional conclusions	6.85	120
The relevance of previous misconduct to propensity	6.86	120
The relevance of previous misconduct to credibility	6.94	121

PART VII: GUIDING PRINCIPLES (II): THE PREJUDICIAL EFFECT OF BAD CHARACTER EVIDENCE 122

Reasons for excluding evidence of probative value	7.1	122
Unfairness to the accused: prejudice	7.2	122
Reasoning prejudice: the jury or magistrates may assess the evidence wrongly, giving too much weight to the disposition evidence	7.7	124
Moral prejudice: the jury or magistrates may reach a verdict on the accused's character, rather than on the evidence	7.10	125
The effectiveness of a judicial direction	7.16	126
Safeguarding the fairness of the criminal justice process	7.21	129
Distraction and confusion	7.25	129
The waste of court time	7.26	130
Surprise	7.28	130
"Balancing" probative value and prejudicial effect	7.29	131
Provisional conclusions	7.36	133

Paragraph *Page*

PART VIII: GUIDING PRINCIPLES (III): SHOULD THE DEFENDANT BE TREATED IN THE SAME WAY AS OTHER WITNESSES? 134

Admitting evidence of the character of witnesses other than the defendant 8.1 134

The relevance of character evidence to an issue in the trial 8.2 134

The relevance of character evidence to credibility 8.3 134

Admitting evidence of the defendant's character 8.4 134

Evidence of the defendant's good character 8.5 135

Evidence of the defendant's bad character 8.14 136

Prejudice 8.15 136

Discouraging the accused from giving evidence 8.17 137

Provisional conclusions 8.20 138

PART IX: SOME OPTIONS WE REJECT, AND OUR PREFERRED APPROACH 139

Options involving no judicial discretion

Option 1: adduce the accused's criminal record at the start of every trial

Arguments in favour of this option

Irrationality 9.4 140

Minimising prejudicial effect 9.5 140

The jury or magistrates know anyway 9.7 141

Simplification 9.10 141

The examples of other criminal justice systems 9.12 141

Arguments against this option

The irrelevance of the criminal history 9.16 143

The risk of prejudice 9.17 143

The concept of rehabilitation 9.20 144

Option 2: adduce the defendant's criminal record in sex cases 9.24 144

"Sexual offences should be treated differently because of the particular psychology of the perpetrators" 9.25 145

"Sexual offenders should be treated differently because of the particular danger they pose to society" 9.28 145

"Sexual offences should be treated differently because of the particular problems they pose in gathering evidence" 9.31 146

Further arguments against the new Rules 9.35 147

Conclusions 9.36 147

Option 3: allow evidence of the defendant's previous misconduct to be adduced *only* where it is an ingredient of the offence charged 9.39 148

Advantages 9.40 148

Disadvantages 9.41 148

	Paragraph	*Page*
Options involving judicial discretion	9.45	149
Judicial discretion		
The merits of judicial discretion	9.46	149
The disadvantages of judicial discretion	9.47	149
Structured discretion	9.51	151
Option 4: a single inclusionary rule with an exception for evidence whose likely prejudicial effect outweighs its probative value	9.58	152
Uncertainty	9.61	152
Over-simplification	9.64	153
A presumption of admissibility	9.66	153
Practical drawbacks	9.67	154
Option 5: an exclusionary rule with a single exception for evidence whose probative value outweighs its likely prejudicial effect	9.70	154
Option 6: an exclusionary rule with separate exceptions for evidence admissible in chief and for evidence subsequently becoming admissible	9.72	154
The scope of the exclusionary rule	9.74	155
Option A: evidence of discreditable conduct by the defendant on another occasion	9.75	155
Option B: evidence from which the fact-finders are invited to draw certain kinds of inference	9.77	156
Option C: evidence carrying a risk of prejudice	9.86	158
Section 1(f)(i) of the 1898 Act	9.93	160
PART X: ADDUCING BAD CHARACTER EVIDENCE IN CHIEF: THE PROBLEMS AND SOME POSSIBLE SOLUTIONS		162
Principles	10.4	163
Prejudice	10.6	163
Relevance	10.8	164
The "purpose" approach	10.9	164
Probative value	10.13	165
Other factors	10.15	166
Defects in the present law		
Uncertainty	10.16	166
The requirement of a "signature" in identity cases	10.18	167
The absence of any reference to the distracting or time-wasting features of previous misconduct	10.19	167
Option 1: no change	10.20	167

	Paragraph	*Page*
Options for reform		
Option 2: allowing evidence of an accused's previous convictions to be adduced where the conduct is admitted but there is an issue as to whether it was performed with any criminal knowledge or intent	10.23	168
Advantages	10.25	169
Disadvantages	10.28	170
The danger of wrongful convictions	10.29	170
Past miscarriages of justice would be compounded	10.32	170
The defendant may not make any admission	10.34	171
It may not always be clear whether the conduct is denied	10.35	171
Option 3: allowing bad character evidence to be adduced in chief if it tends to show a disposition to commit the kind of offence charged or a general disposition to commit offences	10.37	172
Option 4: the Australian common law test	10.47	174
Advantages	10.49	175
Disadvantages	10.52	176
Option 5: the scheme of the Australian Evidence Act 1995	10.60	178
Option 6: prejudicial evidence to be admissible if it is relevant to a specific issue *and* its probative value outweighs its likely prejudicial effect (and any other factors militating against its admission)	10.73	181
Relevance to a specific fact in issue	10.75	182
Balancing probative value against the reasons for exclusion	10.78	182
Advantages	10.83	183
Disadvantages	10.84	184
The cogency of the evidence: collusion and contamination	10.86	184
A matter for the judge or the jury?	10.87	185
Initial admissibility	10.93	187
Option A: the test in *H*	10.94	187
Option B: the judge determines the cogency of the evidence on the basis of the documents	10.96	188
Option C: the judge holds a voir dire	10.97	188
Evidence of collusion or contamination emerging after the admission of similar fact evidence	10.99	188
Joinder and severance	10.106	190
Efficiency considerations	10.107	190
Prejudice	10.109	190
Conclusions	10.111	191
Should the same rule apply if it is the defendant who seeks to adduce the evidence?	10.112	191
Should the same rule apply if it is a co-accused who seeks to adduce the evidence?	10.115	192

	Paragraph	*Page*
PART XI: THE 1898 ACT – THE PROBLEMS AND SOME SOLUTIONS (I): ASSERTIONS OF GOOD CHARACTER		194
The rationale of the first limb of section 1(f)(ii)	11.2	194
Relevance to credibility	11.3	194
The divisibility of character	11.5	195
Relevance to propensity	11.9	196
Judicial warnings	11.13	197
Defects in the present law	11.15	198
The need for change	11.22	201
What should count as an assertion of good character?	11.24	201
Implied assertions	11.25	201
Non-verbal assertions	11.28	202
Who must make the assertion?	11.32	203
If the defence asserts good character in only one respect, what evidence can be adduced to refute that assertion?	11.40	205
How should the bad character evidence admitted as a result be used?	11.44	206
The defendant who asserts good character but does not testify	11.46	206
PART XII: THE 1898 ACT – THE PROBLEMS AND SOME SOLUTIONS (II): IMPUTATIONS AGAINST PROSECUTION WITNESSES		208
The purpose of the second limb of section 1(f)(ii)	12.4	208
Credibility	12.5	209
Fairness	12.9	209
Deterrence	12.14	211
Defects in the present law	12.25	213
Over-reliance on judicial discretion	12.26	213
It is not clear what counts as an imputation	12.31	215
The overlap between the issue of guilt and credibility	12.34	215
Imputations by the non-testifying accused	12.35	216
Evidence may be admitted which is more prejudicial than probative	12.38	216
Evidence of bad character which *is* of probative value may never be adduced	12.39	217
The defendant may be deterred from testifying	12.40	217
The deterrent purpose of the provision is not served	12.43	218
No loss of shield where the defendant is shown in a good light	12.47	219
A temptation to fabricate	12.48	219
Options open to us		
Option 1: no change	12.49	219
Option 2: limiting cross-examination of the accused about previous misconduct to cases where *unnecessary* imputations have been made	12.50	219

	Paragraph	*Page*
The CLRC	12.51	220
Advantages		
Prejudicial evidence would not be admitted unless its probative value outweighed the potential prejudice	12.64	223
More relevant information would be made available to the court	12.65	223
Removal of the anomaly that evidence of bad character cannot be adduced if the defendant leaves it to the advocate to make the imputations	12.67	223
Removal of an inconsistency in the present law	12.68	224
Disadvantages	12.69	224
Option 3: the Australian solution: imputations should result in the loss of the shield only if they do not relate to the witness's conduct in the incident or investigation in question	12.71	224
Disadvantages	12.75	226
Imputations against the maker of a hearsay statement	12.80	227
The defendant who makes imputations against prosecution witnesses but does not testify	12.81	227
Option A: the *Butterwasser* approach	12.86	228
Option B: evidence of the defendant's previous misconduct can be adduced whenever imputations are made against prosecution witnesses	12.88	229
Option C: allowing evidence of the defendant's previous misconduct to be adduced if the nature of the defence is such as to put the defendant's credibility in issue	12.89	229
Option D: allowing imputations to be made against a witness only where, if true, they would *substantially* undermine the witness's credibility	12.91	230
Advantages	12.94	230
Disadvantages	12.97	231
Option E: a rule that the party calling a witness (except the defendant) must reveal any convictions which, in the opinion of the court, bear on the witness's credibility	12.101	231
Advantages	12.105	232
Disadvantages	12.109	233
The direction that the bad character evidence is relevant only to the defendant's credibility	12.116	234
Provisional proposals and consultation issues	12.117	234
PART XIII: THE 1898 ACT – THE PROBLEMS AND SOME SOLUTIONS (III): CROSS-EXAMINATION OF A CO-ACCUSED		236
The rationale of section 1(f)(iii)	13.2	236
Defects in the present law		
Unfairness may result because there is no judicial discretion	13.5	237

	Paragraph	*Page*
It is impossible to keep the evaluation of a defendant's guilt separate from the evaluation of his or her truthfulness	13.10	238
The court may be misled	13.11	239
Technical problems caused by the drafting of section 1(f)(iii)	13.12	239
Defendants may be inhibited from testifying	13.16	240
The rationale of section 1(f)(iii) is not coherent	13.17	240
Options open to us		
Option 1: no change	13.18	240
Option 2: making the right to cross-examine a co-accused under section 1(f)(iii) wholly dependent on an unstructured judicial discretion	13.19	241
Option 3: repealing section 1(f)(iii), so that it would make no difference if one accused attacks another	13.23	242
Option 4: where one defendant attacks another, *both* should lose their shields	13.25	242
Hybrid approaches	13.28	242
Option 5: a presumption that, where D1 attacks D2, the fact-finders should be allowed to hear evidence of D1's character, coupled with a discretion to exclude it	13.29	243
Option 6: a presumption *against* the loss of the shield, coupled with a discretion to *admit* evidence of D1's character	13.38	244
Option 7: evidence given by D1 of D2's conduct in the incident or investigation in question should not result in the loss of the shield; and where the shield *is* lost, the court should nevertheless have a discretion to prevent D1's bad character being revealed	13.41	245
Attacks on a co-accused by a defendant who does not testify	13.48	246
Relevance of bad character to guilt as well as credibility	13.51	247
Provisional proposals	13.54	248
PART XIV: SPECIAL CASES: OPTIONS FOR REFORM		250
Section 1(2) of the Official Secrets Act 1911	14.2	250
Section 27(3) of the Theft Act 1968	14.4	250
Option 1: no change in the present law	14.5	250
Option 2: evidence of previous convictions to be admissible where the accused admits the conduct alleged but denies criminal knowledge	14.11	252
Option 3: repeal section 27(3) and leave handling cases to be dealt with under the same rules as other cases	14.13	252
Children under 14	14.14	252
Section 16(2) of the Children and Young Persons Act 1963	14.18	253
Spent convictions	14.19	253
Alleged misconduct which has previously resulted in an acquittal	14.24	254

	Paragraph	*Page*
PART XV: SHOULD THE SAME RULES APPLY IN COURTS-MARTIAL AND PROFESSIONAL TRIBUNALS?		255
The current position	15.1	255
Courts-martial	15.2	255
Professional tribunals	15.3	255
The issue	15.4	256
PART XVI: SUMMARY OF PROVISIONAL CONCLUSIONS, PROPOSALS AND CONSULTATION ISSUES		257
Guiding principles		
The probative value of bad character evidence		
The relevance of previous misconduct to propensity	1	257
The relevance of previous convictions to credibility		
The nature of the previous convictions	2	257
The significance of a previous plea or verdict	3	258
The significance of similar unusual defences	4	258
The distinction between guilt and credibility	5	258
The prejudicial effect of bad character evidence	6	258
Should the defendant be treated in the same way as other witnesses?	7	259
Some options we reject	8	259
Our preferred approach		
Judicial discretion	9	260
An exclusionary rule with separate exceptions for evidence admissible in chief and for evidence subsequently becoming admissible	10	260
The scope of the exclusionary rule	11–12	260
Section 1(f)(i) of the 1898 Act	13	261
Adducing bad character evidence in chief	14	261
The options	15–17	261
The cogency of the evidence: collusion and contamination		
Initial admissibility	18	263
Evidence of collusion or contamination emerging after the admission of similar fact evidence	19	263
Joinder and severance	20	263
Bad character evidence adduced by the defendant	21	264
Bad character evidence adduced by a co-defendant	22	264
The 1898 Act		
Assertions of good character		
Relevance	23	264
Judicial warnings	24	264
The need for reform	25	264

	Paragraph	*Page*
What should count as an assertion of good character?		
Implied assertions	26	265
Non-verbal assertions	27	265
Who must make the assertion?	28	265
If the defence asserts good character in only one respect, what evidence can be adduced to refute that assertion?	29	266
How should the bad character evidence admitted as a result be used?	30	266
The defendant who asserts good character but does not testify	31	266
Imputations against prosecution witnesses		
The options	32–33	266
Imputations against the maker of a hearsay statement	34	267
Imputations made by a defendant who does not testify	35	267
The direction that the bad character evidence is relevant only to the defendant's credibility	36	267
Cross-examination of a co-accused		
The options	37–39	267
Attacks on a co-accused by a defendant who does not testify	40	269
Relevance of bad character to guilt as well as credibility	41	269
Special cases		
Section 1(2) of the Official Secrets Act 1911	42	269
Section 27(3) of the Theft Act 1968	43–44	269
Children under 14	45	270
Section 16(2) of the Children and Young Persons Act 1963	46	270
Spent convictions	47–48	270
Alleged misconduct which has previously resulted in an acquittal	49	271
Courts-martial and professional tribunals	50	271

APPENDIX A: SOME RELEVANT PROVISIONS OF ENGLISH AND AUSTRALIAN LAW 272

England and Wales	
Criminal Procedure Act 1865, s 6	272
Criminal Evidence Act 1898, s 1	272
Official Secrets Act 1911, s 1(2)	272
Indictments Act 1915, s 5(3)	273
Children and Young Persons Act 1963, s 16(2)	273
Theft Act 1968, s 27(3)	273
Rehabilitation of Offenders Act 1974, ss 4(1), 7(2)(a)	273
Practice Direction (Crime: Spent Convictions) [1975] 1 WLR 1065	274
Police and Criminal Evidence Act 1984, ss 73, 78	275
Criminal Justice and Public Order Act 1994, ss 34, 35	276
Australia	
Evidence Act 1995 (Commonwealth), ss 94–112, 135–137	278

	Paragraph	*Page*
APPENDIX B: THE LAW IN OTHER JURISDICTIONS		285
Scotland	B.2	285
Previous convictions	B.3	285
Similar fact evidence	B.10	287
Australia	B.12	288
Relevance	B.14	289
The tendency and coincidence rules	B.16	289
The credibility rule	B.19	290
Cross-examination	B.20	291
Evidence in rebuttal of a denial	B.23	292
Evidence to re-establish credibility	B.24	292
Evidence of the defendant's character	B.25	292
General exclusionary discretions	B.26	293
Canada		
Similar fact evidence	B.29	293
Previous convictions	B.48	298
New Zealand	B.59	301
Similar fact evidence	B.60	301
Previous convictions	B.69	304
The United States of America	B.72	304
Similar fact evidence	B.74	305
Previous misconduct	B.86	307
Prior convictions	B.88	307
Other misconduct	B.100	311
Continental jurisdictions	B.104	312
The preliminary investigation	B.107	313
The structure of the courts and the trial process	B.108	313
The *dossier* system	B.110	314
The use of previous convictions	B.117	316
Sentencing	B.119	317
APPENDIX C: THE LSE JURY RESEARCH		318
Design and method	C.3	318
Offences charged	C.4	319
Variations	C.6	319
Variations in the criminal history evidence and directions	C.7	319
Sample	C.8	320
Results	C.9	320
The theft cases	C.10	320
The rape cases	C.11	320
Conclusions	C.13	321
Limitations of the study	C.17	321

	Paragraph	*Page*
APPENDIX D: THE OXFORD STUDY		323
Outline of the study	D.2	323
Design and methodology		
Contents of the experiment	D.5	324
The three offences charged	D.6	324
The previous conviction	D.7	325
Materials	D.9	325
The sample	D.13	327
Experimental procedure and gathering the data	D.14	327
Statistical analysis	D.17	328
Summary of main results		
Similarity and recency of the previous conviction	D.21	329
Type of offence for which the defendant was previously convicted	D.26	330
Relationship between type of previous conviction and similarity to current charge	D.28	330
Results and analysis		
Effects of giving information about a previous conviction in terms of recency and similarity to offence charged	D.29	331
Analysis of verdicts	D.31	331
Analysis of likelihood scores	D.32	332
Effects of type of previous conviction on votes for guilty verdicts	D.35	333
Effects of type of previous conviction on the participants' impression of the defendant	D.37	334
The credibility of the defendant	D.38	334
Other aspects of the participants' impression of the defendant	D.42	336
The deliberation of the participants	D.45	336
Beliefs about previous conviction information	D.47	337
Notes on method and limitations of the study	D.52	338
General application	D.55	339
Scope of the study	D.59	340
Conclusions	D.63	341

ABBREVIATIONS

In this paper we use the following abbreviations:

the 1898 Act: the Criminal Evidence Act 1898

the ALRC: the Australian Law Reform Commission

Archbold: *Archbold Criminal Pleading, Evidence and Practice* (1995/96 ed, ed P J Richardson)

Blackstone: *Blackstone's Criminal Practice* (1996 ed, ed P Murphy)

the CLRC: the Criminal Law Revision Committee

the Convention: the European Convention on Human Rights

Cross and Tapper: *Cross and Tapper on Evidence* (8th ed 1995, ed C Tapper)

the Evidence Report: Criminal Law Revision Committee, Eleventh Report: Evidence (General) (1972) Cmnd 4991

the JSB: the Judicial Studies Board

the LSE research: the mock jury research conducted by the London School of Economics between 1968 and 1973, and reported by W R Cornish and A P Sealy, "Juries and the Rules of Evidence" [1973] Crim LR 208: see Appendix C

the NZLC: the New Zealand Law Commission

the Oxford study: the mock jury research conducted by Dr S Lloyd-Bostock of the Centre for Socio-Legal Studies of the University of Oxford in 1995: see Appendix D

the Oxford Report: the report of the findings of the Oxford study

PACE: the Police and Criminal Evidence Act 1984

Phipson: *Phipson on Evidence* (14th ed 1990, ed M N Howard, P Crane and D A Hochberg)

proviso (e): section 1(e) of the 1898 Act

proviso (f): section 1(f) of the 1898 Act

the Royal Commission: the Royal Commission on Criminal Justice (Chairman: Viscount Runciman of Doxford CBE FBA)

the Report of the Royal Commission: (1993) Cm 2263

the Strasbourg Commission: the European Commission of Human Rights

the Strasbourg Court: the European Court of Human Rights

Wigmore on Evidence: J Wigmore, *A Treatise on the Anglo-American System of Evidence in Trials at Common Law* (3rd revised ed 1940)

PART I
INTRODUCTION

THE BACKGROUND TO THIS CONSULTATION PAPER

1.1 On 28 April 1994, the Home Secretary made a reference to this Commission[1] in the following terms:

> to consider the law of England and Wales relating to hearsay evidence[2] and evidence of previous misconduct in criminal proceedings; and to make appropriate recommendations, including, if they appear to be necessary in consequence of changes proposed to the law of evidence, changes to the trial process.

1.2 This reference entails consideration of the right of the prosecution to adduce "similar fact" evidence and the entitlement of the prosecution and co-defendants to cross-examine a defendant in respect of previous misconduct, principally under section 1 of the Criminal Evidence Act 1898. We were pleased with this reference as we realise that the law relating to similar fact evidence is "difficult to summarise because it is exceptionally complicated and because opinions differ greatly as to the effect of some of the decisions and as to whether the law is entirely consistent in itself",[3] and has been referred to as a "pitted battlefield".[4] The House of Lords has considered similar fact evidence twice in the past five years alone,[5] and the present state of the law merited criticism from the Royal Commission, which described it as "difficult to comprehend, embodied as it is in a series of judgments that are not always readily reconcilable".[6] We agree, and one of our main objectives in this paper is to put forward proposals that would make the law more comprehensible.

1.3 Problems have also arisen with the interpretation of section 1 of the 1898 Act. It has been rightly described by a former Lord Chief Justice as "a nightmare of construction",[7] while a leading academic commentator wrote:

> Not only is it facially self-contradictory and inconsistent, but it is vague in its terminology, opaque in its policy and contrary in apparent

[1] This reference was made pursuant to a recommendation made in the Report of the Royal Commission, ch 8 para 30, and Recommendation 191.

[2] A consultation paper was issued on this subject in July 1995: Evidence in Criminal Proceedings: Hearsay and Related Topics (1995) Consultation Paper No 138.

[3] Evidence Report, para 78; cited with approval at ch 8, para 30 of the Report of the Royal Commission, where it is said that "The law in this area is … difficult to comprehend, embodied as it is in a series of judgments that are not always readily reconcilable".

[4] *Per* Lord Hailsham in *Boardman* [1975] AC 421, 445G.

[5] *DPP v P* [1991] 2 AC 447; *H* [1995] AC 596.

[6] Report of the Royal Commission, ch 8, para 29.

[7] *Anderson* [1988] QB 678, 686E, *per* Lord Lane CJ.

effect to the instincts of the practitioner at the criminal bar.[8]

1.4 The problems of this branch of the law can also be illustrated by the fact that it has given rise to "unending litigation".[9] The Court of Appeal has considered the interpretation of section 1 of the 1898 Act at least nineteen times in reported cases since 1990.[10] The admissibility of evidence of previous misconduct is a universal problem; in the United States of America it is the "most frequently litigated evidentiary issue on appeal".[11]

1.5 We believe that the rules governing the circumstances in which a person's criminal record may be mentioned during a trial are extremely important and of relevance in many trials: a large proportion of those tried are affected by them, and the record emerges in a substantial number of cases.[12]

OUR APPROACH

1.6 This Commission has the statutory duty to keep the whole of the law under review "with a view to its systematic development and reform, including … the simplification and modernisation of the law".[13] In this context there are at least four reasons why it is *particularly* desirable to simplify and modernise the law relating to the admissibility of evidence in the criminal courts.

1.7 First, "evidence is the subject, above all others, which the lawyer needs to have at his fingertips because the occasions for its application may arise at any time without warning in the course of a trial. It is not enough to know where to find the basic principles – they must be known and understood."[14] Secondly, unlike in civil cases, no interlocutory appeal[15] on issues relating to the admissibility of evidence is generally available.[16] If a judge's ruling is wrong, this may lead to the quashing of a

[8] C Tapper, "The Revelation of *Jones v DPP*" (1988) 51 MLR 785.

[9] C Tapper, "The Criminal Law Revision Committee 11th Report: Character Evidence" (1973) 36 MLR 56.

[10] *Adair* [1990] Crim LR 571; *Khan* [1991] Crim LR 51; *Lasseur* [1991] Crim LR 53; *Cruttenden* [1991] 2 QB 66, [1991] Crim LR 537; *AT & T Istel v Tully* [1992] 1 QB 315, later reversed by the House of Lords, [1993] AC 45; *Fyffe* [1992] Crim LR 442; *Hendrick* [1992] Crim LR 427; *McGregor* (1992) 95 Cr App R 240; *Holman*, *The Times* 9 September 1992; *Wignall* [1993] Crim LR 62; *Knutton* (1993) 97 Cr App R 115, [1993] Crim LR 208; *Park* (1994) 99 Cr App R 270, [1994] Crim LR 285; *Courtney* [1995] Crim LR 63; *McLeod* [1994] 1 WLR 1500, [1995] Crim LR 54; *Akram* [1995] Crim LR 50; *Marsh* [1994] Crim LR 52; *Hook* (1994) 158 JP 1129; *Wheeler* [1995] Crim LR 312; *Durbin* [1995] 2 Cr App R 84. In addition, the Privy Council considered the section in *Lobban* [1995] 1 WLR 877.

[11] E Imwinkelried, *Uncharged Misconduct Evidence* (1984), reviewed by R Munday [1986] CLJ 523.

[12] In the Crown Court study conducted for the Royal Commission, it was found that 77% of the defendants facing trial had previous convictions, and the record emerged in 20% of those cases: M Zander and P Henderson, Research Study No 19 (1993) paras 4.6.1, 4.6.6.

[13] Law Commissions Act 1965, s 3(1).

[14] J C Smith, *Criminal Evidence* (1995) pp v–vi.

[15] Ie an appeal made before the conclusion of the trial.

[16] Except in respect of rulings in preparatory hearings in serious fraud trials: see Criminal Justice Act 1987, s 9(3)(b),(c) and (11).

conviction[17] and possibly an order for a new trial,[18] with all the additional expense that this will involve,[19] or to a wrongful conviction, with all the additional cost in human and financial terms that this entails.

1.8 Thirdly, uncertainty about the law may induce lawyers to advise their clients to plead not guilty because of uncertainty about the admissibility of similar fact evidence or of the defendant's previous convictions, whereas if the law were clear they would not have given such advice. It may also lead prosecutors to continue with a prosecution which cannot succeed if the judge rules that the similar fact evidence is inadmissible. Finally, a judge ought to be able to direct a jury in terms which it can easily understand and which it can accept as *reasonable*.[20] By the same token, the law must also be easy for magistrates to understand and apply.

1.9 If a comprehensive and comprehensible set of rules governing evidence of previous misconduct were to be brought into force, there would probably be a great reduction in the amount of argument and error with which the criminal law is at present burdened. It would also make it much easier for the law to be explained to the lay magistrates and juries who play such a large part in its administration, and for them to apply it. This point is important not only because of the involvement in the criminal justice system of people who are not judicially trained, but also because a substantial proportion of the judiciary appointed to hear criminal cases and direct juries fulfil that function only on a part-time basis.[21] It is also important for accused persons to understand the application of the law at trial.

THE RELEVANCE OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS

1.10 Although the European Convention on Human Rights has not been incorporated into English domestic law, the United Kingdom is a party to it[22] and its citizens enjoy an individual right of petition to the Strasbourg Commission[23] and thence, if their petition is declared admissible, to the Strasbourg Court, on the basis that a rule of domestic law has led to a violation of their rights under the Convention. It follows that, whenever it contemplates any measure of law reform, the United

[17] See, eg, *Knutton* (1992) 97 Cr App R 115.

[18] Criminal Appeal Act 1968, s 7(1).

[19] The cost of criminal proceedings in the Crown Court is approximately £7,600 per day in the financial year 1994–95 (data provided by the Court Service's Information Management Unit).

[20] Evidence Report, para 25; and see the dictum of Lord Mackay of Clashfern LC in *Sharp* [1988] 1 WLR 7, 9C.

[21] The percentage of trials dealt with in the Crown Court by recorders and assistant recorders in 1994 was approximately 23% (data provided by the Lord Chancellor's Department's Business Management Unit).

[22] "The Contracting Parties have undertaken … to ensure that their domestic legislation is compatible with the Convention and, if need be, to make any necessary adjustments to this end": European Commission on Human Rights, *Yearbook*, vol 2, 234. In *Ireland v United Kingdom* (1978) 2 EHRR 25 the court said, at p 103 (para 239): "By substituting the words 'shall secure' for the words 'undertake to secure' in the text of Article 1, the drafters of the Convention also intended to make it clear that the rights and freedoms set out in Section 1 would be directly secured to anyone within the jurisdiction of Contracting States."

[23] Under Article 25 of the Convention.

Kingdom, and therefore this Commission, should do its best to ensure that any law which it proposes, or which it confirms in place, does indeed conform to the requirements of the Convention.[24]

1.11 Under Article 6(1) of the Convention, in the determination of any criminal charge against him or her, everyone is "entitled to a fair and public hearing". Article 6(2) provides that "Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law."[25]

1.12 Our provisional view is that the Convention does not have any relevance to the present review. If any of our readers disagree, we would be interested in hearing their reasons.

THE FUNCTION OF THE LAW OF EVIDENCE IN CRIMINAL CASES

1.13 Before determining the principles on which this branch of the law should be reformed, we must identify the function of the law of evidence in criminal cases.[26] Rules of evidence define the evidence a court may receive in order that it may elicit the truth in relation to any matters in dispute. Criminal proceedings are concerned with the public interest in the enforcement of the criminal law, and the need to avoid the erroneous conviction of the innocent while ensuring the conviction of the guilty.[27] In order to avoid any erosion of public confidence in the criminal justice system which might follow if wrongful acquittals or convictions occurred more frequently, the rules of evidence should minimise, as far as is practical, the likelihood of any miscarriage of justice.[28] We also bear in mind, and agree with, the traditional view that the conviction of an innocent person is a more serious miscarriage of justice than an acquittal of someone who is guilty.[29] We disagree with the contrary view of the CLRC at para 27 of its Evidence Report

[24] See Evidence in Criminal Proceedings: Hearsay and Related Topics (1995) Consultation Paper No 138, Part V; Binding Over (1994) Law Com No 222, paras 5.1 – 5.2.

[25] In *X v Denmark* 2518/65: *Receuil* (1965) ii; 2742/66 *Receuil* 19, the Strasbourg Commission held that, as many member states of the Council of Europe provide for the disclosure of previous convictions in their criminal procedure before the guilt of the accused has been determined, it was not prepared to hold that such a procedure was in violation of any provision of Article 6, "not even in cases where a jury is to decide on the guilt of the accused".

[26] In this consultation paper we are concerned only with the rules applicable to trials, committal hearings, and "special reasons" hearings. There is no bar to evidence of previous convictions in bail applications and at sentencing, provided they are relevant and subject to the rules on "spent" convictions (see paras 5.4 – 5.12 below). Occasionally in the course of sentencing a *Newton* hearing becomes necessary, and the same rules of evidence apply as at trial. (*Newton* (1982) 77 Cr App R 13 requires the court to accept the defence's version on matters of substance for the purpose of mitigation, unless it has considered the evidence and concluded that it is sure the defence version is wrong.)

[27] W Twining, *Rethinking Evidence* (1990) p 186. Sir Rupert Cross wrote: "An important function of the law of evidence is rightly thought to be the protection of the accused from *the risk of* an unjust conviction." R Cross, "An Attempt to Update the Law of Evidence" (1974) 9 Israel LR 1, 3 (emphasis added).

[28] See, eg, A Zuckerman, "Miscarriages of Justice and Judicial Responsibility" [1991] Crim LR 492, 492–493.

[29] *Warner v Metropolitan Police Commissioner* [1969] 2 AC 256, 278C, *per* Lord Reid.

that "it is as much in the public interest that a guilty person should be convicted as it is that an innocent person should be acquitted".

1.14 We believe that the following principles should underlie any reform of this branch of the law:

(1) The law should be simplified to the greatest degree consistent with the proper functioning of the law of evidence.[30]

(2) As a general rule all *relevant* evidence should be admissible unless there is a *good reason* for it to be treated as inadmissible.[31]

(3) Evidence should not be admitted if a jury or magistrate cannot be given an effective warning about any limitations in the weight that can be attached to it, or a coherent instruction about the use that can be made of it.

If any of our readers disagree, or would wish to add other principles, we would be interested in hearing from them.

THE ISSUES

1.15 The basic rule is that all relevant evidence is admissible. One exception to this principle is that the prosecution may not in general adduce evidence of misconduct by the defendant on occasions other than that relating to the offence charged,[32] or of any disposition or propensity of the defendant to behave in any manner, in order to prove the case.[33] This approach is regarded as "one of the most deeply rooted and jealously guarded principles of our criminal law".[34]

1.16 There are two bases for this exclusionary rule.[35] The first is that such evidence is completely irrelevant. Lord Sumner held that "No-one doubts that it does not tend to prove a man guilty of a particular crime to show that he is the kind of man who would commit a crime, or that he is generally disposed to crime and even to a particular crime".[36] The second basis is that the prejudice created by such

[30] Evidence: Report on Hearsay Evidence in Criminal Proceedings (1995) Scot Law Com No 149, para 2.3.

[31] *Ibid*, para 2.30. For these purposes the word "relevant" means that "nothing is to be admitted which is not logically probative of some matter requiring to be proved ": J B Thayer, *A Preliminary Treatise on Evidence in Common Law* (1898) p 530.

[32] Thus in *Marshall* [1989] Crim LR 819 the defendant was charged with five burglaries and the prosecutor was allowed to adduce evidence that when interviewed by the police the defendant had admitted a total of 87 burglaries. The Court of Appeal held that the evidence of admissions to offences other than those charged should have been excluded in the absence of similar facts or system.

[33] Eg *Taylor* (1923) 17 Cr App R 109; para 2.9, n 14 below.

[34] *Maxwell v DPP* [1935] AC 309, 317, *per* Viscount Sankey LC.

[35] *Boardman* [1975] AC 421, 451C–F, *per* Lord Hailsham.

[36] *Thompson* [1918] AC 221, 232; and note the similar view taken by Devlin J in *Miller* [1952] 2 All ER 667, 668H.

evidence outweighs any probative value it might have.[37] The effect is, as Lord Taylor CJ has said, "Give a dog a bad name and hang him",[38] or, to put it in another way, "the more revolting the suggestion, the more the jury may be likely to lose sight of the fact that it may not be true".[39] An ancillary third argument is that, even if the fact-finders are not fully convinced that the defendant is guilty of the charge that they are considering, they may feel inclined to punish the defendant for his or her past behaviour.

1.17 A fourth point is that evidence of previous misconduct (whether it be similar fact evidence or convictions admissible under the 1898 Act) raises many collateral issues which it may be distracting, expensive and time-consuming to investigate in the light of the main issues of the case. It is said that such evidence might complicate the case and confuse the fact-finders.

1.18 Finally, if evidence of previous misconduct is too freely admissible it may encourage the investigating authority not to search for the real criminal, but instead to discover someone with a possible opportunity and a record: they would know that the weakness of their case could be fortified by the disclosure to the fact-finders of the defendant's previous convictions.[40]

1.19 We shall consider the justifications for the rule in greater detail;[41] but we would welcome comments from those of our readers who have experience of the admission of previous misconduct, in this jurisdiction or others, as to how many (if any) of these fears are justified.

THE RESEARCH

1.20 Our preliminary researches have shown the great difficulty of assessing the ability of a jury to evaluate the significance and relevance of a defendant's previous convictions. Some think that a jury will assume that a defendant with previous convictions is likely to be guilty of the offence charged,[42] while others believe that a modern jury is much more astute and will not be unfairly influenced by the previous convictions. The difference is not surprising, as the CLRC, which

[37] *Reza v General Medical Council* [1991] 2 AC 182, 202F, *per* Lord Lowry: "The inevitable consequence of their Lordships' conclusions about procedure is that in cases like the present, as well as those involving more disparate complaints, all the matters alleged will be heard and considered together. This leaves room for the juxtaposition of allegations which, though not qualifying as similar fact evidence, are like enough in character to cause prejudice."

[38] "Continuity and Change in the Criminal Law", a speech given by Lord Taylor CJ at King's College, London on 6 March 1996, reported at (1996) 160 JPN 190, 191.

[39] Z Cowen and P B Carter, *Essays in the Law of Evidence* (1956) p 146.

[40] See J D Heydon, *Evidence Cases and Materials* (3rd ed 1991) pp 268–269. It is also suggested that "it may be possible for the criminal to cover his tracks by committing the crime in circumstances where another man with a record may be suspected".

[41] See Part VII below.

[42] We note that Lord Taylor CJ is "at present wholly unpersuaded that we should change our present practice": speech given at King's College, London on 6 March 1996 (see n 38 above).

considered character evidence, had a very experienced membership[43] but nevertheless differed "greatly among [themselves] as to the extent of the danger that juries may be unduly affected by knowledge of other misconduct of the accused".[44] We therefore decided to obtain empirical evidence, although we are conscious of its limitations. We hope that it will help our readers to comment on the proposals and issues raised in this paper.

1.21 We regret that it has not been possible for us to carry out any research into the approach of real juries to previous misconduct and their comprehension of any warnings given to them by judges, because of the prohibition contained in section 8 of the Contempt of Court Act 1981. The Royal Commission recommended that this section should be amended to enable research to be conducted into juries' reasons for their verdicts "so that informed debate can take place rather than arguments based only on surmise and anecdote".[45] We respectfully agree, but in the absence of any amendment to the Act we place some information before our readers about the attitudes of mock jurors. This is in the form of a study conducted on simulated juries by the Oxford Centre for Socio-Legal Research at the request of the Home Office.[46] We will call it "the Oxford study". We readily accept that any conclusions to be drawn from it may be seriously impaired by our inability to commission appropriate research with real (rather than simulated) juries.

1.22 We also set out details of other inquiries conducted into juries' attitudes to previous convictions.[47] Some research has been carried out into the likelihood that a person with criminal convictions will commit further offences, and we also refer to that.[48] Finally, actual jurors have been asked whether they understood judges' directions on matters of law, and whether they believed that their fellow jurors did so; we refer to this research, commissioned by the Royal Commission, below.[49] We would be interested if our readers could tell us how far the results of this research reflect their own experience.

[43] Edmund Davies LJ (Chairman); Sir Frederick Sellers MC; Lawton LJ; Sir Donald Finnemore; James J; the Common Serjeant, Mr J M G Griffith-Jones MC; Professor Rupert Cross; Professor D R Seaborne Davies; Sir Kenneth Jones CBE; Sir Frank Milton; Judge Malcolm Morris QC; Mr A C Prothero; Sir Norman Skelhorn KBE QC; and Professor Glanville Williams QC.

[44] Evidence Report, para 76. The report was criticised for its lack of empirical research: C Tapper, "Criminal Law Revision Committee 11th Report: Character Evidence" (1973) 36 MLR 56, 57; but see the response of R Cross, "Clause 3 of the Draft Criminal Evidence Bill, Research and Codification" [1973] Crim LR 400, 403–404.

[45] Report of the Royal Commission, ch 1 para 8, and Recommendation 1. See A Ashworth and R Pattenden, " Reliability, Hearsay Evidence and the English Criminal Trial" (1986) 102 LQR 292, 331. We commented on this problem in our Twenty-Ninth Annual Report 1994 (1995) Law Com No 232, para 2.64, and in Evidence in Criminal Proceedings: Hearsay and Related Topics (1995) Consultation Paper No 138, para 1.22.

[46] The findings are set out in Appendix D below.

[47] Part VII and Appendix C below.

[48] Para 7.7, n 10 below.

[49] Para 7.17 below.

1.23 They should bear in mind that the ability and role of jurors has changed. Lord Griffiths explained last year:[50]

> In the past when jurors were often uneducated and illiterate and the penal laws were of harsh severity, when children could be transported, and men were hanged for stealing a shilling and could not be heard in their own defence, the judges began to fashion rules of evidence to protect the accused from a conviction that they feared might be based on emotion or prejudice rather than a fair evaluation of the facts of the case against him. The judges did not trust the jury to evaluate all the relevant material and evolved many restrictive rules which they deemed necessary to ensure that the accused had a fair trial in the climate of those times. Today with better educated and more literate juries the value of those old restricted rules of evidence is being re-evaluated and many are being discarded or modified. This appeal provides two such examples. [Lord Griffiths referred to the rules on corroboration warnings, and then continued] … and the rule as to the admissibility of similar fact evidence has been restated in a less restrictive form in *Director of Public Prosecutions v P.*
>
> This seems to me to be a wholly desirable development of law. The basic reason why criminal cases are heard by juries rather than by a judge alone is that our society prefers to trust the collective judgment of 12 men and women drawn from different backgrounds to decide the facts of the case rather than accept the view of a single professional judge. Deciding the facts requires the jury in all cases to decide whose evidence they find credible and what inferences they are prepared to draw from the facts as they find them. I would therefore resist any attempt to remove this essential role from the jury for to do so seems to me to strike root and branch at the very reason we have jury trial.

METHOD OF WORKING

1.24 When we commenced this project we were anxious to obtain the views of as many people as possible with practical experience of criminal trials so that we could ascertain the strengths and weaknesses of the present law. We therefore produced a number of questionnaires which we circulated to individuals and organisations involved in the practice of criminal law. Responses to these questionnaires were received from prosecuting authorities, defence bodies, representatives of the judiciary, barristers on different circuits, and solicitors, as well as many of the organisations to which they belong. We also spoke to many users of the criminal justice system. We are obliged to all of them for their assistance, which has helped us to focus on the main issues of contemporary importance.

1.25 Significantly, they all welcomed this review, and they were inevitably concerned with disparate aspects of, and defects in, the present law. It is widely accepted that the present law is difficult to apply and that a lot of time is wasted on arguing points of basic importance to which there is no clear answer. It was apparent to us that a modernised, simplified and codified law would be welcomed.

[50] *H* [1995] AC 596, 613C–F.

1.26 We are greatly indebted to Sir Donald Farquharson, a former Lord Justice of Appeal and Chairman of the Criminal Justice Consultative Council, and to Mr Peter Mirfield, Fellow of Jesus College, Oxford, who have acted as our consultants on this project. We have also been assisted by Lord Justice Brooke, both during and after his Chairmanship of this Commission. The Criminal Law Committee of the Judicial Studies Board allowed the Commissioner for Criminal Law to lead a very useful discussion on previous misconduct at its seminar for the Crown Court judiciary held at Creaton, Northamptonshire, in September 1995. We are grateful to all of them for their help.

THE STRUCTURE OF THIS PAPER

1.27 The remainder of this paper falls into three main sections:

(1) an account of the present law on the admissibility of bad character evidence (Parts II–V);

(2) an attempt to identify the principles on which the law in this area should be based (Parts VI–VIII); and

(3) an examination of a number of options for reform, some of which we provisionally propose (Parts IX–XV).

The present law

1.28 In Part II we set out the principles of the present law on the admissibility of evidence of a defendant's bad character as part of the prosecution's case. In Part III we examine some special cases where the prosecution is permitted to adduce such evidence although it would not qualify for admission under the principles set out in Part II.

1.29 In Part IV we examine the circumstances in which bad character evidence can, at present, be adduced in cross-examination of a defendant under section 1(f) of the 1898 Act.

1.30 Part V deals with some special cases where bad character evidence may be inadmissible although it would otherwise be admissible under the principles set out in Parts II–IV.

Guiding principles

1.31 Part VI examines the ways in which bad character evidence may be relevant to the issues in the case. In the light of the psychological research, we provisionally conclude that such evidence may have some probative value in suggesting that a defendant has a propensity to act in the manner alleged, but that the significance that can be attached to such character traits is limited. We analyse the concept of credibility in its various forms, and the ways in which evidence of previous misconduct can be relevant to it.

1.32 Part VII is concerned with the reasons for excluding bad character evidence even where it is relevant. Chief among these is the risk of "prejudice" to the defendant; we attempt to clarify what is meant by prejudice, and distinguish "reasoning prejudice" (over-estimating the probative value of bad character evidence) from

"moral prejudice" (a willingness to convict on the basis of the defendant's character rather than the evidence in respect of the offence charged). Our provisional view is that the rules of evidence should seek to minimise the risk of prejudice, but that this can be done by balancing that risk against the probative value of the evidence in question.

1.33 In Part VIII we compare the position of the defendant with that of other witnesses, and ask whether there is any justification for treating them differently. Our provisional conclusion is that there is, and that a defendant should not only be permitted to adduce evidence of his or her *good* character but should also be given some measure of protection against the introduction of evidence of his or her *bad* character.

Options for reform

1.34 In Part IX we consider some radical options for reform, starting with some which would involve the elimination of any element of judicial discretion.[51] We provisionally reject these options in favour of some form of judicial discretion, but suggest that, if such discretion is to be retained in the present context, it would be preferable for its exercise to be "structured" by statutory guidelines.[52]

1.35 We then go on to consider options which would involve an element of discretion but would make the admissibility of bad character evidence dependent entirely on whether the probative value of the evidence outweighs its likely prejudicial effect.[53] We provisionally reject these options on the ground (inter alia) that they over-simplify the issues involved, by treating the balance of probative value over prejudicial effect as the *only* justification for admitting evidence of bad character. Our provisional view is that the present law is right to make separate provision for various circumstances in which evidence which is not admissible in chief may subsequently *become* admissible as a result of the course that the trial has taken, and the way in which the defence has been conducted, and that it may be justifiable to admit evidence on this latter basis without the need to ask whether its probative value exceeds its likely prejudicial effect.[54] Our preferred approach, therefore, is to retain an exclusionary rule with *separate* exceptions for evidence admissible in chief and for evidence subsequently becoming admissible.[55]

1.36 We then consider what *kind* of evidence should fall within the scope of the exclusionary rule that we propose, so that it would be inadmissible unless it falls within one of the exceptions to that rule;[56] and we provisionally propose that the rule should apply to any evidence which appears to the court to carry a risk of prejudice, in either of the senses we analyse in Part VII.[57]

[51] Paras 9.4 – 9.44 below.

[52] Paras 9.45 – 9.57 below.

[53] Paras 9.58 – 9.71 below.

[54] Paras 9.64 – 9.65 below.

[55] Paras 9.72 – 9.73 below.

[56] Paras 9.74 – 9.92 below.

[57] See para 1.32 above.

Adducing bad character evidence in chief

1.37 In Part X we ask what rules should determine the admissibility *in chief* of evidence which prima facie falls within the scope of our proposed exclusionary rule. We consider a number of options, and provisionally conclude that prejudicial evidence should be admissible in chief if it is relevant to a specific issue *and* its probative value outweighs its likely prejudicial effect (together with any other factors militating against its admission);[58] and we suggest some guidelines for the "structuring" of the balancing exercise that this proposal would entail.[59]

1.38 We then turn to the separate issue of how the court should deal with similar fact evidence which is suspect because of the danger of collusion or contamination. We invite consultees' views on whether the test in *H*[60] (namely whether the evidence would have sufficient probative value *on the assumption that it is true*) should be replaced by a procedure under which the judge either determines the cogency of the evidence on the basis of the documents alone or holds a voir dire.[61] We provisionally propose that where, after hearing *all* the evidence, the judge is satisfied that a conviction would be unsafe because, in the light of the risk of contamination or collusion, the probative value of any evidence admitted is outweighed by its likely prejudicial effect and the risk that the jury may be misled, confused or distracted, the judge should discharge the jury.[62]

1.39 We examine the advantages and disadvantages of including counts for two or more different offences in the same indictment, where the evidence relating to each offence is not admissible as similar fact evidence in relation to the others, and invite views as to whether the present rules should be changed.[63]

1.40 We provisionally propose that the *defendant* should be at liberty to adduce evidence of his or her bad character.[64] Finally, we invite views as to whether one defendant should be entitled to call evidence of the bad character of another, without the need to show that the probative value of the evidence exceeds its likely prejudicial effect.[65]

The 1898 Act

1.41 In Parts XI–XIII we examine the three ways in which a defendant may lose the "shield" against cross-examination as to bad character under section 1(f) of the 1898 Act.

[58] Paras 10.23 – 10.85 below.

[59] Paras 10.78 – 10.82 below.

[60] *H* [1995] AC 596.

[61] Paras 10.86 – 10.98 below.

[62] Paras 10.99 – 10.105 below.

[63] Paras 10.106 – 10.111 below.

[64] Paras 10.112 – 10.114 below.

[65] Paras 10.115 – 10.118 below.

ASSERTIONS OF GOOD CHARACTER

1.42 In Part XI we consider the defects of the first limb of section 1(f)(ii), under which the shield is lost by a defendant who claims to be of good character. We provisionally propose that this limb should extend to *implied* assertions of good character[66] (including non-verbal assertions),[67] and we suggest some rules for determining whether the circumstances in which the defendant's good character is asserted are such that the defendant can fairly be held responsible for that assertion.[68]

1.43 We also provisionally propose that the law should cease to treat the defendant's character as indivisible, and that he or she should be open to cross-examination only on *that part* of his or her character or truthfulness about which an assertion of good character has been made;[69] and that, where the assertion of good character, and the evidence adduced in rebuttal of that assertion, are directly relevant to the accused's propensities, the fact-finders should not (as at present) be directed to treat the evidence as bearing solely on the accused's credibility.[70] Finally we consider the case where a defendant is asserted to be of good character but does not testify.[71]

IMPUTATIONS AGAINST PROSECUTION WITNESSES

1.44 In Part XII we examine the many defects of the second limb of section 1(f)(ii), under which the shield is lost by a defendant who makes imputations against prosecution witnesses, and we provisionally conclude that reform is necessary.[72] We consider the CLRC's proposal to limit cross-examination of the accused about previous misconduct to cases where *unnecessary* imputations have been made;[73] but we provisionally prefer the Australian solution, namely that imputations should result in the loss of the shield only if they do not relate to the witness's conduct *in the incident or investigation in question*.[74] However, we also provisionally propose that, where an imputation is made which would have resulted in the loss of the shield if it had been made against a prosecution *witness*, it should equally result in the loss of the shield if it is made against the maker of any statement adduced by the prosecution under an exception to the rule against hearsay.[75]

1.45 We consider various approaches to the problem of the defendant who makes imputations against prosecution witnesses but does not testify, and under the present law is therefore protected from cross-examination as to his or her bad

[66] Paras 11.25 – 11.27 below.

[67] Paras 11.28 – 11.31 below.

[68] Paras 11.32 – 11.39 below.

[69] Paras 11.41 – 11.42 below.

[70] Paras 11.44 – 11.45 below.

[71] Paras 11.46 – 11.48 below.

[72] Paras 12.25 – 12.49 below.

[73] Paras 12.50 – 12.70 below.

[74] Paras 12.71 – 12.79 below.

[75] Para 12.80 below.

character.[76] We invite views on whether the present rule should be retained, or reversed, or *partially* reversed: this last option would mean that the bad character of such a defendant would be admissible, provided that he or she could have been cross-examined about it if he or she had testified *and* the nature of the defence is such as to put his or her credibility in issue.[77] We also invite comment on two further suggestions: first, that no party should be permitted to make imputations against a witness unless, if true, they would *substantially* undermine the witness's credibility;[78] and second, the introduction of a rule that the party calling a witness (except the defendant) must reveal any convictions which, in the opinion of the court, bear on the witness's credibility.[79] Our provisional view is that both these suggestions raise issues going beyond the scope of this paper.

1.46 Finally we ask for views on whether, where evidence of previous misconduct is admitted because the defendant has cast imputations, the fact-finders should invariably be directed to treat it as relevant only to the defendant's credibility, and not as going directly to the issue of guilt.[80]

CROSS-EXAMINATION OF A CO-ACCUSED

1.47 Part XIII is concerned with section 1(f)(iii) of the 1898 Act, under which the shield is lost by a defendant who undermines the defence of a co-accused. We examine the defects of this provision, and provisionally conclude that reform is necessary.[81] Having considered a number of options for reform, we make a provisional proposal which would correspond to our preferred option in relation to the making of imputations against prosecution witnesses[82] – namely that evidence given by one defendant against another should not result in the loss of the shield if it relates to the co-accused's conduct *in the incident or investigation in question*.[83] We further provisionally propose that, where the shield *is* lost on this ground, it should nevertheless be necessary to apply for the leave of the court before evidence of the accused's bad character can be adduced;[84] and we suggest guidelines for the exercise of the discretion thus conferred upon the court.[85]

1.48 We then turn to the question of the defendant who undermines a co-accused's defence but does not testify; and we provisionally propose that, where an application could have been made for leave to cross-examine the defendant about his or her previous misconduct on this ground, any other party should be able to

[76] *Butterwasser* [1948] 1 KB 4.

[77] Paras 12.81 – 12.90 below.

[78] Paras 12.91 –12.100 below.

[79] Paras 12.101 – 12.115 below.

[80] Para 12.116 below.

[81] Paras 13.5 – 13.18 below.

[82] See para 1.44 above.

[83] Paras 13.19 – 13.46 below.

[84] Para 13.46 below.

[85] Para 13.55 below.

apply for leave to adduce evidence of the defendant's previous misconduct if the nature of the defence is such as to put the defendant's own credibility in issue.[86]

1.49 Finally we provisionally propose the abolition of the common law rule that, where evidence of an accused's bad character is admitted pursuant to section 1(f)(iii), such evidence is directly relevant only to the accused's credibility.[87]

Miscellaneous topics

1.50 Part XIV deals with the possibilities for reform of the special cases examined in Parts III and V. We invite views as to whether section 1(2) of the Official Secrets Act 1911 should be repealed or amended.[88] We provisionally propose that section 27(3) of the Theft Act 1968 should be repealed, and that handling cases should be dealt with under the same rules as other cases.[89]

1.51 We provisionally conclude that the exclusionary rule should apply in respect of a child as in respect of an adult defendant, even if the prosecution proposes to adduce the bad character evidence merely to rebut the presumption of doli incapax.[90] We make no proposal for any change to section 16(2) of the Children and Young Persons Act 1963.[91]

1.52 We provisionally propose that the Practice Direction on spent convictions[92] should continue to apply and should be enacted in statutory form; and we suggest factors that the court should take into account in deciding whether to allow a party to refer to a spent conviction.[93]

1.53 We provisionally conclude that, save for those cases in which evidence of previous misconduct resulting in an acquittal can already be admitted, alleged misconduct which has previously resulted in an acquittal should continue to be inadmissible.[94]

1.54 Part XV asks whether any reformed rules on the admissibility of evidence of previous misconduct should apply in places where the criminal rules of evidence currently apply, namely courts-martial and professional tribunals established by statute. Our provisional view is that they should.[95]

[86] Paras 13.48 – 13.50 below.

[87] Paras 13.51 – 13.53 below.

[88] Paras 14.2 – 14.3 below.

[89] Paras 14.4 – 14.13 below.

[90] Paras 14.14 – 14.17 below.

[91] Para 14.18 below.

[92] *Practice Direction (Crime: Spent Convictions)* [1975] 1 WLR 1065.

[93] Paras 14.19 – 14.23 below.

[94] Para 14.24 below.

[95] Para 15.4 below.

Summary

1.55 Part XVI is a summary of our provisional conclusions and proposals, and of the issues on which we seek our readers' views. **Consultees are invited to send us their views on as many or as few of these points as they may wish.**

Appendices

1.56 Finally we include four appendices, devoted respectively to

(1) the relevant provisions of the existing English law, and of the Evidence Act 1995 of the Commonwealth of Australia;

(2) the law of Scotland, Australia, Canada, New Zealand, the United States of America and Continental jurisdictions;

(3) the jury research carried out by the London School of Economics between 1968 and 1973; and

(4) the Oxford study.[96]

[96] See para 1.21 above.

The background to this consultation paper 1
Our approach 2
The relevance of the European Convention on Human Rights 3
The function of the law of evidence in criminal cases 4
The issues 5
The research 6
Method of working 8
The structure of this paper 9
The present law 9
Guiding principles 9
Options for reform 10
Adducing bad character evidence in chief 11
The 1898 Act 11
Assertions of good character 12
Imputations against prosecution witnesses 12
Cross-examination of a co-accused 13
Miscellaneous topics 14
Summary 15
Appendices 15

PART II
THE PRESENT LAW (I): ADDUCING BAD CHARACTER EVIDENCE IN CHIEF

2.1 In this Part we look at the common law rules that enable evidence of previous misconduct to be adduced in chief. The most important instance is "similar fact" evidence,[1] but we also consider the circumstances in which previous misconduct can be adduced as part of the same transaction[2] and the right of a defendant to adduce evidence of previous misconduct by a co-defendant.[3] In Part III we move on to consider some special cases in which the prosecution is permitted to adduce bad character evidence which would not be admissible under the principles we examine in this Part. We begin with a summary which, in very broad outline, identifies the issues discussed in this Part and sets out the current state of the law.

SUMMARY

2.2 It is a basic principle that all relevant evidence is admissible. A traditional exception to this principle has been that evidence of previous misconduct by the defendant, or of the defendant's disposition or propensity to act in a particular way, will be inadmissible. This exception is, as we explain below,[4] derived either from the belief that what is commonly termed "similar fact" evidence is simply irrelevant, or from the concern that any relevance it might have will be lost as a result of its effect in prejudicing the fact-finder against the defendant.

2.3 Despite these concerns, the courts have been willing to relax controls on the admission of this kind of evidence where they have been satisfied that its relevance is sufficient to outweigh any prejudice that may be caused to the defendant's case. Most of the authorities discussed below concern attempts by the appellate courts to develop formulae by which to ensure that the balance between relevance (or probative value) and prejudice is properly struck.

2.4 In the nineteenth century case of *Makin*[5] the Privy Council stated that similar fact evidence may be admissible if it is relevant to an issue before the fact-finder. It was suggested that such relevance may be derived from the impact that the similar fact evidence has upon the question whether the acts alleged to constitute the offence charged were designed rather than accidental, or if it rebuts a defence otherwise open to the accused.

2.5 In *Boardman*[6] in 1975 the House of Lords reconsidered the admissibility of similar fact evidence. It stated that if the evidence bore a *striking* or *peculiar* similarity to

[1] Paras 2.7 – 2.69 below.

[2] Paras 2.70 – 2.84 below.

[3] Paras 2.85 – 2.91 below.

[4] See para 2.10 below.

[5] *Makin v A-G for New South Wales* [1894] AC 57.

[6] [1975] AC 421.

the facts of the offence charged then it may be of sufficient relevance to justify its admission.

2.6 The most recent House of Lords authority in this area is *DPP v P*,[7] in which the "striking similarity" test used in *Boardman* was stated to be just one means by which the enhanced relevance required of similar fact evidence may be found. The current test can be simply stated: the probative value of the similar fact evidence must be sufficiently great to justify its admission, notwithstanding its prejudicial effect. While striking similarity can provide this enhanced relevance, and may continue to be insisted upon where the identity of the perpetrator of an offence is in doubt, other factors, such as a relationship in time or circumstances between the disputed evidence and the facts of the offence charged, may achieve the same objective.

WHEN SIMILAR FACT EVIDENCE MAY BE ADDUCED BY THE PROSECUTION

2.7 We make no apologies for considering this subject in detail and with some care, in the light of its complexity. The CLRC looked at the whole law of evidence in criminal cases and considered similar fact evidence to be "far the most difficult of all the topics which we have discussed".[8] We understand why Lord Hailsham saw it as a "pitted battlefield".[9]

2.8 Similar fact evidence covers evidence

(1) of misconduct by the defendant, whether arising before or after the offence charged; and

(2) of his or her propensity or disposition to misconduct himself or herself, either in general or in specific ways.

May[10] has rightly pointed out that the term "similar fact evidence" is misleading because in category (1) evidence of "similar acts" would be more accurate, while in category (2) the expression is a complete misnomer. *Cross and Tapper* says it is "doubly misleading"[11] because it "describes the exclusionary rule in a phrase more apt to describe one of the principal exceptions to it, and because it suggests a unifying factor between the situations in this area which they do not necessarily possess". Nevertheless, the expression is firmly established and is in constant use, so we adopt it, although we too believe it to be misleading.

2.9 In order to understand the role of similar fact evidence it must be remembered that "one of the most deeply rooted and jealously guarded principles of our criminal law"[12] is that the prosecution may not, in general, adduce evidence of

[7] *DPP v P* [1991] 2 AC 447.

[8] Evidence Report, para 70.

[9] *Boardman* [1975] AC 421, 445G.

[10] R May, *Criminal Evidence* (3rd ed 1995) para 6.03.

[11] *Cross and Tapper*, p 361 (footnotes omitted). In *Ananthanarayanan* [1994] 1 WLR 788, 793F, Laws J said that this area *used* to be called similar fact evidence.

[12] *Maxwell v DPP* [1935] AC 309, 317, *per* Viscount Sankey LC.

occasions of previous bad conduct, other than those relating to the offence charged,[13] nor of any disposition or propensity of the defendant to conduct himself or herself in any manner so as to establish or assist in the establishment of the case against him or her.[14]

2.10 There are usually said to be two possible bases for the general rule excluding evidence of bad character.[15] First, evidence of this kind is regarded as irrelevant in showing guilt. The second reason is that, insofar as such evidence *is* relevant, its prejudicial effect outweighs its probative value.[16]

2.11 Lord Hailsham believed that both theories are correct in the sense that evidence of bad character may have no probative value if there is nothing to connect the accused with the crime charged; but where there is some such evidence, it may be dangerous to admit evidence of bad character which a jury might invest with a far greater degree of probative value than it actually possesses.[17] We consider these points later.

2.12 Although, as we have said, previous misconduct cannot be used to besmirch the defendant's character, there are occasions when such evidence has a "probative force in support of the allegation that an accused person committed a crime [which] is sufficiently great to make it just to admit the evidence, notwithstanding that it is prejudicial to the accused in tending to show that he was guilty of another crime".[18] Nevertheless, although the principle upon which evidence of similar facts is admissible is easy to state, it has been notoriously difficult to apply.[19] In considering the application of the principle it is worth remembering Lord Herschell LC's assertion[20] that there is a fundamental difference between evidence which "would only show the prisoner to be a bad man" and evidence which would

[13] Thus in *Brown*, *Smith*, *Woods and Flanagan* (1963) 47 Cr App R 204 the prosecution adduced evidence that one of the defendants, who had pleaded guilty to an offence of shop-breaking, had pleaded guilty to a similar offence committed 5 days before the offence charged. The Court of Criminal Appeal held that the evidence had been wrongly admitted since there were no sufficiently similar idiosyncratic features to connect the two offences so as to make the evidence admissible.

[14] Thus in *Taylor* (1923) 17 Cr App R 109 the accused was charged with burglary. He had been seen to emerge from a door which was subsequently found to have been broken. The Court of Criminal Appeal held that the trial judge had been wrong to admit evidence that a jemmy had been found in the accused's possession a few days after the alleged offence, as there was no evidence to show that this jemmy had been used to open the door. The evidence went only to disposition, and was therefore inadmissible.

[15] *Boardman* [1975] AC 421, 451D–F, *per* Lord Hailsham.

[16] See Part VII below.

[17] *Boardman* [1975] AC 421, 451F–G.

[18] *Per* Lord Mackay LC (with whom the rest of their Lordships concurred) in *DPP v P* [1991] 2 AC 447, 460E–F. He also gives various illustrative examples of situations from which the probative force may be derived, to which we refer later.

[19] See, eg, comments to the like effect by Lord Herschell LC in *Makin* [1894] AC 57, 65; cited in *Boardman* [1975] AC 421, 446A.

[20] In *Makin* [1894] AC 57, 67.

be "direct evidence of the particular fact in issue".[21] However, this "fundamental" difference is now merely a difference of degree.[22]

2.13 We conclude this Part by emphasising that the admission of similar fact evidence is exceptional in that it constitutes a major common law deviation from the rule that evidence of previous misconduct is inadmissible.[23] It is therefore not surprising that the courts require a "strong degree of probative force"[24] before they will admit similar fact evidence: "when in doubt the Judge should remember the admission of similar fact evidence is the exception rather than the rule".[25]

Early developments in similar fact evidence[26]

2.14 There is much to be said for the cautionary view that precedents are of little help in the application of a principle which depends on relevance. The "evidence which is directly and sufficiently relevant on one set of facts may be irrelevant or insufficiently relevant, if the facts are changed only slightly".[27] In consequence, it is often said that the other applications of the rule are of little value in determining admissibility.[28] The courts have, however, offered some guidance, which is by necessity of a general nature, on the criterion for admissibility of similar fact evidence to be positive proof of the crime charged. Nevertheless, before embarking on an analysis of the guidance given by the courts we must point out, and agree with, *Cross and Tapper*'s comment that "Significant confusion of terminology, long historical development and the absence of statutory intervention so throwing more weight upon the precise formulation of appellate opinions than they can reasonably bear have, no doubt, all contributed" to the "legendary difficulty" of this subject.[29] As there is constant reference to particular judicial utterances on the rule, it is necessary to start by referring to them, although it is a dangerous temptation to regard them as if they had statutory force.

2.15 The starting point is the opinion of the Privy Council in *Makin* in which Lord Herschell LC, in a very well known and much-quoted passage, subsequently

[21] A similar point was made in *Thompson* [1918] AC 221, 234, by Lord Sumner, who said that "there is all the difference in the world between evidence proving that the accused is a bad man and evidence proving that he is *the* man."

[22] *DPP v P* [1991] 2 AC 447, 460H–461A, *per* Lord Mackay LC; see paras 2.35 – 2.43 below.

[23] See para 2.2 above, however, where we point out that the principle that evidence of previous misconduct is inadmissible is itself an exception to the basic rule that all relevant evidence is admissible.

[24] *Boardman* [1975] AC 421, 444D, *per* Lord Wilberforce.

[25] *Markby* (1978) 140 CLR 108, 117, *per* Gibbs ACJ.

[26] For the history of the rule, see J Stone, "The Rule of Exclusion of Similar Fact Evidence: England" (1933) 46 Harv LR 954.

[27] *Blackstone*, para F12.4.

[28] *Harris v DPP* [1952] AC 694, 711, *per* Viscount Simon; *Mustafa* (1976) 65 Cr App R 26, 31, *per* Scarman LJ.

[29] *Cross and Tapper*, p 362.

described by Lord Morris as having "always been accepted as expressing cardinal principles",[30] expressed the rule as follows:

> It is undoubtedly not competent for the prosecution to adduce evidence tending to shew that the accused has been guilty of criminal acts other than those covered by the indictment, for the purpose of leading to the conclusion that the accused is a person likely from his criminal conduct or character to have committed the offence for which he is being tried. On the other hand, the mere fact that the evidence adduced tends to shew the commission of other crimes does not render it inadmissible if it be relevant to an issue before the jury, and it may be so relevant if it bears upon the question whether the acts alleged to constitute the crime charged in the indictment were designed or accidental, or to rebut a defence which would otherwise be open to the accused.[31]

2.16 As we show in this Part, this formulation has presented great difficulties for the courts. Some of these may have derived from the order in which Lord Herschell referred to his propositions. In particular, the reference to the inclusionary relevance test as an exception to the general rule that similar fact evidence ought to be excluded seems in conflict with the rule that, in general, *all* relevant evidence should be admissible. This criticism received judicial support in the Court of Appeal in *Sims*,[32] in which Lord Goddard CJ pointed out that

> if one starts with the general proposition that all evidence that is logically probative is admissible unless excluded, then evidence of this kind does not have to seek a justification but is admissible irrespective of the issues raised by the defence, and this we think is the correct view.[33]

There is, perhaps, much to be said for the view that many of the difficulties experienced in the application of Lord Herschell's remarks in *Makin* might have been eliminated if his two sentences had been delivered in the converse order: thereby it would be made clear that the second was not so much an exception to

[30] *Boardman* [1975] AC 421, 438F. In the same case Lord Hailsham said of the comments of Lord Herschell "I do not know if the matter can be better stated" (at p 453D); while Lord Salmon pointed out that they were stated with "crystal clarity" (at p 461E). Others have been more critical of the survival and continued use of Lord Herschell's statements – see P B Carter, "Forbidden Reasoning Permissible: Similar Fact Evidence a Decade after *Boardman*" (1985) 48 MLR 29, and P Mirfield, "Similar Facts – *Makin* Out?" [1987] CLJ 83.

[31] *Makin* [1894] AC 57, 65. At one time it was unclear whether the exclusionary rule in *Makin* excluded evidence only of *criminal* conduct. However, it was made clear in *Ball* [1911] AC 47 that the rule was not restricted in this way and that it also embraced bad conduct or character. Whether conduct is "bad" may depend on the circumstances: eg for a man to marry a woman and take out insurance on her life is innocent, unless it is alleged that this was done as part of a plan to kill her and take the insurance money: see *Smith* (1915) 11
Cr App R 229.

[32] *Sims* [1946] KB 531.

[33] *Ibid*, at p 539.

the first as the first was an exception to the second.[34] Conversely, it should be noted that in *Boardman*[35] Lord Hailsham of St Marylebone stated that Lord Herschell's dictum in *Makin* contained two independent propositions covering "the entire field".[36]

2.17 The meaning of relevance, as it was understood in *Makin*, has troubled both academic commentators and the courts. First, there has been a tendency to use "relevant" and "admissible" interchangeably, and this, as one academic commentator has pointed out, "clouds the issue".[37] There has also been uncertainty about whether the second proposition in Lord Herschell's dictum constitutes a *closed* list of relevant categories or whether it was intended merely to provide examples of situations in which similar fact evidence would be accepted as "relevant to an issue before the jury". This dilemma was eventually resolved, with the latter interpretation being accepted.[38] The eventual rejection of the "closed list" approach was, in one sense, a product of its unmanageability, particularly the rule that permitted the use of similar fact evidence to rebut a defence open to the accused. The uncertainty created by this rule, and its impact upon the defence of "innocent association",[39] opened up the situations in which similar fact evidence could be accepted as relevant. Indeed, it was questioned whether an accused's simple denial of the charges against him or her would enable the prosecution to adduce similar fact evidence in rebuttal of this denial.[40] In *Thompson*[41] Lord Sumner made it clear that a plea of not guilty would not, without more, lead to the introduction of similar fact evidence under *Makin*, nor was it permissible for the prosecution to credit the accused with "fancy defences in order to rebut them at the outset with some damning piece of prejudice".

2.18 However, in the later case of *Harris*[42] Viscount Simon made it clear that it was *not* necessary for the prosecution to wait for the accused to raise a specific defence before introducing similar fact evidence in rebuttal. He went on to state:

[34] McNamara, "Dissimilar Judgments on Similar Facts: Part II" (1984) 58 ALJ 143. See also *Sims* [1946] 1 KB 531, where Lord Goddard CJ pointed out, at p 539, that if the relevance test in the *Makin* dictum was treated as an exception to a general rule of exclusion then the justification for its admission would usually be that it tended to rebut a defence open to the accused.

[35] *Boardman* [1975] AC 421.

[36] *Ibid*, at p 452B.

[37] *Cross and Tapper*, p 367.

[38] See *Harris* [1952] AC 694, 705, *per* Viscount Simon: "It is, I think, an error to attempt to draw up a closed list of the sort of cases in which the principle operates: such a list only provides instances of its general application, whereas what really matters is the principle itself and its proper application to the particular circumstances of the charge that is being tried."

[39] See *Boardman* [1975] AC 421, 443B, *per* Lord Wilberforce: "It is sometimes said that evidence of 'similar facts' may be called to rebut a defence of innocent association, a proposition which I regard with suspicion since it seems a specious manner of outflanking the exclusionary rule."

[40] See para 2.57 below.

[41] *Thompson* [1918] AC 221, 232.

[42] *Harris* [1952] AC 694, 705–706.

> What Lord Sumner meant when he denied the right of the prosecution to 'credit the accused with fancy defences' ... was that evidence of similar facts involving the accused ought not to be dragged in to his prejudice without reasonable cause.[43]

2.19 In fact, *Makin* is now regarded as authority for the view that the so-called similar fact evidence must be relevant to the issues in the case, as appears from the decision of the House of Lords in *Boardman*[44] in which the criterion for admitting similar fact evidence was discussed and there was a shift in emphasis of the justification of similar fact evidence from its purpose to its degree of relevance.[45] The rule adopted by the House of Lords in *Boardman* resulted from decisions of the appellate courts during the *Makin* era in which the "enhanced relevance" inherent in "striking similarity" came to be seen as a way of controlling the prejudice caused to defendants by the introduction of similar fact evidence. A line of case law, decided when *Makin* was still the pre-eminent authority, suggested that it was insufficient for the prosecution to argue that the similar fact evidence was legally relevant to rebut a defence reasonably open to the accused: it came to be necessary for similar fact evidence to bear such a strong similarity to the facts in the matters charged that it should be admitted. As the House of Lords acknowledged in *Boardman*, the first use of the formula "striking similarity" was in the 1946 decision of the Court of Appeal in *Sims*.[46] It was, however, in *Boardman* itself that this concept was developed and more fully discussed.

2.20 In *Boardman*, Lord Salmon said:

> whether or not evidence is relevant and admissible against an accused is solely a question of law. The test must be: is the evidence capable of tending to persuade a reasonable jury of the accused's guilt on some ground other than his bad character and disposition to commit the sort of crime with which he is charged? In the case of an alleged homosexual offence, just as in the case of an alleged burglary, evidence which proves merely that the accused has committed crimes in the past and is therefore disposed to commit the crime charged is clearly inadmissible. It has, however, never been doubted that if the crime charged is committed in a *uniquely or strikingly similar manner* to other crimes committed by the accused the manner in which the other crimes were committed may be evidence upon which a jury could reasonably conclude that the accused was guilty of the crime charged. *The similarity would have to be so unique or striking that common sense makes it inexplicable on the basis of coincidence.*[47]

[43] *Ibid*, at p 707.

[44] *Boardman* [1975] AC 421, in which various criteria for the admission of similar fact evidence were proffered. Of these the most frequently cited is that of Lord Salmon, but reference is also made to the speeches of Lords Morris and Wilberforce. We will refer to each of these in turn.

[45] See D W Elliott, "The Young Person's Guide to Similar Fact Evidence – I" [1983] Crim LR 284, 285.

[46] *Sims* [1946] 1 KB 531, 540: "That [striking similarity] is a special feature sufficient in itself to justify the admissibility of the evidence".

[47] *Boardman* [1975] AC 421, 462B–C (emphasis added).

2.21 Lord Morris stated:

> there may be cases where a judge, having both limbs of Lord Herschell LC's famous proposition ... in mind,[48] considers that the interests of justice (of which the interests of fairness form so fundamental a component) make it proper that he should permit a jury when considering the evidence on a charge concerning one fact or set of facts also to consider the evidence concerning another fact or set of facts if between the two there is *such a close or striking similarity or such an underlying unity* that probative force could fairly be yielded.[49]

2.22 Lord Wilberforce considered whether similar facts could be sought to be adduced as corroboration, and said:

> The basic principle must be that admission of similar fact evidence ... is exceptional and requires a strong degree of probative force. This probative force is derived, if at all, from the circumstance that the facts testified to by the several witnesses bear to each other *such a striking similarity* that they must, when judged by experience and common sense, either all be true, or have arisen from a cause common to the witnesses or from pure coincidence. The jury may, therefore, properly be asked to judge whether the right conclusion is that all are true, so that each story is supported by the other(s).[50]

2.23 Lord Cross of Chelsea took a similar view and, while he did not use words such as "striking similarity", he did emphasise that the matter was a question of degree when he said:

> The question must always be whether the similar fact evidence taken together with the other evidence would do no more than raise or strengthen a suspicion that the accused committed the offence with which he is charged or would point so strongly to his guilt that only an ultra-cautious jury, if they accepted it as true, would acquit in [the] face of it. In the end – although the admissibility of such evidence is a question of law, not of discretion – the question as I see it must be one of degree.[51]

2.24 As is apparent from these quotations, the House of Lords in *Boardman* was in agreement that the probative value of similar fact evidence could be determined by the *degree* of similarity it exhibited to the evidence in the present case. However, a split in their Lordships' reasoning is also apparent. It may be significant that, while Lords Morris, Salmon and Hailsham endorsed the *Makin* direction in enthusiastic terms, Lords Cross and Wilberforce made no reference to it at all. Lords Cross and Wilberforce said that, in determining whether to admit similar fact evidence, the trial judge must judge its probative force, the extent to which it tended to support the other evidence in the case, against its prejudicial effect on the accused. The speech of Lord Cross suggests that prejudice should be judged by measuring

[48] See para 2.15 above (footnote added).

[49] *Boardman* [1975] AC 421, 441D (footnote and emphasis added).

[50] *Ibid*, at p 444D–E (emphasis added).

[51] *Ibid*, at p 457C–D.

the difference between the probative value a jury may be inclined to give similar fact evidence and its real probative value; his Lordship was particularly concerned that a jury member should not be led, by the similar fact evidence, into thinking that there was "probably something in it".[52] It is possible that this speech was influenced by a concern to avoid what Lord Hailsham referred to as the "forbidden type of reasoning",[53] that is reasoning *directly* from the accused's previous disposition to the conclusion that he or she is more likely to have committed the present offence.[54] For Lords Cross and Wilberforce, as well as their brethren, the means by which to ensure that the similar fact evidence had sufficient probative force, and avoid the forbidden reasoning approach, was to insist upon a "striking similarity" between the similar fact evidence and the evidence in the present proceedings.[55]

2.25 To be admissible the evidence had to have some relevance, other than showing the defendant's propensity to commit the type of crime charged, or crimes in general, and must have had a strong degree of probative force. This is illustrated by the facts of *Boardman* in which the accused, a middle-aged headmaster, was charged with one act of buggery and two of incitement to buggery with pupils at his school, and the alleged common feature was that he had tried to get the boys to take the active part in the buggery while he took the passive part. Each charge related to a different youth, and in evidence each youth recounted other incidents involving himself which, if true, amounted to criminal offences. No application was made for separate trials, and objection does not seem to have been taken to the admission of evidence of the other incidents involving a particular youth. Subject to an irrelevant exception, the trial judge held that all the evidence was mutually corroborative because it consisted of criminal behaviour of a particular, unusual kind. The argument against this was that the evidence on one count should have been held irrelevant to the determination of the others, but the House of Lords held the evidence to have been rightly considered relevant and admissible on all counts.

2.26 The position after *Boardman* was that before evidence of similar fact could be adduced, it had to be of "close or striking similarity",[56] "striking similarity"[57] or "striking resemblance",[58] or exhibit "very striking peculiarities"[59] or be "uniquely or strikingly similar".[60] The reason why *Boardman* seemed to herald a new era for evidence of bad character was that it recognised that the admissibility of such

[52] *Ibid*, at p 460E.

[53] *Ibid*, at p 453F.

[54] See paras 2.51 – 2.54 below.

[55] Lord Cross of Chelsea actually preferred the term "striking peculiarities": *Boardman* [1975] AC 421, 460F. However, he also approved, at pp 457G–H and 458F, the use of "striking similarity" by the Court of Appeal in *Sims* [1946] KB 531, 539.

[56] *Boardman* [1975] AC 421, 441D, *per* Lord Morris of Borth-y-Gest.

[57] *Ibid*, at p 444D, *per* Lord Wilberforce.

[58] *Ibid*, at p 455D, *per* Lord Hailsham.

[59] *Ibid*, at p 460E, *per* Lord Cross of Chelsea.

[60] *Ibid*, at p 462C, *per* Lord Salmon.

evidence depended on a question of degree: namely, how relevant it was to the matter in issue. This constituted a sharp contrast with *Makin*,[61] the case consistently relied on by judges during the 80 years between it and *Boardman*, which appeared to draw a distinction between *kinds* of relevance: if used to show disposition it was to be excluded, but if used to show something else it was admissible.

2.27 *Boardman* was described by L H Hoffmann[62] as "In some ways ... an intellectual breakthrough".[63] Sir Rupert Cross regarded it as a case of "fourth time lucky"[64] for the House of Lords, which fulfilled the expectations of those who hoped for guidance on the vexed question of the admissibility of similar fact evidence, particularly as those expectations had been dashed by the earlier decisions of the House in *Ball*,[65] *Thompson*[66] and *Harris*.[67] Getting rid of *Makin* in this way would indeed have been a breakthrough, but it has been suggested[68] that a careful examination of the speeches in *Boardman* leaves one with a mixed, rather than an iconoclastic, view of the case.[69]

2.28 We have referred to the recurring use of a test of "unique or striking similarity" in *Boardman*. This was no doubt a consequence of the analysis required on the facts of that particular case.[70] Nevertheless, this was not to be regarded as the sole

[61] The difference between the approaches sanctioned in *Makin* and in *Boardman* is evident in the Court of Appeal's judgment in *Scarrott* [1978] QB 1016, where Scarman LJ, as he then was, giving the judgment of the court, said at p 1021A that the "striking similarity" test was to be applied regardless of the purpose for which the evidence was sought to be adduced, "whether, for instance, it be to prove intention, to rebut a possible defence of accident, to support an identification, to corroborate, or to rebut the possibility of innocent association." See para 2.31 below.

[62] Now Lord Hoffmann. Differing views have been expressed upon the significance of *Boardman.* Zuckerman considers that *Boardman* represented little, if any, advance on *Makin.* But, as *Cross and Tapper* points out at p 365, Lord Herschell LC's words tended to be construed as if they were part of a criminal statute and there was, in particular, a tendency to treat the examples given in the second sentence as if they constituted a comprehensive and closed list of rigid categories.

[63] L H Hoffmann, "Similar Facts after *Boardman*" (1975) 91 LQR 193.

[64] Sir Rupert Cross, "Fourth Time Lucky – Similar Fact Evidence in the House of Lords" [1975] Crim LR 62.

[65] *Ball* [1911] AC 47.

[66] *Thompson* [1918] AC 221.

[67] *Harris* [1952] AC 694.

[68] See P Mirfield, "Similar Facts – *Makin* Out?" [1987] CLJ 83.

[69] A number of reasons have been suggested for this view. First, as we have said in para 2.24 above, Lords Morris, Hailsham and Salmon endorsed Lord Herschell LC's statement in *Makin* in enthusiastic terms: this indicates support for his view, rather than any fundamental change. The second reason why *Boardman* does not look like a revolutionary case is that all five speeches were broadly in agreement in stressing the importance of striking similarity and similarities. For Lords Wilberforce and Cross the presence of relevantly striking similarity was one way in which the judge might be satisfied that the probative value of the evidence outweighed its prejudicial value. The others emphasised that, even though the notion of a forbidden chain of reasoning should be retained, it is still important to bear in mind that simple legal relevance will not suffice for admissibility.

[70] See para 2.25 above for the facts.

ground of admissibility because Lord Hailsham referred to the possibility of admitting similar fact evidence where it would be "an affront to common sense" to refuse admissibility.[71] It may even be that Lord Morris's phrase of "underlying unity"[72] might also be suggesting a much broader admissibility test than "unique or striking similarity". The use of the phrase "underlying unity" was, however, criticised by Lord Wilberforce in *Boardman*[73] and was labelled "vacuous" in a leading textbook.[74]

2.29 There is one further matter which remained unclear after *Boardman*. Lords Hailsham and Salmon both stated that, in addition to the *Makin* rule of exclusion, the judge would retain a discretion, "not as a matter of law but as a matter of good practice", to exclude evidence with very great prejudicial effect.[75] Lord Cross, however, emphasised that the test he envisaged was one of law rather than discretion.[76] In the light of these conflicting remarks it remained unclear, after *Boardman*, whether the test laid down in that case had the status of a legal rule or involved the exercise of a discretion.[77] The practical significance of this distinction lies in the manner in which the Court of Appeal will approach appeals based on the admission of similar fact evidence. If the trial judge has a discretion, the Court of Appeal will not interfere with the exercise of this discretion[78] unless the decision to admit the evidence could not have been taken by any reasonable trial judge, or was made without regard to relevant factors or with regard to irrelevant factors.[79] If, however, the test has the status of a rule, the Court of Appeal may assess for itself where the balance between probative value and prejudicial effect lies.[80]

[71] *Boardman* [1975] AC 421, 454A, approving Lord Simon's use of that phrase in *Kilbourne* [1973] AC 729, 759.

[72] *Boardman* [1975] AC 421, 441D.

[73] *Ibid*, at p 443A: "In my understanding we are not here concerned with cases of 'system' or 'underlying unity' … words whose vagueness is liable to result in their misapplication, nor with a case involving proof of identity, or an alibi, nor, even, is this a case where evidence is adduced to rebut a particular defence."

[74] *Cross and Tapper*, p 372.

[75] *Boardman* [1975] AC 421, 453F.

[76] *Ibid*, at p 457D.

[77] A third possibility is that *Boardman* provided for two distinct stages whenever similar fact evidence was sought to be adduced: first, the application of a rule based upon the assessment of probative value, judged according to whether there was any "striking similarity", as against prejudicial effect; secondly, the exercise of a discretion to exclude the similar fact evidence, despite it being technically admissible, on the ground referred to by Lord Hailsham.

[78] A good example is *Mackie* (1973) 57 Cr App R 453: see para 2.42 below.

[79] See *Scarrott* [1978] QB 1016, 1028B–C, *per* Scarman LJ. In this case Scarman LJ was referring to a trial judge's decision not to sever a multi-count indictment. While he conceded that a judicial discretion operated at this pre-arraignment stage, the admissibility of the similar fact evidence itself would, he stated, be determined by the operation of the laws of evidence rather than the exercise of judicial discretion.

[80] We discuss the current status of the test at para 2.41 below.

Post-*Boardman* developments

2.30 Not surprisingly, it soon became clear that the "striking similarity" test was not always appropriate.[81] Thus in *Rance*[82] the accused was charged with corruptly paying a sum of money to a local councillor; the allegation was that the bribe was covered in the building company's account by a bogus certificate to the effect that the councillor was a sub-contractor and was entitled to the payment. The certificate was signed by the defendant; he claimed that he had been tricked into signing it. The prosecution sought to adduce evidence of other bribes in which he was implicated and which had been covered by a bogus bid or certificate. The Court of Appeal held that the evidence had been correctly admitted as it was similar. They poured cold water on what they called the "vivid phrase 'uniquely or strikingly similar.'"[83] In the words of Lord Widgery CJ:

> The gist of what is being said ... is that evidence is admissible as similar fact evidence if, but only if, it goes beyond showing a tendency to commit crimes of this kind and is *positively probative* in regard to the crime now charged.[84]

2.31 The test of "positive probative" value for the admission of similar fact evidence was subsequently applied by the Court of Appeal.[85] Scarman LJ, giving judgment in the Court of Appeal in *Scarrott*, said rather more about why he favoured the test of positive probative value than Lord Widgery did in *Rance*: one should be looking for an underlying link between the allegations, and, although not insisting on *striking* similarity, he added that "The existence of such a link is not to be inferred from mere similarity of facts which are themselves so commonplace that they can provide no sure ground for saying that they point to the commission by the accused of the offence under consideration."[86]

2.32 The phrase "positive probative value" can also be criticised: first, it makes no reference to counterbalancing prejudice, and, second, the fact that a person has a disposition to commit offences of the kind charged, in common sense, makes it more likely that he or she has committed the offence charged, and is therefore "positively probative". In other words, according to *Phipson*, the *Rance* / *Scarrott* test might undermine the very essence of the first part of Lord Herschell's statement in *Makin*.[87]

2.33 An important post-*Boardman* development was a tendency to link together the

[81] D W Elliott, "The Young Person's Guide to Similar Fact Evidence – I" [1983] Crim LR 284, 285–7.

[82] *Rance* (1975) 62 Cr App R 118.

[83] *Ibid*, at p 121.

[84] *Ibid* (our emphasis).

[85] *Mansfield* (1977) 65 Cr App R 276; *Scarrott* [1978] QB 1016.

[86] *Scarrott* [1978] QB 1016, 1022D–E, *per* Scarman LJ.

[87] *Phipson*, para 17-38.

learning to be found in *Makin*, *Boardman* and *Scarrott*.[88] Thus in *Lunt*,[89] Neill LJ, giving judgment in the Court of Appeal, suggested five guidelines which should be distilled from the authorities:[90]

> (1) As a general rule the prosecution may not adduce evidence tending to show that the accused has been guilty of criminal acts other than those charged against him, or that the accused has a propensity to commit crimes of the kind charged. (2) Notwithstanding the general rule, however, evidence is admissible as "similar fact" evidence if, but only if, it goes beyond showing a tendency to commit crimes of the kind charged and is positively probative in regard to the crime charged ... . (3) In order to decide whether the evidence is positively probative in regard to the crime charged it is first necessary to identify the issue to which the evidence is directed. Thus the evidence may be put forward, for example, to support an identification ... , or to prove intention, or to rebut a possible defence of accident or innocent association ... . (4) Once the issue has been identified the question will be: will the "similar fact" evidence be positively probative, in the sense of assisting the jury to reach a conclusion on that issue on some ground other than the accused's bad character or disposition to commit the sort of crime with which he is charged? ... . (5) If the evidence is positively probative in the foregoing sense the judge will nevertheless have a discretion to exclude it if it "would probably have a prejudicial influence on the minds of the jury which would be out of proportion to its true evidential value" ... .[91]

2.34 Our first comment is that these guidelines are far closer to the general approval given to *Makin* by three of their Lordships in *Boardman* than to the rather adverse analysis of the other two. Thus, Lord Hailsham's view that there is a forbidden type of reasoning runs through them (although, as we shall show, we are unhappy about the use of the forbidden reasoning argument).[92] Second, the test of probative value and prejudicial effect is acknowledged only at the discretionary level.[93] Thirdly, the need for evidence to be positively probative, rather than strikingly similar or such that it would affront common sense to exclude it, is repeatedly emphasised.[94] Finally, the reason for not using the test of "striking similarity" in all

[88] *Scarrott* [1978] QB 1016; see para 2.31 above.

[89] *Lunt* (1986) 85 Cr App R 241.

[90] *Ibid*, at pp 244–245.

[91] This quotation is from *Sang* [1980] AC 402, 434. These guidelines have subsequently been approved in, eg, *Shore* (1989) 89 Cr App R 32; *Beggs* (1989) 90 Cr App R 430; and *Wells* (1988) 92 Cr App R 24.

[92] See paras 2.51 – 2.54 and 10.9 – 10.12 below.

[93] This provides some guidance on the questions we raise about the status of the *Boardman* test in para 2.29 above. See also Scarman LJ in *Scarrott* [1978] QB 1016, 1028F–G: "[the judge's] task, though a difficult exercise of judgment, can be stated in simple terms. He first has to reach a view upon what he then knows of the facts of the case and of the nature of the evidence to be adduced as to whether the evidence possesses the features of striking similarity or probative value … . If he reaches the view that it does, he then has to consider whether the evidence is such that it ought to be put to the jury."

[94] This is also consistent with the Privy Council case of *A-G of Hong Kong v Siu Yuk-Shing* [1989] 1 WLR 236. On a charge of possession of articles relating to a prohibited "Triad"

cases is that it is just one of the ways in which evidence may exhibit the unusually high degree of probative force required for admissibility, so that to insist upon it to an equal degree in all cases is to set off on a false trail.[95]

DPP v P

2.35 In *DPP v P*,[96] the House of Lords decided that to regard "striking similarity" as an essential qualification for the admissibility of similar fact evidence is "to restrict the operation of the principle in a way which gives too much effect to a particular manner of stating it".[97] Their Lordships also unanimously accepted that the test for admissibility was, at least for some purposes, that the probative value of the bad character evidence must outweigh its prejudicial effect.

2.36 In that case, just as in *Boardman,*[98] two complainants gave direct evidence of the commission of sexual offences against them by the accused. The complainants were the daughters of the accused, and they complained of a number of offences of incest and rape. The trial judge held that one daughter's allegations were admissible in relation to the other's allegations, and could be used to corroborate them. The House of Lords held that the trial judge had been right. Lord Mackay LC, giving the leading speech, asked himself whether or not the evidence of the first victim provided "strong enough support for the evidence of the second victim",[99] and, making the point more clearly, also said that it must "so strongly support the truth of [the] charge that it is fair to admit it notwithstanding its prejudicial effect".[100]

2.37 In the Court of Appeal Lord Lane CJ described the relevance of the supporting evidence as being "to lend plausibility to the direct evidence".[101] The test of balancing probative value and prejudicial effect applies not only to credibility cases but whenever the evidence is sought to be adduced as directly relevant to any issue in the case, such as the identity of the perpetrator of the crime,[102] or to refute a defence of accident[103] – such as where, if the deceased was murdered, it must have been the accused who did it, but the accused claims that the death was accidental.

society, the prosecution had the burden of establishing that the defendant knew the significance of items in his possession. Knowledge appeared to be a live issue, and evidence was admitted which showed that the defendant had previously been convicted of membership of such a society and must have known of the ritual significance of the objects in question. It was held that evidence of the defendant's previous conviction of being a member of a Triad Society was powerfully probative of his knowledge that the articles in his possession related to the Triads.

95 *Blackstone*, para F12.5.

96 *DPP v P* [1991] 2 AC 447.

97 *Ibid, per* Lord Mackay LC, at p 460G.

98 *Boardman* [1975] AC 421; see para 2.25 above.

99 *DPP v P* [1991] 2 AC 447, 462D.

100 *Ibid*, at pp 462H–463A.

101 *P* (1990) 93 Cr App R 267, 269.

102 As in *Straffen* [1952] 2 QB 911.

103 As in *Smith* (1915) 11 Cr App R 229.

The Lord Chancellor in *DPP v P* mentioned both cases in the context of his support for the test of probative value against prejudicial effect, which he formulated as follows:

> From all that was said by the House in *Reg. v Boardman* I would deduce the essential feature of evidence which is to be admitted is that its probative force in support of the allegation that an accused person committed a crime is sufficiently great to make it just to admit the evidence, notwithstanding that it is prejudicial to the accused in tending to show that he was guilty of another crime.[104]

2.38 The breadth of the Lord Chancellor's approach was shown by his comments on what he meant by "probative force":

> Such probative force may be derived from striking similarities in the evidence about the manner in which the crime was committed and the authorities provide illustrations for that of which *Straffen*[105] and *Smith*[106] provide notable examples. But restricting circumstances in which there is sufficient probative force to overcome prejudicial evidence relating to another crime to cases in which there is some striking similarity between them is to restrict the operation of the principle in a way which gives too much effect to a particular manner of stating it, and is not justified in principle.[107]

2.39 The Lord Chancellor also stressed the great variety of cases in which similar fact evidence may arise when he said:

> Once the principle [of admitting similar fact evidence] is recognised, that what has to be assessed is the probative force of the evidence in question, the infinite variety of circumstances in which the question arises, demonstrates that there is no single manner in which this can be achieved. Whether the evidence has sufficient probative value to outweigh its prejudicial effect must in each case be a question of degree.[108]

2.40 *DPP v P* makes it clear that it is no longer the law that the question of admissibility turns mainly upon whether or not "striking similarity" can be demonstrated.[109] The Lord Chancellor did, however, point out that the existence of "striking similarities"

[104] *DPP v P* [1991] 2 AC 447, 460E–F.

[105] *Straffen* [1952] 2 QB 911; see para 2.52 below (footnote added).

[106] *Smith* (1915) 11 Cr App R 229; see para 2.56, n 148 below (footnote added).

[107] *DPP v P* [1991] 2 AC 447, 460F–G.

[108] *Ibid,* at pp 460H–461A.

[109] In several older cases involving alleged sexual offences against children, the Court of Appeal refused to accept that commonplace similarities would provide a passport to admissibility. In *Inder* (1977) 67 Cr App R 143, a case involving allegations made by six young boys, Lord Widgery CJ examined the list of similarities and said: "it seems to us that these are similarities which represent the stock in trade of the seducer of small boys and were not unique but appear in the vast majority of cases that come before the courts." So far as these cases require a similarity beyond stock-in-trade before similar fact evidence can be adduced, *DPP v P* overrules them.

may, in certain cases, continue to be used as a means by which to establish strong enough probative force to satisfy the test of admissibility; it may be particularly useful in cases where the identity of the perpetrator of the offence is in issue:

> Where the identity of the perpetrator is in issue, and evidence of this kind [that is, evidence said to exhibit a striking similarity] is important in that connection, obviously something in the nature of what has been called in the course of the argument a signature or other special feature will be necessary.[110]

2.41 It is our view that one other matter was resolved by the decision in *DPP v P*. As we point out above,[111] in *Boardman* the House of Lords had failed to provide a clear answer to the question whether the test established by that case had the status of a legal rule or a discretion. However, in *DPP v P* Lord Mackay LC stated that the introduction of similar fact evidence raises "questions of law but also involve[s] judgments on matters of degree".[112] Thus, while the weighing of probative value against prejudicial effect inevitably involves very difficult judgments, turning on degrees of relevance and prejudice, this exercise is required by a *rule* of law.

2.42 It is less clear whether the rule applies in cases where the bad character evidence that the prosecution seeks to adduce is not relied upon to show the defendant's disposition, but there is a real *risk* that the jury will rely upon it as evidence of disposition. A useful illustration of this kind of case is the decision of the Court of Appeal in *Mackie*.[113] In this case the defendant was charged with the manslaughter of his young son; the cause of death was that the child had fallen down the stairs of the defendant's home. The prosecution case was that the child had fallen while fleeing from his father's violence, and sought to rely, inter alia, upon bad character evidence from two witnesses and on medical evidence of extensive bruising on the child's body. This evidence was introduced to show the *child's* disposition rather than the defendant's, but there was clearly a risk that the jury would regard it as evidence of the latter. The defendant appealed against conviction on the ground that the bad character evidence was improperly admitted. The Court of Appeal upheld the conviction, declining to interfere with the exercise of the trial judge's discretion even though it agreed with counsel that "the prejudicial effect of the evidence admitted was enormous and far outweighed its value in proving that the child was frightened of the appellant".[114]

2.43 Some commentators have cited *Mackie* in support of the view that the common law rule applies only if, as in *Straffen*,[115] the disposition evidence is relied upon directly by the prosecution, and that in other cases there is merely a judicial

[110] *DPP v P* [1991] 2 AC 447, 462F.

[111] See para 2.29 above.

[112] *DPP v P* [1991] 2 AC 447, 463A–B.

[113] *Mackie* (1973) 57 Cr App R 453.

[114] *Ibid*, at p 464, *per* Stephenson LJ.

[115] *Straffen* [1952] 2 QB 911, 916, *per* Slade J: "Abnormal propensity is a means of identification."

discretion;[116] but this view may now be out of date. If the reason for the very existence of the rule is the risk of prejudice, this applies equally whether the bad character evidence is relied upon to prove the defendant's disposition or to prove something else. It is our view that the rule in *DPP v P* centres on the risk of prejudice, rather than the purpose for which the prosecution claims to be adducing the evidence.

2.44 We now proceed to some outstanding questions on similar fact evidence.

What is the present test of admissibility?

2.45 We agree with *Blackstone*[117] that the present law is as follows:

> (a) In cases where the evidence is adduced for some purpose other than to identify the perpetrator, the question is whether the probative value of the evidence is sufficiently great to justify admissibility notwithstanding its prejudicial effect. *Probative value* may derive either from *striking similarity*, or from some other source, such as a relationship in time or circumstance ... .[118]
>
> (b) In cases where the evidence is adduced to identify the perpetrator, striking similarity in the form of a "signature" is required ... .[119]

2.46 *Blackstone* goes on:

> (c) … *Boardman* may be regarded as correctly stating the *degree* of probative force required of similar fact evidence, but as incorrectly limiting the *manner* in which that force must be demonstrated, insofar as striking similarity was regarded in that case as an essential requirement even though there was no issue as to the identity of B.[120]

(1) We doubt, with respect, whether this accurately represents the effect of *DPP v P*: our own interpretation is that *Boardman* is no longer a reliable authority even on the *degree* of probative force required. However, the fact that there should be a difference of opinion on such a fundamental point tends to reinforce the view of the Royal Commission that the law is unduly obscure.[121]

[116] See *Cross and Tapper*, p 405. The authors contend that if the exclusionary rule is restricted in the way suggested in the text then this will leave "simple relevance to govern admissibility when disposition forms no part of the chain of reasoning". They go on to argue that in this situation a judicial discretion will be necessary to exclude evidence which, while relevant, is prejudicial.

[117] *Blackstone*, para F12.5.

[118] Emphasis added.

[119] Like *Blackstone* (para F12.7), we doubt that this is correct: see para 2.47 below. See also the Court of Appeal decision in *Ruiz* [1995] Crim LR 151, where doubt was cast on the suggestion that Lord Mackay LC intended the striking similarity rule to be retained in cases where identity is disputed.

[120] Emphasis in original.

[121] See para 1.2 above.

What is the relevance now of striking similarity?

2.47 There is now some uncertainty as to how far the striking similarity criterion has been abandoned. Clearly it is retained for identity cases, as Lord Mackay expressly said so,[122] but this must now be regarded as a gloss on the overall test. This is difficult to understand because the leading case on identity, that of *Thompson*,[123] involved no similarities at all, striking or otherwise.[124] The bad character evidence in that case, just as in *DPP v P* itself, can properly be regarded as having supported the credibility of the direct evidence of the alleged victim. This contrasts with *Straffen*,[125] where the evidence went directly to the issue of guilt by establishing the identity of the killer as Straffen. The lesson may be that the more work the bad character evidence has to do, the more probative value it must have – though this need not have been put in terms of whether or not striking similarity is required.[126]

2.48 Where the similar fact evidence is adduced on an issue other than identity, it may have probative value in a number of different ways. For example, it may serve to rebut an inference that the accused acted innocently, so that a defence which might have succeeded in respect of an isolated incident evaporates when other similar episodes are brought into account.[127]

[122] *DPP v P* [1991] 2 AC 447, at p 460D.

[123] *Thompson* [1918] AC 221. The requirement of striking similarity does seem to have been insisted upon in *Ryder* (1993) 98 Cr App R 242, an identity case. Although *Laidman and Agnew* [1992] Crim LR 428 appears at first sight to be to the opposite effect, it is not in fact inconsistent with what Lord Mackay LC said in *DPP v P*.

[124] In that case the appellant was charged with committing acts of gross indecency with a group of boys. It was not disputed that someone had committed these acts and that this person had arranged to meet the boys again three days later near a public toilet. The appellant was seen to meet the boys there on this occasion and admitted giving them money, although he said this was only to make them go away and "get their dirty faces washed". The boys all identified him as the offender. His defence of mistaken identity was rebutted by evidence showing that he was carrying two powder puffs and that at his lodgings there were a number of photographs of naked boys. At this time homosexuality was considered by the courts to be such an abnormal and depraved condition that evidence of homosexual behaviour on one occasion would almost invariably be admissible in support of allegations of such behaviour on another. Thus, Lord Sumner spoke of such persons as having a characteristic which "not only takes them out of the class of ordinary men gone wrong, but stamps them with a hall-mark of a specialised and extraordinary class as much as if they carried on their bodies some physical peculiarity": [1918] AC 221, 235. This dictum was adopted and approved in *Sims* [1946] KB 531, but it no longer represents the law. It was initially doubted, obiter, in *DPP v Kilbourne* [1973] AC 729, and was emphatically rejected in *Boardman*, where Lord Cross said, at p 458, "the attitude of the ordinary man to homosexuality has changed very much even since *Sims* was decided and what was said on that subject in 1917 by Lord Sumner in *Thompson* … sounds nowadays like a voice from another world".

[125] *Straffen* [1952] 2 QB 911.

[126] C Tapper, "The Probative Force of Similar Fact Evidence" (1992) 108 LQR 26, 28.

[127] See, eg, *Rance* (1975) 62 Cr App R 118; para 2.30 above.

What characteristics does evidence have to have for it to be "strikingly similar"?

2.49 We agree with *Blackstone* that what has to be established is a "striking peculiarity"[128] or something idiosyncratic.[129] In short, the court looks to see if the unlikelihood of repetition overcomes the possibility of mere coincidence.[130]

2.50 The "similarity" is not "striking" unless it is probative of an element in the prosecution case.[131] The relevance of the evidence can consist in a striking similarity either with the offence itself or with the surrounding circumstances.[132] If there are dissimilarities in the evidence which reduce its probative value, these must be taken into account.[133]

Can evidence of propensity be admitted as similar fact evidence?

2.51 The traditional view is that evidence of mere propensity to commit crimes of a certain type is inadmissible.[134] Lord Hailsham, in *Boardman*,[135] spoke of "the forbidden chain of reasoning", which was any chain of reasoning leading directly from propensity to guilt.

2.52 This view has been criticised[136] on the grounds that evidence of disposition may occasionally have sufficient probative value to merit admission. An example is *Straffen*,[137] where the charge was of murdering a young girl by strangling in unusual circumstances: no attempt had been made to assault her sexually or to conceal her body. The defendant came under immediate suspicion because he had previously strangled two other girls, with each murder having the same peculiar feature. He had also been in the neighbourhood at the time, having just escaped from Broadmoor, and he admitted having seen the murdered girl. In those circumstances, very little other evidence was required to convict him of the third murder, as it bore his "signature".

[128] *Blackstone*, para F12.6.

[129] In *Brown, Smith, Woods and Flanagan* (1963) 47 Cr App R 204 the Court of Appeal held that on a charge of burglary the prosecution could not rely on evidence of another burglary, committed a week before the offence charged, which had similar characteristics not only to the offence charged but to many thousands of other offences of burglary.

[130] Eg the illustration adopted by Lord Hailsham in *Boardman* [1975] AC 421, 454F, where he refers to a man who commits repeated homosexual offences and whose victims all state that he was dressed in "a ceremonial head-dress of a Red-Indian chief or other eccentric garb"; or the facts of *Straffen* [1952] 2 QB 911, para 2.52 below.

[131] *Beggs* (1989) 90 Cr App R 430.

[132] *Scarrott* [1978] QB 1016, 1025.

[133] *Johnson* [1995] Crim LR 53.

[134] Eg *A-G of Hong Kong v Siu Yuk-Shing* [1989] 1 WLR 236, 239F, *per* Lord Griffiths; and Lord Herschell LC's dictum in *Makin* [1894] AC 57, 65; see para 2.15 above.

[135] *Boardman* [1975] AC 421, 453E–G. See para 2.24 above.

[136] *Ibid*, at pp 456–457, *per* Lord Cross of Chelsea.

[137] *Straffen* [1952] 2 QB 911.

2.53 A similar case was *Butler*,[138] in which the defendant, charged with the rape of two women, claimed that he had been mistakenly identified. Both rapes bore certain features suggesting that the same man was responsible, including the common fact that both victims said they had been forced to take part in oral intercourse to the point of ejaculation while their abductor was driving them to the scene of the rape in his car. A former girlfriend of the defendant testified that he had done the same unusual things with her, although with her consent. The evidence was held admissible to rebut the defence of mistaken identity.

2.54 We agree with the view of *Blackstone*, which is supported by *DPP v P*,[139] that the demarcation between what is permitted and what is prohibited is a matter of degree: "the evidence must be shown to be of very specific significance to the issue before the court. Viewed in this way 'mere' evidence of propensity is simply another way of describing evidence which does not sufficiently specifically prove guilt."[140]

How can similar fact evidence be used to rebut a defence?

2.55 It will be recollected that in *Makin*[141] Lord Herschell LC said that similar fact evidence "may be ... relevant if it bears upon the question whether the acts alleged to constitute the crime charged in the indictment were designed or accidental, or to rebut a defence which would otherwise be open to the accused".[142] There is no fixed rule about the number of cases which can constitute a "system" sufficient to rebut a claim that the acts were accidental. Lord Cross of Chelsea thought that two cases could constitute a system, but he thought that it would be right to proceed with great caution where only two cases were relied on.[143] Lord Reid doubted whether two incidents were sufficient to constitute a system,[144] but we believe that they might be enough if the similarities were sufficiently unusual.

2.56 If a defence is to be rebutted by similar fact evidence, the purpose of such evidence is to put a different complexion on what occurred – perhaps by

[138] *Butler* (1986) 84 Cr App R 12.

[139] *DPP v P* [1991] 2 AC 447.

[140] *Blackstone*, para F12.8.

[141] *Makin* [1894] AC 57.

[142] In that case the discovery of the body of one child in the defendants' back yard was not necessarily probative of non-accidental death. The critical factor, which made the inference irresistible, was that many other children had been taken in by the couple and their bodies had been discovered in the defendants' garden.

[143] *Boardman* [1975] AC 421.

[144] *DPP v Kilbourne* [1973] AC 729, 751B–C.

demonstrating a criminal purpose[145] or knowledge,[146] or by showing that a death is attributable not to natural causes but to the activities of the accused.[147] In some such cases[148] the incidents may bear a striking similarity to each other, but since *DPP v P*[149] this is no longer essential. The evidence is admissible if it is clear that the link between the events cannot be put down to coincidence: "the degree of improbability depends partly on the number of incidents and partly on other factors which in common experience point to coincidence or lack of it".[150]

2.57 It is trite law that if a fact is not in issue, evidence cannot be adduced about it. By the same token, similar fact evidence must be directed to an issue in the case; one such issue would be the nature of the defence.[151] As we have said,[152] one of the accepted uses of similar fact evidence is to rebut particular defences such as accident or innocent association. It has been suggested that the same evidence would not necessarily be admissible if the defence was a general denial of the prosecution's case.[153] This approach is erroneous: it seems to assume that Lord Herschell LC in *Makin* was proposing a closed list of defences which would enable

[145] For example, in *Bond* [1906] 2 KB 389 the prosecution case was that a doctor had operated upon a woman who was pregnant with his child, with intent to procure her miscarriage. To rebut the defence that he was carrying out a lawful medical examination of the woman, the prosecution was allowed to rely on the evidence of another woman who claimed that nine months previously the defendant had operated on her when she had become pregnant by him, with the intention of terminating her pregnancy, and that he had told her that he had "put dozens of girls right." See also *Mortimer* (1936) 25 Cr App R 150.

[146] For example, in *Peters* [1995] 2 Cr App R 77 the defendant was charged with importing amphetamine sulphate. He claimed that he was not involved with drugs in any way, and that the drugs must have been concealed in his car without his knowledge. Evidence was admitted that small quantities of cannabis had been found at his address. The Court of Appeal held that the evidence was relevant and admissible (though the judge should have considered whether to exercise his discretion to exclude it as unduly prejudicial), because the jury were entitled to consider the coincidence that an accused who denied knowledge of the drugs in his car also had drugs at his home.

[147] Thus in *Smith* (1915) 11 Cr App R 229 the defendant, charged with the murder of his wife, claimed that she had drowned in the bath through natural causes. To rebut this defence, the prosecution was permitted to adduce evidence that two other women whom the defendant had induced to marry him had met with the same fate, and that, in each case, the defendant had insured the woman's life, with the result that he benefited from her death.

[148] Such as *Mortimer* (1936) 25 Cr App R 150 and *Smith* (1915) 11 Cr App R 229.

[149] *DPP v P* [1991] 2 AC 447; see para 2.40 above.

[150] *Blackstone*, para F12.9.

[151] Thus in *Lunt* (1986) 85 Cr App R 241 it was said that in order to decide whether evidence is positively probative in relation to the crime charged, it is first necessary to identify the issue to which it relates. *Lunt* was applied in *Wells* (1991) 92 Cr App R 24n, in which the Court of Appeal approved the summary of the law in *Phipson* (see now 14th ed 1990, p 393) where it is stated that "the nature of the defence, or possible defence is one of the factors which the judge should have in mind in deciding whether the probative force of the 'evidence' outweighs its prejudicial value".

[152] See para 2.55 above.

[153] As in *Flack* [1969] 1 WLR 937, 943C, *per* Salmon LJ, in which the defendant was charged with incest with three of his sisters. It was held that the evidence on each count was inadmissible to prove the other two since "no question of identity, intent, system, guilty knowledge, or of rebutting a defence of innocent association ever arose." See also *Blackstone*, para F12.10.

similar fact evidence to be adduced in rebuttal, thus prohibiting the use of such evidence where the defence consists of a general denial of the prosecution case.

2.58 The House of Lords has repeatedly made it clear that no such closed list exists, and in particular that it was an error "to attempt to draw up a closed list of places in which the principle operates: such a list only provides instances of its general application, whereas what really matters is the principle itself".[154] We respectfully agree with this approach, and would also seek to discourage attempts to dress up every conceivable innocent explanation given by an accused in a sexual case as a "defence of innocent association", so as to found an argument that similar fact evidence must be admissible to rebut that defence.

2.59 We also regard as fallacious the notion that similar fact evidence may not be used to rebut a defence based on involuntariness: it appears to be a corollary of the fallacy that similar fact evidence cannot be used in respect of a defence which involves a complete denial of the prosecution case. An illustration of this fallacious approach is *Harrison-Owen*,[155] in which the defendant to a charge of house-breaking raised a defence of automatism but the prosecution were not permitted to rely on his previous convictions. We do not accept that there is an absolute rule to this effect, and agree with *Blackstone*[156] that "if a man is charged with an indecent assault on a woman, and he claims that he simply tripped and fell against her awkwardly, or blacked out and came round in a compromising position, it may be highly relevant to prove that that is what he says every time he is accused of indecency".

2.60 Many of these problems were caused by the notion that Lord Herschell LC in *Makin*[157] was setting out a refined and closed group of categories in which similar fact evidence can be admitted.[158] This approach has been undermined by the approach in *Boardman*[159] and *Scarrott*,[160] under which the courts are encouraged to look at each case on its own facts. As a result, it is unwise to assert any absolute bar to the use of similar fact evidence in rebuttal of any particular type of defence.[161]

[154] *Per* Lord Simon LC in *Harris v DPP* [1952] AC 694, approved by Lord Hailsham in *Boardman* where he added that "the rules of logic and common sense are not susceptible to exact certification when applied to the actual facts of life in its infinite variety ": [1975] AC 421, 452. This view was also endorsed in *Boardman* by Lord Morris (at 439) and Lord Cross (at 457).

[155] *Harrison-Owen* [1951] 2 All ER 726.

[156] *Blackstone*, para F12.10.

[157] *Makin* [1894] AC 57; see para 2.15 above.

[158] See para 2.17 above.

[159] *Boardman* [1975] AC 421; paras 2.19 – 2.29 above.

[160] *Scarrott* [1978] QB 1016; para 2.31 above.

[161] Thus in *Wilmot* (1989) 89 Cr App R 341, 345, *per* Glidewell LJ, the Court of Appeal dealt brusquely with an argument that similar fact evidence could never be used to rebut a defence of consent to a charge of rape, as it was impossible to be sure that circumstances could never arise in which such evidence might be sufficiently relevant to be admissible.

Should the prosecution have to wait and see what defence is to be relied upon before adducing similar fact evidence?

2.61 The starting point to this discussion must be that similar fact evidence can be adduced only if it goes to one of the issues in the case, not if it merely goes to "strengthen the evidence of a fact which was not denied and, perhaps, could not be the subject of rational dispute".[162] The problem is that the prosecution may not know, before it closes its case, what defence will be relied on – though the likelihood of this has been reduced by the provisions in the Criminal Justice and Public Order Act 1994 which enable the fact-finders to draw inferences if a defence is not raised when the defendant is questioned or charged.[163]

2.62 The test is whether the defence in question "may fairly be said to be open to the accused on the facts as they appear from the evidence available to the prosecution".[164] We believe this to be a fair principle because it is always open to the accused to say that a particular defence will *not* be taken, or that a particular fact is not in issue, thus obviating the need for similar fact evidence to be called.[165] It is possible that the Crown will not know which defence the accused wishes to run until after the close of its own case. While the case law suggests that evidence in rebuttal of a defence fairly open to the accused should be given as part of the prosecution's case, the courts have also, exceptionally, permitted what has been called the "short-circuiting" of this process, allowing the prosecution to put questions in rebuttal of the accused's defence in cross-examination without having led the evidence as part of its own case.[166]

[162] *Noor Mohamed* [1949] AC 182, 191, *per* Lord Du Parcq.

[163] See ss 34–38; and note the similar provisions in the current Criminal Procedure and Investigations Bill, cls 5 and 10.

[164] *Blackstone*, para F12.11. This is borne out by the comment of Lord Sumner in *Thompson* [1918] AC 221, 232, that "the prosecution cannot credit the accused with fancy defences in order to rebut them at the outset with some damning piece of prejudice". This was subsequently explained by Lord Du Parcq in *Noor Mohamed* [1949] AC 182, 191–2, when he said that "the plea of not-guilty may be equivalent to saying 'let the prosecution prove its case, if it can' and having said so much the accused may take refuge in silence. In such a case it may appear (for instance) that the facts and circumstances of the particular offence charged are consistent with innocent intention, whereas further evidence which incidentally shows that the accused has committed one more other offence, may tend to prove that they are consistent only with a guilty intent. The prosecution could not be said … to be 'crediting the accused with a fancy defence' if they sought to adduce such evidence." This comment was approved by the House of Lords in *Harris* [1952] AC 694.

[165] *A-G of Hong Kong v Siu Yuk-Shing* [1989] 1 WLR 236, 240H, *per* Lord Griffiths: "The defence … had the opportunity if they so desired to admit knowledge of the Triad significance of the articles. If the defendant had made this admission knowledge would no longer have been in issue and no proper purpose would have been served by proof of the previous conviction." See n 95 above.

[166] See *Anderson* (1988) 87 Cr App R 349, 358, *per* Lord Lane CJ.

Is there a special rule for sexual offences against persons of the same sex, or children?

2.63 It used to be accepted that homosexual offences fell into a special category, with the result that evidence of similar conduct or of a homosexual disposition became admissible.[167] This approach has been said by Lord Wilberforce to be "obsolete".[168]

2.64 It was also thought that indecency against children was a "rare and peculiar offence, and, accordingly, evidence inferring a course of conduct is admitted as relevant".[169] We believe that the present position is as stated by the Court of Appeal in *Clarke*:[170] there is no specific category of offences against children for the purpose of similar fact evidence, because to assert that such offences are so rare as to justify admissibility is to ignore the regrettable fact that they are not uncommon.

Can evidence of sexual orientation be taken outside the exclusionary rule and admitted simply on the grounds of relevance?

2.65 The basis of this question[171] is that society is no longer so intolerant of homosexuality that a jury will inevitably be prejudiced against an accused simply by learning that he or she is a homosexual. However, the courts have yet to be convinced of this.[172]

2.66 We believe that a homosexual orientation is something which the prosecution would not ordinarily be allowed to lead, because of its prejudicial nature, and that its admission can be justified only under the rules on similar fact evidence.

Do the courts have a discretion to exclude similar fact evidence?

2.67 The courts have traditionally had a discretion to exclude similar fact evidence even if it passes the test of admissibility. This discretion "flows from the duty of the judge when trying a charge of crime to set the essentials of justice above the technical rule if the strict application of the latter would operate unfairly against the accused".[173] However, we explain above[174] that the principle stated by the House of Lords in *DPP v P*[175] now has the character of a legal rule – at least in cases where the prosecution seeks to rely on the evidence as proof of the

[167] *Thompson* [1918] AC 221, 235, *per* Lord Sumner.

[168] *Boardman* [1975] AC 421, 443E. He added, at 444H, that "what is striking in one age is normal in another; the perversions of yesterday may be the routine and the fashion of tomorrow."

[169] *Per* Lord Sands in *Moorov v HM Advocate* 1930 JC 68, 89, and approved by Lord Hailsham LC in *DPP v Kilbourne* [1973] AC 729; and note the statement by Lord Goddard CJ in *Sims* [1946] KB 531, 540, that crimes of indecency against children of either sex "indicate a perverted lust" so as to guarantee admissibility.

[170] *Clarke* (1977) 67 Cr App R 398.

[171] See *Blackstone*, para F12.15.

[172] For example, in *Bishop* [1975] QB 274 it was regarded as an imputation on the character of a prosecution witness to suggest that he was party to a lawful homosexual relationship.

[173] *Per* Viscount Simon in *Harris v DPP* [1952] AC 694, 707.

[174] See para 2.41 above.

[175] *DPP v P* [1991] 2 AC 447.

defendant's disposition, or where there is a risk that the jury will regard it as such – and the existence of a residual discretion may now be in doubt.

What degree of proof is required for similar fact evidence?

2.68 The cogency of bad character evidence varies greatly from case to case; but at one extreme the most cogent form will be where the defendant has been convicted, or has confessed by pleading guilty. Thus in *Straffen* the accused was known to have committed two earlier killings of young girls, and one could pass on immediately to the question of what value that fact had for the present accusation against him.

2.69 At the other end of the spectrum the cogency of the extrinsic evidence will be very much in issue. For example, in *Sokialiois*[176] the accused was charged with importing a Class A drug and there was much circumstantial evidence connecting him with particular importations. When interviewed, he denied dealing in drugs or using them. The prosecution wished to use evidence of the discovery of cocaine (not the subject of the present charge) in his holdall, in order to show that he had lied. He claimed that the cocaine had been "planted" in the holdall by a co-accused. Plainly, the cogency of the evidence turned entirely on how the cocaine had got into the holdall. The Court of Appeal approved a direction that the jury should not rely on the evidence if they thought that the accused's explanation of it *might* be true.

BACKGROUND EVIDENCE AND EVIDENCE FORMING PART OF THE SAME TRANSACTION: AN EXCEPTION TO THE SIMILAR FACT EVIDENCE RULE?

2.70 There is a line of case law suggesting that evidence of the accused's past conduct, even if it is evidence of a disposition or propensity to commit a certain type of offence and would otherwise be excluded by the similar fact evidence rule, can be adduced by way of exception to that rule if it either forms an integral part of the background to the offence charged or is "so closely entwined and involved with the evidence directly relating to the facts in issue that it would amount to distortion to attempt to edit [it] out".[177]

2.71 *Blackstone* cites two nineteenth century cases in support of the proposition that evidence of misconduct which is not strictly part of the offence charged may nevertheless be adduced if it forms part of the same, continuous, transaction.[178] In *Ellis*[179] the defendant was a shop assistant whose employer suspected him of stealing money from the till and was able to observe him operating the till over a course of time. The employer had checked the discrepancy between the money he knew should be there and the money that was actually there. The defence objected to the introduction of the employer's evidence of other instances when the defendant had taken money, but were unsuccessful. Bayley J stated:

[176] *Sokialiois* [1993] Crim LR 872.

[177] *Cross and Tapper*, p 371.

[178] *Blackstone*, para F12.21.

[179] *Ellis* (1826) 6 B & C 145; 108 ER 406.

> Now all the evidence in this case tended to shew that the prisoner was guilty of the felony charged in the indictment. It went to shew the history of the till from the time when the marked money was put into it up to the time when it was found in the possession of the prisoner. I think, therefore, that the evidence was properly received.[180]

2.72 This was taken to a surprising degree in *Rearden*,[181] where, on an indictment for the rape of a child under ten years old, the victim's evidence that the defendant had raped her on subsequent occasions, before she informed her mother, was held admissible on the basis that it constituted virtually one offence.[182]

2.73 *Rearden* was referred to in *Bond*,[183] where Kennedy J said that the past "relations" of the injured man with his assailant may be treated as "explanatory" of the conduct of the appellant and may form "integral parts of the history of the alleged crime". However, in a number of the later cases, and in some textbooks, the starting point for this rather anomalous line of case law is stated to be the following dictum of Lord Atkinson, given in argument, in what has been called the "dubious authority"[184] of *Ball*:[185]

> Surely in an ordinary prosecution for murder you can prove previous acts or words of the accused to shew he entertained feelings of enmity towards the deceased, and that is evidence not merely of the malicious mind with which he killed the deceased, but of the fact that he killed him. You can give in evidence the enmity of the accused towards the deceased to prove that the accused took the deceased's life. Evidence of motive necessarily goes to prove the fact of the homicide by the accused, as well as his "malice aforethought", inasmuch as it is more probable that men are killed by those who have some motive for killing them than by those who have not.[186]

2.74 In his judgment in the Australian High Court case of *Harriman*[187] McHugh J emphasised the importance of separating the background evidence cases, or "circumstantial evidence cases", from cases in which the evidence of past conduct forms part of the same transaction which is the subject of the offence charged: the latter, he stated, should properly be dealt with under the res gestae rule.[188] The

[180] (1826) 6 B & C 145, 148; 108 ER 406, 407.

[181] *Rearden* (1864) 4 F & F 76; 176 ER 473.

[182] (1864) 4 F & F 76, 80; 176 ER 473, 476, *per* Willes J: "It has repeatedly appeared to me in cases of this sort, that the man, by a threat of violence, deters the child from complaining, and thus acquires a species of influence over her by terror, which enables him to repeat the offence on subsequent occasions, and this seems to me to give a continuity to the transaction, which makes such evidence properly admissible."

[183] *Bond* [1906] 2 KB 389, 401.

[184] *Berry* (1986) 83 Cr App R 7, 10, *per* Watkins LJ.

[185] *Ball* [1911] AC 47.

[186] *Ibid*, at p 68.

[187] *Harriman* (1989) 167 CLR 590.

[188] *Ibid*, at p 628: "the cases draw a distinction between evidence, disclosing other criminal conduct, which is part of the transaction or res gestae and circumstantial evidence, disclosing other criminal conduct, which tends to prove a fact in issue."

importance of this dichotomy lay in the different rules governing the admissibility of each category of evidence.[189] Circumstantial evidence, where it consists of evidence of similar facts, falls to be dealt with under the rules of admissibility described elsewhere in this Part. If, however, the evidence can be classified as res gestae, no further control is imposed on its admission. *Blackstone* adopts McHugh J's distinction, but does not accept that there is any difference in the test of admissibility.[190] In *Harriman* itself Brennan J, while accepting McHugh J's distinction, also said he did not believe that there was any difference in the test governing the admission of such evidence.[191]

2.75 The use of previous misconduct to establish the accused's motive,[192] as sanctioned in the dictum of Lord Atkinson in *Ball*, was questioned by the Court of Appeal in *Berry*.[193] In this case the appellant was charged with the murder of a woman with whom he had previously had a relationship. At trial, the judge granted a request by the prosecution to refer to the history of the relationship between the appellant and the victim to establish a motive. This evidence consisted, inter alia, of rows between the appellant and the victim. The appellant had told another person that if he could not "have" the victim then neither could anyone else, and had admitted, in the presence of the victim's mother, that he had tried to strangle the victim twice "in fun". The conviction was quashed on the ground that the evidence should not have been admitted. Watkins LJ said that the use of past incidents to establish the accused's state of mind was not generally permissible;[194] only "evidence of what was said or done at the time or at a time or times close or relatively close to the death of the victim" will be relevant and, therefore, admissible.[195]

2.76 Despite the Court of Appeal's disapproval of the introduction of "background" evidence of previous misconduct in *Berry*,[196] the same court took a different line

[189] *Ibid*, at pp 632–633.

[190] *Blackstone*, paras F12.21 – F12.23. See also *Cross and Tapper*, pp 371–372, where there is an allusion to this distinction.

[191] See *Harriman* (1989) 167 CLR 590, where Brennan J stated, at p 594, that if his view, in this respect, departed from that of McHugh J then "the departure is more in the realm of theory than of practice."

[192] The use of background evidence to establish motive is also a feature of the law of evidence in other common law jurisdictions. In the Canadian case of *Robertson* [1987] 1 SCR 918 the Supreme Court sanctioned the use of background evidence both to establish the motive of the defendant and to present a clearer, more coherent, narrative of the facts of the offence charged. This was a case in which the defendant was charged with a sexual assault and the prosecution sought to introduce evidence that the defendant had, on an earlier occasion the same day, sexually propositioned the victim's roommate. The Supreme Court found that the trial judge had properly admitted this background evidence but, in contrast to practice in the English courts, it did label the evidence "similar fact evidence" and it also carried out an assessment of probative value as against prejudicial effect.

[193] *Berry* (1986) 83 Cr App R 7.

[194] *Ibid*, at p 10. The argument that evidence of previous misconduct should be adduced to help establish motive was derided as a "fallacious and almost incomprehensible argument". The Court of Appeal referred to authorities on similar fact evidence.

[195] *Ibid*.

[196] At least for the purpose of establishing motive.

when, in the same year, it delivered its judgment in *Williams (Clarence Ivor)*.[197] The appellant was charged with making a threat to kill,[198] and was convicted following the trial judge's decision to allow the admission of evidence relating to the history of his relationship with the victim; this included assaults and threatening telephone calls. At trial, and before the Court of Appeal, counsel for the appellant conceded that the issue was not one of admissibility per se: he concentrated instead upon the exercise of the trial judge's discretion. The Court of Appeal, after reviewing the authorities, relied on the dicta in *Bond* and *Ball*[199] and held that the trial judge had properly exercised his discretion.

2.77 This area of the law was most recently examined by the Court of Appeal in *Fulcher*.[200] In this case the appellant had been charged with the murder of his infant son. His wife had found the child injured, and the child died some 11 months later. While there was no direct evidence to indicate who had inflicted the fatal injury, the appellant's mother-in-law gave evidence that if the child cried the appellant became aggravated, upset and annoyed. The appellant's wife, the child's mother, gave evidence that she had in the past seen her husband give the child "quite a hard slap". This evidence was admitted, without any objection being taken to it by counsel for the appellant,[201] and the appellant was convicted. He appealed, arguing, inter alia, that the judge had wrongly allowed the prosecution to adduce evidence of his previous misconduct. The appeal was dismissed.

2.78 Kennedy LJ justified the Court of Appeal's decision on this ground of the appeal by stating that the previous misconduct evidence was properly deployed "to rebut a possible defence of accident".[202] While this reasoning bears some relationship to the second proposition of Lord Herschell LC in *Makin*,[203] Kennedy LJ was keen to point out that the previous misconduct evidence was not "similar fact evidence" as such and that "any objection to it on the basis that it was similar fact evidence would have been misconceived".[204] The previous misconduct evidence assisted in establishing motive, and therefore "went to the actus reus and the mens rea".[205]

[197] *Williams (Clarence Ivor)* (1986) Cr App R 299. In this case *Berry* was distinguished on its facts; the Court of Appeal stated that it may have been correct when it had stated, in *Berry*, that evidence of past misdeeds were irrelevant to prove the state of mind with which the violent stabbing of the victim was done.

[198] Offences Against the Person Act 1861, s 16.

[199] See para 2.73 above.

[200] *Fulcher* [1995] 2 Cr App R 251.

[201] See *ibid*, at p 257, *per* Kennedy LJ: "experienced counsel who appeared for the appellant at the trial made no attempt to exclude either category of evidence [of the appellant's disposition and propensity to commit crimes of violence], and in our judgment they were right not to do so."

[202] *Ibid*.

[203] *Makin* [1894] AC 57, 65.

[204] *Fulcher* [1995] 2 Cr App R 251, 257G. This rather surprising assertion may explain why, except for *Ball*, none of the leading authorities on similar fact evidence are referred to in the Court of Appeal's judgment.

[205] *Ibid*, at p 257G.

2.79 The Court of Appeal did state that the trial judge could have exercised her residual discretion to exclude the previous misconduct evidence as being more prejudicial than probative; however, this was *not* related to the assessment which trial judges are required to make under the similar fact evidence rule.[206]

2.80 *Archbold* contains a useful summary of the current state of the law. The following passage was expressly approved in *Williams (Clarence Ivor)*:[207]

> A distinction should be drawn between evidence of similar facts, usually relating to offences against persons other than the alleged victim of the offence charged, and evidence of other acts or declarations of the accused indicating a desire to commit, or reason for committing, the offence charged *i.e.* motive. This distinction is sometimes blurred in reported decisions.[208]

2.81 The following basic "indicators" may govern the use of this kind of previous misconduct evidence:

(1) the evidence may be close in time, place or circumstances to the facts or circumstances of the offence charged;[209]

(2) the evidence may be necessary to complete the account of the circumstances of the offence charged, and thus make it comprehensible to the jury;[210]

(3) the accused may have had a relationship with the victim of the offence charged, and the previous misconduct evidence may relate to this victim rather than the victims of other offences;

(4) the evidence may assist in establishing the motive behind the offence charged.[211]

[206] See paras 2.29 and 2.41 above, where we question whether the similar fact evidence rule has the character of a mandatory rule of exclusion or whether it is a matter entirely within the trial judge's discretion.

[207] *Williams (Clarence Ivor)* (1986) 84 Cr App R 299, 301, *per* Hodgson J.

[208] *Archbold*, para 13-40.

[209] See *Archbold*, para 13-41: "the evidence must have clear probative value and the more remote from the date of the offence the incident sought to be proved is, the clearer the probative value must be." See also *Berry* (1986) 83 Cr App R 7, 10, *per* Watkins LJ, referred to at para 2.75 above, and *Sidhu* (1994) 98 Cr App R 59.

[210] This is taken from the Court of Appeal's judgment (*per* Purchas LJ) in the unreported case of *Pettman*, 2 May 1985, CA No. 5048/C/82: "where it is necessary to place before the jury evidence of part of a continual background of history relevant to the offence charged in the indictment and without the totality of which the account placed before the jury would be incomplete or incomprehensible, then the fact that the whole account involves including evidence establishing the commission of an offence with which the accused is not charged is not of itself a ground for excluding the evidence." This passage is also referred to in *Fulcher* [1995] 2 Cr App R 251, 258D–E, *per* Kennedy LJ and in *Stevens* [1995] Crim LR 649.

[211] See *Ball* [1911] AC 47, 68; para 2.73 above.

2.82 The factor identified at (1) above corresponds to the res gestae or "same transaction" category identified by McHugh J in *Harriman*,[212] whereas (2), (3) and (4) are, perhaps, closer to the category of "background" (or circumstantial) evidence. However, this distinction, while faintly present in some of the judgments of the English Court of Appeal cited above, has not, in this jurisdiction, led to any difference in the test for the admissibility of evidence falling within each category.

2.83 The case law discloses that there clearly does exist a species of evidence of previous misconduct which is distinguishable from similar fact evidence and to which the rules requiring an assessment of probative value against prejudicial effect do not, therefore, apply. However, the line of authority establishing this distinction has been criticised. *Cross and Tapper*, in particular, questions whether this kind of background or same transaction evidence does fall into a discrete category and should therefore be given special status:

> It is submitted though that it [background or same transaction evidence] still falls within the ambit of the exclusionary rule, and that the question of its inadmissibility is to be determined by the application of the ordinary process of balancing probative force against prejudicial effect. It would be wrong to regard it as falling outside the rule ... .[213]

2.84 We set out some options, and provisional proposals, for the treatment of background or same transaction evidence in Part IX below.[214]

BAD CHARACTER EVIDENCE ADDUCED BY A CO-ACCUSED

2.85 One defendant (A) is not permitted to introduce evidence of the bad character of another defendant (B) except

> (a) by asking B about his previous convictions in the circumstances for which section 1(f) of the 1898 Act expressly provides, and
>
> (b) by leading or eliciting evidence of B's previous convictions *when they are relevant to A's defence*.[215]

2.86 We deal with the first possibility in Part IV; here, we concentrate on the circumstances in which B's previous convictions are relevant to A's defence. If so relevant, the evidence must be admitted: the court has no discretion to exclude it, notwithstanding its prejudicial effect.[216] The test of relevance is strictly applied.

[212] *Harriman* (1989) 167 CLR 590; para 2.74 above.

[213] *Cross and Tapper*, p 372. *Blackstone*, however, takes the view that this kind of evidence is properly distinguishable from similar fact evidence: para F12.23.

[214] See paras 9.74 – 9.92 below.

[215] *Per* Leggatt LJ, giving the judgment of the Court of Appeal in *Knutton* (1993) 97 Cr App R 115, 119–120 (emphasis added).

[216] *Per* Scarman LJ in *Neale* (1977) 65 Cr App R 304, 306. The principle behind this rule is that "It is … one thing to say that such evidence is excluded when tendered by the Crown in proof of guilt, but it is quite another to say that it is excluded when tendered by the accused in disproof of his own guilt. We see no reason of policy or fairness which justifies or

2.87 In the leading case of *Miller*,[217] a decision at first instance,[218] the three accused were charged with conspiracy to evade customs duty. The defence of one accused, A, was that he had not been involved in the conspiracy but that another accused, B, had masqueraded as him, using his office for this purpose. In support of this assertion A sought to adduce evidence that there had been no criminal activity, of the kind forming the subject of the charge, during the period when B had been in prison. Devlin J ruled that this evidence was admissible in that it was relevant to the defence of A as it made it less likely that he was guilty of the offence.

2.88 The courts have also permitted a defendant to adduce evidence of the propensity of a co-accused to commit the offence if it is relevant, although the relevance test has been very strictly applied. Thus in *Neale*[219] a defendant to a charge of arson contended that the fire had been started by his co-accused and that he was either not there or not participating when it started. He sought to adduce evidence that his co-defendant had a propensity to raise fires, but it was held to be inadmissible because it did not logically relate to his defence of alibi.[220]

2.89 Where the co-accused sets up his own good character or launches an attack on the accused in an attempt to show him in a poor light, it becomes much easier for the accused to show the relevance of the co-accused's previous convictions to answer these points. In *Douglass*,[221] for example, D and A were charged with causing death by reckless driving by racing each other in circumstances which led to a collision with another vehicle. Each defendant blamed the other. Evidence was elicited that A had not drunk alcohol in the two years that the witness had known him. The significance of this was that it was to be used to invite the jury to contrast A with D, who, according to prosecution evidence, had been drinking. D's counsel sought to adduce evidence of A's previous convictions for offences including careless and dangerous driving and driving with excess alcohol. The Court of Appeal held that the trial judge was wrong in refusing to admit this evidence because A had put his

requires the exclusion of evidence relevant to prove the innocence of an accused person": *Lowery* [1974] AC 85, 102F–G, where the Privy Council, *per* Lord Morris of Borth-y-Gest, approved this statement of principle expressed in that case by the Supreme Court of Victoria, sitting as a Court of Criminal Appeal.

[217] *Miller* [1952] 2 All ER 667.

[218] The case has been approved by the appellate courts on several occasions: see, inter alia, *Neale* (1977) 65 Cr App R 304; *Knutton* (1992) 97 Cr App R 114.

[219] *Neale* (1977) 65 Cr App R 304.

[220] See also *Knutton* (1993) 97 Cr App R 114; cf *Kracher* [1995] Crim LR 819. Professor D J Birch argues, *ibid*, at p 820, that the court in *Neale* was mistaken in holding that the evidence was not relevant: "The point that the defendant was trying to make in *Neale* … , but was prevented from substantiating by reference to his co-accused's convictions, was that the other man, B, was a fire-raiser who was perfectly capable of committing arson on his own … . The point that K sought to raise in the present case is essentially similar: that B was a hell-raiser who was perfectly capable of making an unprovoked attack on his own … . While it was correct of the court to say that the evidence [in *Neale*] of B's propensity did not directly assist N's defence of alibi, it could have been said to provide more direct evidence of innocence in that it would have been incumbent upon the jury to acquit N had they considered it possible that B acted alone."

[221] *Douglass* (1989) 89 Cr App R 264.

character in issue and D was wrongly prevented from introducing *relevant* evidence.

2.90 Similarly in *Bracewell*,[222] L was charged, with B, with the murder of an old man in the course of a burglary. L contended that he was an experienced and non-violent burglar, able to keep a cool head, while B was inexperienced, nervous, excitable and probably drunk. The Court of Appeal said that in those circumstances B was wrongly prevented from adducing evidence of L's violent disposition: such evidence had become relevant because L had put his character in issue. Its relevance lay in its inconsistency with the portrait L sought to paint of himself.

2.91 In the Privy Council case of *Lowery*[223] the two defendants were charged with the joint murder of a 15-year-old girl. Both defendants gave evidence of their own good character, but Lord Morris of Borth-y-Gest seemed to suggest that evidence of one defendant's violent disposition might have been admissible even *without* regard to his assertion of good character. It is therefore unclear, as *Blackstone* points out,[224] whether putting character in issue is a condition precedent for the admission of evidence of a co-accused's disposition or propensity. However, it seems clear from *Lowery* that putting character in issue does make evidence of disposition relevant in cases of this kind.

JOINDER AND SEVERANCE

2.92 Joinder of offences is governed by rule 9 of the Indictments Rules 1971, which allows joinder of different counts in the same indictment if the counts are "founded on the same facts, or form or are part of a series of offences of the same or a similar character".[225] In the leading case, *Ludlow v MPC*,[226] the House of Lords held that a count of attempted larceny and one of robbery could be properly joined in one indictment as forming "a series of offences of the same or a similar character" even though their sole factual similarity was that they were both alleged to have been committed in public houses in Acton within sixteen days of each other. In *Conti*[227] the Court of Appeal held that counts were properly joined where the defendant was charged on an indictment containing counts for assault occasioning actual bodily harm, possessing an offensive weapon, and possessing a prohibited drug without authority. The prosecution's case was that the defendant had taken the drug for the purpose of getting himself into a suitable state of mind for the commission of the assault.

[222] *Bracewell* (1978) 68 Cr App R 44.

[223] *Lowery v R* [1974] AC 85.

[224] *Blackstone*, para F12.19.

[225] It is well settled that the second alternative is not a reference to a need to comply with the similar fact rule – see *Ludlow v MPC* [1971] AC 29, where the evidence on the two counts was not inter-admissible and would not be so now: the court cited Lord Goddard CJ in *Sims* [1946] KB 531, 536, where he said: "we do not think that the mere fact that evidence is admissible on one count and inadmissible on another is by itself a ground for separate trials: because often the matter can be made clear in the summing up without prejudice to the accused."

[226] *Ludlow v MPC* [1971] AC 29.

[227] *Conti* (1974) 58 Cr App R 387.

2.93 Even if counts have been properly joined under rule 9,[228] the trial judge has a discretion to order that they be tried separately.[229] By section 5(3) of the Indictments Act 1915, the judge may, either before or during the trial, order a separate trial where he or she is "of the opinion that a person accused may be prejudiced or embarrassed in his defence by reason of being charged with more than one offence in the same indictment". In *Ludlow v MPC* Lord Pearson stated:

> The manifest intention of the Act is that charges which either are founded on the same facts or relate to a series of offences of the same or a similar character properly can and normally should be joined in one indictment, and a joint trial will normally follow, although the judge has a discretionary power to direct separate trials under section 5(3).[230]

2.94 Lord Pearson, giving the leading speech of the House of Lords in *Ludlow v MPC*, stated that there is no duty on the judge to direct separate trials unless "in his opinion there is some special feature of the case which would make a joint trial of the several counts prejudicial or embarrassing to the accused and separate trials are required in the interests of justice."[231] This adds to the statutory requirement in that severance must now be "in the interests of justice": it is not enough that a joint trial would cause prejudice or embarrassment to the defence. Moreover, there must also exist "some special feature" which would cause such prejudice or embarrassment. The discretion given to the judge by section 5(3) is a wide one, and the Court of Appeal will not readily interfere with the exercise of that discretion unless it can be shown that the judge failed to exercise his or her discretion upon the usual and proper principles.[232]

Similar facts

2.95 Plainly, where evidence upon one count is admissible on another, under the principles governing similar fact evidence, there is no point in severing those

[228] The discretion to order severance should be distinguished from the procedure in the case of misjoinder. Where there has been a misjoinder the defect in the indictment cannot be cured by the exercise of a discretion to sever, either under s 5(3) of the Indictments Act 1915 or under any inherent power. The discretion to sever is applicable only to cases where the charges have been properly joined but it appears improper for them to be tried together. Even where s 5(3) applies there is no duty to direct separate trials unless the extra conditions outlined by Lord Pearson in *Ludlow* (para 2.101 below) are satisfied. Misjoinder can be cured by removing such counts from the indictment as will result in it being in accordance with the rules. If a court were to proceed via s 5(3) any outcome would be a nullity: see *Newland* [1988] QB 402.

[229] In "Propensity Evidence In Continental Legal Systems" (1994) 70 Chicago-Kent LR 55, 58, n 7, M R Damaska points out that if a Continental defendant is charged even with several independent crimes in which no common scheme is alleged, a joint trial on all of those charges is not only possible but often mandated.

[230] *Ludlow v MPC* [1971] AC 29, 41.

[231] *Ibid*, mentioning specifically complexity of trial and the inclusion of scandalous counts as examples of when severance might be required; see para 2.101 below.

[232] See, for example, *Blackstock* (1980) 70 Cr App R 34; *Wells* (1991) 92 Cr App R 24n; *Dixon* (1991) 92 Cr App R 43; *Cannan* (1991) 92 Cr App R 16.

counts.[233] Where the evidence upon one count is *not* admissible on another, it is still uncommon for those counts to be severed; the preferred course appears to be for the judge to direct the jury that they must not use the evidence on one count to support that on another.[234]

2.96 A different approach was suggested by Lord Cross in *Boardman*.[235] Having pointed out that, where evidence against a defendant on one count is inadmissible on another, the judge must tell the jury that when considering each count they must put out of mind the fact that others are making similar allegations,[236] he went on:

> But, as the Court of Criminal Appeal said in *Rex* v. *Sims*,[237] it is asking too much of any jury to tell them to perform mental gymnastics of this sort. If the charges are tried together it is inevitable that the jurors will be influenced, consciously or unconsciously, by the fact that the accused is being charged not with a single offence against one person but with three separate offences against three persons. It is said, I know, that to order separate trials in all these cases would be highly inconvenient. If and so far as this is true it is a reason for doubting the wisdom of the general rule excluding similar fact evidence. But so long as there is that general rule the courts ought to strive to give effect to it loyally and not, while paying lip service to it, in effect let in the inadmissible evidence by trying all the charges together.[238]

2.97 In *Blackstock*[239] the Court of Appeal had to resolve the conflict between this dictum and the courts' traditional hostility to applications for severance. It did so by holding that the dicta in *Boardman*,[240] a case concerning allegations of sexual

[233] The problem with this is that the counts may gain cumulative probative force – though some judges do seem to direct juries to find the evidence on at least one count proved beyond reasonable doubt before they apply it as similar fact evidence to the other counts.

[234] In *Blackstock* (1980) 70 Cr App R 34 the Court of Appeal dismissed an appeal against the refusal of the trial judge to order separate trials of pairs of robbery and firearms charges, where the evidence on one pair of charges was not admissible upon the other. Roskill LJ said, at p 37:

> Every trial judge is familiar with the requirement, where more counts than one of a similar kind are joined in an indictment, of adding a warning to the jury that they must not add all the counts together and convict because there is more than one count in the indictment, or use the evidence on one count as evidence on the other. They should consider each count separately in the light of the evidence upon that particular count against the accused person, but no other. Juries have shown themselves well able over the years to follow such a direction and apply it.

This decision was followed by the Court of Appeal in *McGlinchey* (1983) 78 Cr App R 282.

[235] *Boardman* [1975] AC 421.

[236] *Ibid*, at p 459.

[237] [1946] KB 531, 536.

[238] *Ibid*.

[239] *Blackstock* (1980) 70 Cr App R 34.

[240] *Boardman* [1975] AC 421, 459, *per* Lord Cross:

> When in a case of this sort [allegations of homosexual misconduct involving a number of boys] the prosecution wishes to adduce 'similar facts' evidence which the defence says is inadmissible, the question … ought, if possible, to be decided in the absence of the jury at the outset of the trial and if it is decided that the

misconduct, should not be taken as casting any doubt on the principles expressed in *Ludlow*[241] or as having been intended to apply beyond the circumstances of *Boardman* itself. This approach was followed in subsequent cases where the courts refused to interfere with trial judges' refusal to order severance where the evidence on some charges was not evidence on others, even if it was very prejudicial.[242]

2.98 In principle there must be some cases where the evidence on one count does not qualify to be admitted on a similar fact basis, but is so prejudicial to the proper consideration of the other counts that there must be severance, and no warning to the jury will suffice.[243] In *Beggs*[244] the Court of Appeal allowed an appeal against a conviction for murder because the trial judge had wrongly directed the jury that, in

> evidence is inadmissible and the accused is being charged in the same indictment with offences against the other men the charges relating to the different persons ought to be tried separately. If they are tried together the judge will, of course, have to tell the jury that in considering whether the accused is guilty of the offence alleged against him by A, they must put out of mind the fact – which they know – that B and C are making similar allegations against him.

[241] *Ludlow v MPC* [1971] AC 29; paras 2.92 – 2.94 above.

[242] Current practice relating to similar fact and severance is probably exemplified by the Court of Appeal decisions in *Dixon* (1991) 92 Cr App R 43 and *Cannan* (1991) 92 Cr App R 16. In *Dixon,* the indictment contained counts relating to four rapes and six robberies, an indecent assault on a woman, an attempted rape and an assault, all of which occurred between February and May 1986. The trial judge had declined to give a definitive ruling on the similar fact evidence question until he had heard all the prosecution evidence, but then refused to order separate trials in any event. Having heard the prosecution evidence he ruled that it was not a similar fact case, and he subsequently directed the jury correctly on the evidence that they could properly take into account in respect of each charge. The appeal against conviction was based on the judge's refusal to order separate trials, and it was contended that the allegations were scandalous (in the sense referred to by Lord Pearson in *Ludlow v MPC* [1971] AC 29) so as to require a departure from the general rule that charges which are properly joined should be tried together. The appeal was dismissed, it being held that the trial judge was in the best position to decide whether separate trials were necessary to avoid prejudice because firm directions had been given to the jury to consider each and every count individually. The court referred to *Ludlow v MPC*, *Blackstock* (1980) 70 Cr App R 34 and *McGlinchey* (1983) 78 Cr App R 282, but there was no mention made of the fact that charges in those cases did not involve allegations of serious sexual misconduct, or that special considerations might arise in the sort of case mentioned in *Boardman*.

In *Cannan* the appellant was convicted of the abduction, rape and buggery of one female, the attempted kidnapping of another and the abduction and murder of a third, all in October 1987. He appealed against conviction on the ground that certain charges should have been tried separately, the trial judge having ruled that the three sets of offences were evidentially separate. It was also argued that the charges were of a scandalous nature and were likely to cause a surge of revulsion against the appellant. In dismissing the appeal the court said that it may well be that judges in sexual cases, in the exercise of their discretion, will often order separate trials and that the members of the Court of Appeal might have come to a different conclusion to that of the trial judge in the instant case in exercising that discretion, but there were nevertheless grounds on which the trial judge had been entitled to exercise his discretion in the way that he did. He had taken into account all relevant matters and ignored the irrelevant ones, and the Court of Appeal therefore declined to interfere with the exercise of the discretion. The Court of Appeal also emphasised that cases which have been decided on their own facts should not be turned into binding decisions.

[243] See *Brooks* (1991) 92 Cr App R 36; para 2.100 below.

[244] *Beggs* (1989) 90 Cr App R 430.

considering the count of murder, they were entitled to take into account, on a similar fact basis, the evidence on a number of unrelated wounding charges on which the appellant had been tried at the same time. The court expressed the view that, on the particular facts of the case, there was no justification for trying the murder count together with the other counts if the evidence on the other counts was not admissible on a similar fact basis.[245] This was a particularly important consideration in this case, because, in going directly to the only defence advanced,[246] the prejudicial effect of the admission of the evidence was enormous.[247]

Sex offences – a special category?

2.99 The courts are very conscious of the prejudicial nature of certain types of sexual complaint, especially where the previous misconduct cannot be relied on as similar fact evidence. Thus in *Brooks*[248] the Court of Appeal held that, once the court had ruled that similar fact evidence was not involved, there could be no justification for the joinder of incest counts relating to alleged offences against the defendant's three daughters. Although many aspects of that case were subsequently overruled by the House of Lords in *DPP v P*,[249] Lord Mackay LC suggested in the latter case that there had to be such a relationship between the different offences as to make them mutually corroborative: in other words, they had to be similar fact cases.[250] In *Christou*,[251] however, the House of Lords held that there is no such rule, and that it is always a matter for the discretion of the judge.

2.100 In *Sims*[252] Lord Goddard CJ stated that "it is asking too much to expect any jury when considering one charge [of sexual misconduct] to disregard the evidence on the others, and if such evidence is inadmissible, the prejudice created by it would

[245] The murder had been committed by an attack on the throat and the jugular vein had been cut in two places, whereas the wounds on the other counts were not to any vulnerable part of the body; nor did the particulars allege an intent to cause really serious injuries.

[246] The defence being that he had met the victim in a night-club, they had decided to camp out for the night and B awoke to find the victim making homosexual advances to him, which horrified him so much that he lashed out at the victim with a razor.

[247] However, in *Wells* (1991) 92 Cr App R 24n the Court of Appeal found no reason to interfere with the exercise by the trial judge of his discretion in refusing to order separate trials of two groups of charges arising from two separate drugs raids on the appellant's premises six months apart. The court held, on the particular facts of the case, that the trial judge had been entitled to rule that even if the evidence on one group of charges was not admissible on the charges in the other group, the two groups of charges could be tried together without injustice to the appellant, and that neither the complexity nor the nature of the charges necessitated separate trials. The court indicated that a decision in each case must depend on its own facts.

[248] *Brooks* (1991) 92 Cr App R 36.

[249] *DPP v P* [1991] 2 AC 447.

[250] In *Tickner* [1992] Crim LR 44 the Court of Appeal seemed not to interpret *DPP v P* as laying down a rigid rule.

[251] *Christou* [1996] 2 WLR 620.

[252] *Sims* [1946] KB 531.

be too great for any direction to overcome".[253] In *Brooks*, Mustill LJ explained that "it could not be right to try together in a case like this[254] a series of offences in which the evidence of one series is not only inadmissible in relation to another, but casts a cloud of prejudice upon it".[255]

2.101 This argument relies upon the reasoning of Lord Pearson in *Ludlow v MPC*,[256] that another reason for a judge to exercise his or her discretion to sever under section 5(3)[257] is that there are "scandalous" counts which would be likely to prejudice a jury in its deliberations on all the counts included in the indictment. However, when an attempt was made to include drug-trafficking within this category, on the grounds that it is so scandalous in the minds of right-thinking people as to arouse hostility towards the accused, the Court of Appeal would not interfere with the judge's decision to reject that submission and refuse severance.[258] It was said that the trial judge's decision, made according to prevailing mores, that the counts laid were not scandalous, was a decision which lay peculiarly within his discretion[259] and was not one with which the court would feel justified in interfering.[260]

2.102 It may also be the case that there exists evidence of similar facts, extraneous to the counts themselves and potentially admissible on some counts but not on others, and with the potential to be used by the jury in a prohibited manner. If collusion of "victims" is alleged, this will obviously be a factor in deciding whether evidence of similar facts is admissible on certain counts, and hence whether joinder or severance of those counts is the best course. The cumulative effect of two recent decisions on the admissibility of similar fact evidence where collusion or

[253] *Ibid*, at p 536, *per* Lord Goddard CJ, cited with approval by Lord Pearson in *Ludlow v MPC* [1971] AC 29, 41H–42B. A similar approach was adopted by the Court of Appeal in *Brooks* (1991) 92 Cr App R 36.

[254] In this case a father's appeal against his conviction for sexual offences against his three daughters was allowed because of a refusal by the trial judge to order separate trials, and the erroneous ruling that the evidence of the daughters was capable of being mutually corroborative.

[255] *Brooks* (1991) 92 Cr App R 36, 42.

[256] *Ludlow v MPC* [1971] AC 29, 41.

[257] See para 2.93 above.

[258] *Wells* (1991) 92 Cr App R 24n.

[259] *Ibid*, at p 36, *per* Hodgson J.

[260] The court stated that if the charges against the appellant had amounted to an allegation that he was a "drug baron" then other considerations might have applied.

contamination is alleged, *DPP v P*[261] and *H*,[262] is that in considering admissibility the court must assume such evidence to be true unless there is obvious evidence of collusion. The particular difficulties posed by the possibilities of collusion or contamination are considered in Part X below.[263]

2.103 It seems, therefore, that for counts to be severed as being scandalous they must pass some special threshold of prejudice. Experience to date demonstrates that an application for severance on this ground is unlikely to succeed. The current position would appear to be that severance is most likely to be granted in cases which involve some form of sexual misconduct, although even in these cases the trial judge retains a discretion whether to sever. As Lord Lane CJ stated in *Cannan*:[264]

> It may well be that often the judge in sexual cases will order severance ... . But the fact remains that the Indictments Act 1915 gives the judge a discretion ... .[265]

[261] *DPP v P* [1991] 2 AC 447.

[262] *H* [1995] AC 596.

[263] Paras 10.86 – 10.105.

[264] *Cannan* (1991) 92 Cr App R 16.

[265] *Ibid*, at p 23.

PART III
THE PRESENT LAW (II): SPECIAL CASES WHERE BAD CHARACTER EVIDENCE IS ADMISSIBLE IN CHIEF

3.1 In the previous Part we set out the current common law governing the admission of what is usually known as "similar fact evidence". Evidence of bad character may be admitted in chief in a number of other situations, and they are covered in this Part.

WHEN PREVIOUS MISCONDUCT IS AN ELEMENT OF AN OFFENCE

3.2 It is an element of some offences that the accused person should have previously been convicted of a crime; in the case of others it is almost inevitable that previous misconduct will be proved. Examples of the former include:

- driving while disqualified, contrary to section 103(1)(b) of the Road Traffic Act 1988;
- being an "incorrigible rogue", under section 5 of the Vagrancy Act 1824;
- possession of firearms by a person previously convicted of crime and having received a custodial sentence of a certain length, contrary to section 21 of the Firearms Act 1968;
- contravention of a disqualification order (made under section 2 of the Company Directors Disqualification Act 1986), contrary to section 13 of the same Act.[1]

3.3 Examples of the latter include:

- assault with intent to resist arrest, contrary to section 38 of the Offences against the Person Act 1861;
- causing grievous bodily harm or wounding with intent to resist or prevent lawful apprehension, contrary to section 18 of the Offences Against the Person Act 1861;
- escape at common law;
- breach of a prison at common law;

[1] A disqualification order can be made against a person, under s 2 of the 1986 Act, when he or she is convicted of an indictable offence in connection with the promotion, formation, management or liquidation of a company or with the receivership or management of a company's property. An order can also be made, under s 3, for persistent breaches of the companies legislation, under s 4 for fraud offences and under s 5 for conviction of a summary offence connected with the running of a company.

- prison mutiny, contrary to section 1(1) of the Prison Security Act 1992;
- knowingly failing to comply with an exclusion order, contrary to section 8(1) of the Prevention of Terrorism (Temporary Provisions) Act 1989;
- absconding on bail, contrary to section 6(1) of the Bail Act 1976.

SECTION 1(2) OF THE OFFICIAL SECRETS ACT 1911

3.4 Section 1(2) provides:

> On a prosecution under this section,[2] it shall not be necessary to show that the accused person was guilty of any particular act tending to show a purpose prejudicial to the safety or interests of the State, and, notwithstanding that no such act is proved against him, he may be convicted if, from the circumstances of the case, or his conduct, or his known character as proved, it appears that his purpose was a purpose prejudicial to the safety or interests of the State …

3.5 This constitutes an exception to the general exclusionary rule at common law that evidence of a defendant's character may not be adduced as part of the prosecution case.[3]

3.6 As was noted during the passage of the Bill, such a provision runs contrary to the usual principles of justice. Mr A C Morton MP, referring to section 1(2), commented that the Bill was contrary to the Magna Carta, and Sir William Byles MP said:

> That [sc. section 1(2)] certainly strikes me, a layman, as a very startling innovation upon our ordinary legal precedents.[4]

The Bill passed quickly through Parliament,[5] and the only speaker to address the concerns about the inroad on the principle that the prosecution should bear the burden of proof was the Attorney-General (Sir Rufus Isaacs MP), who said:

[2] Section 1(1) of the Act provides:

> If any person for any purpose prejudicial to the safety or interests of the State – (a) approaches, inspects, passes over or is in the neighbourhood of, or enters any prohibited place … ; or (b) makes any sketch, plan, model, or note which is calculated to be or might be or is intended to be directly or indirectly useful to an enemy; or (c) obtains, collects, records, or publishes, or communicates to any other person any secret official code word or pass word, or any sketch, plan, model, article, or note, or other document or information which is calculated to be or might be or is intended to be directly or indirectly useful to an enemy; he shall be guilty of [an offence].

[3] "The wording of this subsection shows that evidence of the accused's misconduct may be given although it is relevant only because it shows that he is the kind of man whose purpose in doing certain acts might be of the type proscribed by the statute": *Cross and Tapper,* p 409.

[4] *Hansard* (HC) 18 August 1911, vol 29, col 2253.

[5] A total of four peers spoke during the Bill's second reading in the House of Lords. It reached the House of Commons on Friday 18 August 1911, where it passed through all its stages in less than an hour.

> it is essential to have this provision. The sense of justice in this country is perfectly fair to all persons, and there would be no danger to anyone engaged in something perfectly innocent.[6]

3.7 We are not aware of any authority on subsection 2 and no doubt it is not frequently relied on.

SECTION 27(3) OF THE THEFT ACT 1968

3.8 Section 27(3) of the Theft Act 1968 permits the prosecution to adduce evidence in chief of criminal disposition, in the form of evidence of prior possession of stolen goods (section 27(3)(a))[7] or previous convictions (section 27(3)(b)).[8] It has been described as a "most curious rogue provision"[9] because it attracts the criticism made of its predecessor that it is "a great departure from the ordinary rules which apply to evidence in criminal trials".[10]

The application of section 27(3)

3.9 There are a number of limitations on the applicability of both paragraphs (a) and (b) of section 27(3):

(1) The section applies only if the defendant is charged solely with handling stolen goods.[11]

(2) Evidence must be given that the defendant has committed an act of handling. This requirement may be satisfied even if the evidence is disputed, but there must then be a careful direction that the evidence under section 27(3) is admitted only for the purpose of proving guilty knowledge,[12] and not to prove the act of handling.

(3) It must be shown that the goods that are the subject matter of the charge are in fact stolen goods.[13]

(4) The defendant must have seven days' notice in writing of the prosecution's intention to prove the previous conviction, although the notice need not

[6] *Hansard* (HC) 18 August 1911, vol 29, col 2254.

[7] See Appendix A below.

[8] See Appendix A below.

[9] See R Munday, "Handling the Evidential Exception" [1988] Crim LR 345, who quotes Lord Goddard CJ's criticism in *Davies* [1953] 1 QB 489, 493, referred to at n 10 below.

[10] *Per* Lord Goddard CJ in *Davies* [1953] 1 QB 489, 493.

[11] This must be the sole charge before the court at the time when the evidence is tendered. It is immaterial that some other offence was charged in the same indictment but has subsequently been severed and awaits trial: *Anderson* [1978] Crim LR 223 (Judge Stroyan QC); and see *Jones and Hayes* (1877) 14 Cox CC 3.

[12] *Wilkins* (1974) 60 Cr App R 300.

[13] *Girod and Girod* (1906) 22 TLR 720.

specify that it is given for the purpose of section 27(3).[14]

(5) The courts have held that the terms of the subsection must be strictly adhered to, because it allows the prosecution to prove facts that would not ordinarily be admissible at common law.[15]

3.10 The provision has been narrowly construed,[16] and the courts have assumed a discretion to exclude such evidence if there is a danger of undue prejudice.[17] This discretion is exercised where there is a danger of the jury regarding the evidence as relevant on the issue of possession.[18]

3.11 Similarly, the ambit of the evidence admissible under the provision has been literally construed.[19] Thus, under paragraph (a) all that is admissible is the bare fact "that the defendant was on a previous occasion found to be in possession of stolen goods".[20] The magistrates or jury will not, therefore, hear any details of the earlier transaction, and will have no evidence as to whether the defendant's earlier possession was that of a guilty handler or an unfortunate person who had acted honestly.[21] By confirming this interpretation of the paragraph, the Court of Appeal appears to be uncertain as to its rationale, which must be to show previous guilty knowledge.

3.12 One of the major reasons why section 27(3) was felt to be necessary was that, until recently, the difficulty of proving intent was compounded by the fact that no inference could be drawn against a defendant who refused to answer questions put by the police or to give evidence; thus the prosecution had enormous difficulties in establishing knowledge or belief that the goods were stolen. As a result of the Criminal Justice and Public Order Act 1994 a judge can, in certain circumstances, comment on the failure of a defendant to disclose a defence either when questioned by the police[22] or at the end of the prosecution's case.[23] It is too early to comment on the operation of these provisions, but we would be interested in

[14] *Airlie* [1973] Crim LR 310.

[15] See, in particular, *Davies* [1953] 1 QB 489, 493.

[16] *Cross and Tapper* points out, at p 410 n 5: "It is no more popular in its local form in Australia, see *Cresswell* (1987) 8 NSWLR 56 where faint ambiguity in the drafting of the starting point for time beginning to run was resolved in favour of inadmissibility."

[17] *Herron* [1966] 2 All ER 26, 30B–C, *per* Havers J: "the judge always has the discretion and overriding duty in every case to secure a fair trial, and if, in any particular case, he comes to the conclusion that, even though certain evidence is strictly admissible, yet its prejudicial effect once admitted is such as to make it virtually impossible for a dispassionate view of the crucial facts of the case to be thereafter taken by the jury, then he should exclude that evidence."

[18] *Perry* [1984] Crim LR 680.

[19] *Cross and Tapper*, p 410.

[20] *Wood* [1987] 1 WLR 779, 783C, *per* Mustill LJ.

[21] *Ibid*.

[22] See s 34 (accused's failure to mention facts when charged or questioned) and s 36 (accused's failure or refusal to account for objects in his possession etc).

[23] s 35.

hearing the views of any of our readers on whether this will mean that more defendants will testify, thus laying themselves open to cross-examination on whether they knew or believed the goods to be stolen.

3.13 In *Wood* [24] Mustill LJ observed that if paragraph (a) is given a literal construction then the fact-finders will merely be told that the defendant was, on a previous occasion, found to be in possession of stolen goods; they will not be given any facts upon which to base an assessment of whether on that earlier occasion the possession was guilty or innocent. The risk then is that the fact-finders will leap to the conclusion that there must have been some guilty knowledge attending the previous incident, and the task of conveying to them that "the only relevance of the fact is that the previous occasion would have served as a warning to be more careful in future (if indeed this is the rationale of paragraph (a)) will not be easily performed".[25] This rationale cannot be universally correct because the section permits the admission of evidence of *any* prior possession, including one later than the present alleged offence.[26]

3.14 Although paragraph (b) used to be similarly construed, with the result that it was thought permissible to adduce only the bare fact, time and place of the previous conviction for theft or handling and not to give any details,[27] the House of Lords held in *Hacker*[28] that paragraph (b) necessitates evidence being given of what the indictment for the earlier offence reveals about the nature of the goods stolen or handled.[29] In that case the charge was of handling the bodyshell of a Ford Escort RS Turbo motor car, and the evidence of the previous handling conviction revealed that it had also related to a Ford RS Turbo. The prosecution was not restricted, as the defence had contended it should be, to the bare fact, time and place of the earlier conviction.

3.15 It remains to be seen whether paragraph (b) will now be used more frequently, because the old and mistaken interpretation, which prevented the details of the

[24] *Wood* [1987] 1 WLR 779.

[25] *Ibid*, at p 784E–F, *per* Mustill LJ. If this is the rationale of paragraph (a) then there is a counter-argument: see R Munday, "The Admissibility of Evidence of Criminal Propensity in Common Law Jurisdictions" (1989) 19 VUWLR 223, 231, n 35: "given [the defendant's] previous skirmishes with the courts, he will have been more careful and the reason that once again he has stolen goods in his possession is because he is genuinely more likely *not* to have known that they were dishonestly come by" (emphasis in original).

[26] The section states that the handling to be relied on must have occurred "not earlier" than twelve months before the offence charged; see *Davies* [1972] Crim LR 431.

[27] *Fowler* (1988) 86 Cr App R 219.

[28] *Hacker* [1994] 1 WLR 1659.

[29] The reasoning was that paragraph (b) had to be read together with s 73(2) of PACE, which defines the phrase "certificate of conviction", in the case of a conviction on indictment, as "a certificate … giving the substance and effect (omitting the formal parts) of the indictment and of the conviction". A certificate of a summary conviction consists of "a copy of the conviction" signed by the clerk of the convicting court. The certificate must record the nature of the goods stolen or handled, and *Hacker* shows that "the whole certificate … is admissible".

previous conviction from being put in, was regarded as one reason for prosecutors' reluctance to rely on it.[30]

3.16 As we have previously said, evidence rendered admissible by the section is not admitted automatically: the judge retains a discretion, and should admit the evidence only if the demands of justice warrant its admission.[31] This means that the judge has a duty to exclude it if, in the circumstances of the case, it can be of only minimal assistance to the jury.[32]

3.17 The Court of Appeal has also given a clear indication that prosecutors should be discouraged from seeking to introduce evidence just because it is technically admissible under the subsection.[33] In exercising their discretion the courts are mindful that "to let in evidence of circumstances from which the existence of guilty knowledge on the prior occasion could be inferred would be such a striking inroad into the general rule which excludes evidence of prior unconnected offences that one would need clear words in the statute to justify it, and section 27(3) is quite silent".[34]

The justification for section 27(3)

3.18 When evidence is admitted under section 27(3), "very great care should be exercised in order to ensure that the jury realises the issues to which [the] previous convictions are relevant – namely those counts in which guilty knowledge is involved and not those counts in which possession is the only, or the primary, issue".[35]

3.19 Guilty knowledge in handling cases is notoriously difficult to prove, and this is undoubtedly a justification for the section.[36] Nevertheless, innocent persons do from time to time unwittingly acquire or deal with stolen goods, and this can make it difficult for the fact-finders to know whether a defence of lack of knowledge or belief might be true in the case before them. Their doubts in such cases might, however, be resolved if they were to learn that the accused had dealt with other stolen property in the past, or has previous convictions for handling or theft.[37]

3.20 Section 27(2) of the 1968 Act states:

[30] R Munday, "Handling the Evidential Exception" [1988] Crim LR 345, 351–352.

[31] *Rasini*, *The Times* March 20 1986.

[32] *Knott* [1973] Crim LR 36. But in *Canton* (1992) CA No 90/5242/X3 the Court of Appeal emphasised the importance of the judge ascertaining the circumstances of the conviction rendered admissible by paragraph (b) so that he or she may assess its relevance and probative value: E Griew, *The Theft Acts* (7th ed 1995), p 255 n 18(a).

[33] *Rasini*, *The Times* 20 March 1986.

[34] *Wood* [1987] 1 WLR 779, 784E–F, *per* Lord Mustill.

[35] *Wilkins* (1974) 60 Cr App R 300, 302, *per* Lane LJ.

[36] See *Cross and Tapper*, p 410.

[37] Such evidence – particularly evidence of mere theft – would generally be excluded at common law under the similar fact doctrine, but is generally admissible if the statutory conditions are satisfied for the limited purpose of proving knowledge under section 27(3).

> On the trial of two or more persons indicted for jointly handling any stolen goods the jury may find any of the accused guilty if the jury are satisfied that he handled all or any of the stolen goods, whether or not he did so jointly with the other accused or any of them.

3.21 This provision carries the risk that innocent persons such as antique dealers may face criminal liability. Clearly, however, this is a risk which the legislature has decided must be taken if habitual or professional receivers are to be prosecuted effectively.[38]

3.22 The extent of the risk taken by the legislature is shown by the fact that section 27(3) permits the prosecution to adduce evidence, under paragraph (a), of a crime with which the defendant has never been charged, let alone convicted.[39]

CHILDREN UNDER 14

3.23 There is a legal presumption, known as the presumption of doli incapax, that a child under the age of 14 does not know that what he or she is doing is seriously wrong; and the child cannot be convicted of an offence unless this presumption is rebutted by evidence. One way in which the prosecution may seek to rebut the presumption is by adducing evidence of the child's previous convictions.

3.24 This raises a problem which was formulated by Laws J for the Court of Appeal.[40] He describes a case where the "primary facts" are disputed and the Crown seeks to have at least part of the child's criminal record admitted in evidence to rebut the presumption. The problem is particularly acute where there is no other evidence that the Crown can adduce to rebut the presumption.[41] Laws J concluded that in such a case the judge will either have to admit the evidence, doing a "rank injustice" to the accused, or exclude it, doing a "rank injustice" to the prosecution.[42]

3.25 Lord Lowry, who gave the leading speech when the case reached the House of Lords, made it clear which party should, in his view, suffer the rank injustice in such a situation:

> a child defendant ought not to be put in a worse position than an adult by having evidence of his previous convictions admitted unless they

[38] *Andrews and Hirst on Criminal Evidence* (2nd ed 1992), para 15.57.

[39] The CLRC has recommended that the subsection be repealed: Evidence Report, para 101(vi). Interestingly, A T H Smith, *Property Offences* (1994) para 30-65 n 65, points out that similar provisions were not incorporated into the Victorian Crimes Act 1973 when the Theft Act 1968 was adopted, following a recommendation by the Chief Justice's Law Reform Committee that they were unfair to defendants.

[40] *C v DPP* [1994] 3 WLR 888.

[41] Although Laws J confines himself to discussion of this acute situation, it is submitted that the problem persists even where there is other evidence which the prosecution could call to rebut the presumption. It is not always possible to determine in advance which items of evidence will be persuasive, and so the prosecution could be disadvantaged even if there is other evidence on the point. In such a situation, it will not necessarily lead to the dismissal of the case if the prejudicial evidence is excluded.

[42] *C v DPP* [1994] 3 WLR 888, 895G.

> can be admitted under a generally applicable principle, for example, if he has put his character is issue or attacked the character of prosecution witnesses or if the earlier convictions come within the "similar facts" rule … .[43]

3.26 His Lordship did not consider that a direction to the jury would solve the problem:

> Assuming that the previous convictions were allowed to be put in evidence but were not admissible under the similar facts rule, it would clearly have been in vain for the judge to tell the jury to disregard them when considering the primary issue but then to take account of them if they had to decide the "knowledge" issue.[44]

3.27 His Lordship concludes:

> I do not think it right … to admit non-similar fact evidence which would be inadmissible on issue 1 for the purpose of proving the prosecution's case on issue 2. If the prosecution's case must sometimes fail because some or all of the probative evidence cannot be given, that is not a unique situation and it must be borne with fortitude in the interests of fairness to the accused.[45]

3.28 The type of convictions most likely to be relevant for the purpose of rebutting the presumption are those that are of a similar nature to the offence charged; and it is therefore clear, following Lord Lowry's dictum, that they will often be inadmissible.[46]

3.29 Lord Lowry's conclusion appears to be based on two precepts: a child should not be in a worse position than an adult; and if the prejudicial effect of the evidence will outweigh its probative value, then it should be excluded. It is respectfully submitted that these precepts are correct and that Lord Lowry is right when he says that the problem of the admissibility of the child's criminal record will persist as long as the presumption of *doli incapax* persists. We do not consider it appropriate for us to express a view on the desirability of retaining or abolishing the presumption in this paper, and we therefore consider how the problem can be tackled within the existing legal framework.

[43] *C v DPP* [1995] 2 WLR 383, 397H–398A.

[44] *Ibid*, at p 398F–G.

[45] *Ibid*, at p 399A–C.

[46] As, on the facts of *C v DPP*, this precise point was not in issue, his Lordship's comments are obiter; but we would expect them to carry considerable weight were the point to arise.

When previous misconduct is an element of an offence 53

Section 1(2) of the Official Secrets Act 1911 55

Section 27(3) of the Theft Act 1968 56

The application of section 27(3) 56

The justification for section 27(3) 59

Children under 14 60

PART IV
THE PRESENT LAW (III): ADDUCING BAD CHARACTER EVIDENCE IN CROSS-EXAMINATION (THE 1898 ACT)

4.1 Section 1 of the Criminal Evidence Act 1898, as amended, provides:

> Every person charged with an offence shall be a competent witness for the defence at every stage of the proceedings, whether the person so charged is charged solely or jointly with any other person. Provided as follows –
>
> …
>
> (e) A person charged and being a witness in pursuance of this Act may be asked any question in cross-examination notwithstanding that it would tend to criminate him as to the offence charged:
>
> (f) A person charged and called as a witness in pursuance of this Act shall not be asked, and if asked shall not be required to answer, any question tending to show that he has committed or been convicted of or been charged with any offence other than that wherewith he is then charged, or is of bad character, unless –
>
> (i) the proof that he has committed or been convicted of such other offence is admissible evidence to show that he is guilty of the offence wherewith he is then charged; or
>
> (ii) he has personally or by his advocate asked questions of the witnesses for the prosecution with a view to establish his own good character, or has given evidence of his good character, or the nature or conduct of the defence is such as to involve imputations on the character of the prosecutor or the witnesses for the prosecution, or the deceased victim of the alleged crime; or
>
> (iii) he has given evidence against any other person charged in the same proceedings.

4.2 Professor Tapper describes the Act in these terms:

> Not only is it facially self-contradictory and inconsistent, but it is vague in its terminology, opaque in its policy and contrary in apparent effect to the instincts of the practitioner at the criminal bar.[1]

We hope that in this Part the faults of the statute will become apparent.

[1] C Tapper, "The Revelation of *Jones v DPP*" (1988) 51 MLR 785.

4.3 The 1898 Act marked a significant development in criminal evidence. With the changes effected by the Act, the accused became for the first time generally competent to testify in all criminal cases.[2] It is important to note that the legislature *could* instead have chosen to provide that the accused should be a competent witness and that the ordinary rules should apply to him or her.[3] In that event, as *Cross and Tapper* points out,[4] the defendant would have been unduly favoured in one respect and unduly prejudiced in the other.

4.4 The accused would have been unduly *favoured* because he or she could have claimed the privilege against self-incrimination on the ground that answers to questions put in cross-examination might reveal his or her guilt of the charge, and unduly *prejudiced* as he or she would have been exposed to cross-examination on his or her criminal record in so far as it related to matters affecting his or her credibility as a witness. It seems that Parliament "was in an evident difficulty, and it pursued the familiar English system of a compromise."[5]

4.5 This compromise consisted of removing the privilege against self-incrimination by proviso (e) to section 1, under which the accused may be asked any question in cross-examination notwithstanding that it would tend to incriminate him or her as to the offence charged. In return, proviso (f) gives the accused a shield against being cross-examined on his or her criminal record or other misdeeds, which can be "thrown away" only in specified circumstances – by the accused giving evidence of his or her own good character, casting imputations on the prosecutor or prosecution witnesses, or giving evidence against any other person charged in the same proceedings.[6]

[2] There had already been a number of Acts passed before 1898 that contained express provisions by which prisoners were allowed to give evidence on their own behalf. This lack of consistency was used in argument during the Second Reading of the Bill that became the 1898 Act by the then Attorney-General, Sir Richard Webster QC MP. He remarked that "it does seem to me a most remarkable fact that if a man is charged with entering a house and committing a rape he can give evidence upon his own behalf, whereas if he is charged with committing murder he cannot give evidence": 56 Official Report (4th Series) col 978.

[3] *Jones v DPP* [1962] AC 635, 662, *per* Lord Reid.

[4] *Cross and Tapper,* pp 418–19.

[5] *Per* Viscount Sankey LC in *Maxwell v DPP* [1935] AC 309, 317.

[6] During the Second Reading debates in the Commons on the Bill that became the 1898 Act, the Attorney-General said:

> The reasons which have led us to take the view embodied in the Bill are that, according to the law of England, the offence for which a man is tried is the offence with which he is being charged, and not any other offence. At present previous convictions are only allowed to be given in evidence after the prisoner has been convicted of the offence with which he is charged; they are not allowed to be given as evidence before, except in particular cases where it is necessary to establish the offence with which the prisoner is charged. Under these circumstances it does seem to us better to maintain the existing privilege that the prisoner has of not having what I may call his past career brought before the jury in a way that would influence their minds unless he, by his misconduct in such a case, has rendered it necessary. Sir, I am fully alive to the facts that Members of this House may feel, possibly, that in safeguarding the prisoner to this extent I have done something which is not altogether logical. I prefer, however, if I

THE MEANING OF SECTION 1(f)

"shall not be asked, and if asked, shall not be required to answer"

4.6 The rule does not prevent a defendant from voluntarily making revelations about his or her past. As Lord Reid said,[7] the words "shall not be required to answer" are

> quite inappropriate for examination in chief. The proviso is obviously intended to protect the accused. It does not prevent him from volunteering evidence, and does not in my view prevent his counsel from asking questions leading to disclosure of previous conviction or bad character if such disclosure is thought to assist in his defence.[8]

4.7 The prohibition applies not only to cross-examination, but to any questions put by the trial judge.[9]

"committed or been convicted of or been charged with any offence other than that wherewith he is then charged"

4.8 These words extend the shield to cover offences of which the defendant has not been convicted.[10] The courts have been keen to ensure that the prohibition covers not only direct suggestions that the defendant has committed an offence, but also oblique ones.[11] The question whether a particular suggestion infringes the rule must be decided on a consideration of the cross-examination as a whole, not merely on one question taken in isolation.[12]

"or been convicted of … any offence other than that wherewith he is then charged"

4.9 This prohibition relates to all convictions, whether they occurred before or after the offence charged.[13] The prohibition operates when the suggestion of a previous

> possibly can – and I am sure that the House will understand my feeling – to proceed on the basis of doing what I feel to be fair to the prisoner.

56 Official Report (4th Series) col 984.

7 *Jones v DPP* [1962] AC 635, 663.

8 This dictum was approved by Lord Hodson in *Selvey v DPP* [1970] AC 304, 342H.

9 *Ratcliffe* (1919) 14 Cr App R 95.

10 In *Hills* [1980] AC 26 a defendant who had been charged with causing death by dangerous driving was asked whether it was true that he was at the time of the accident an unqualified driver driving without L-plates and unaccompanied by a qualified driver. As he had not been charged with either of those offences, the House of Lords held that he should not have been questioned about them.

11 In *Ratcliffe* (1919) 14 Cr App R 95 it was suggested by the judge that the defendant's answers to questions concerning his whereabouts at a certain time were unsatisfactory for some discreditable reason which was not revealed. It was held that the questioning tended to show the commission of some other offence and therefore should not have taken place.

12 *Ellis* [1910] 2 KB 746.

13 In *Wood* [1920] 2 KB 179, cross-examination was permitted on convictions that had occurred after the date of the offence charged after the defendant had put himself forward as being of good character. Nevertheless, the date of the convictions might be a factor affecting the exercise of the judge's discretion to prevent cross-examination: *Coltress* (1978) 68
Cr App R 193.

offence is made obliquely, such as by cross-examining the defendant as to his employment record during a time when (as counsel knows) he was in prison.[14] The likely effect of such a question on the jury must be determined by the trial judge. We agree with *Blackstone*[15] that Lord Denning was right to say that the critical factor is the impression that the question would make on the jury, and that if it is capable of conveying two different impressions, one objectionable and the other not, it should be excluded so as to ensure that the jury is not left with the worse impression of the two.[16]

4.10 The House of Lords has decided that the word "charged" means "charged in court", not merely suspected or accused without subsequent prosecution, as "The most virtuous may be suspected, and an unproven accusation proves nothing".[17] This does not mean that questions about incidents giving rise to a suspicion cannot be the subject of comprehensive cross-examination: the courts use the doctrine of relevance to decide whether such questions may be put.[18] Thus, questions such as "'Were you suspected?' or … 'Were you accused?' are inadmissible because they are irrelevant to the issue of character, and can only be asked if the accused has sworn expressly to the contrary."[19]

4.11 There are some cases where cross-examination about an acquittal might be relevant: Viscount Sankey envisaged such cases in *Maxwell*, for example, where it is alleged that one accused had uttered threats against another because he was angry with him for bringing a charge which turned out to be unfounded.[20]

THE RELATIONSHIP BETWEEN SECTION 1(e) AND SECTION 1(f)[21]

4.12 At first glance, section 1(e) appears to permit cross-examination of a kind which section 1(f) appears to prohibit. Thus, evidence on a charge of burglary that the accused had previous convictions for burglary would seem, on a literal construction of section 1(e), to be admissible as tending "to criminate him as to the offence charged", yet by virtue of section 1(f) this is prohibited as "tending to show that he has … been convicted of … any offence other than that wherewith he is then charged". The House of Lords sought to resolve the apparent conflict between these subsections when, in *Jones v DPP*,[22] a majority took the view that, in cases of conflict, the prohibition in section 1(f) defeats the permission in section 1(e). Of those in the majority, Lord Reid and Lord Morris of Borth-y-Gest took rather different views from each other, while Viscount Simonds gave support to

[14] *Haslam* (1916) 12 Cr App R 10.

[15] *Blackstone*, para F14.8.

[16] *Jones v DPP* [1962] AC 635, 663.

[17] *Stirland v DPP* [1944] AC 315, 324, *per* Viscount Simon LC.

[18] *Maxwell v DPP* [1935] AC 309, 321; affirmed in *Stirland v DPP* [1944] AC 315.

[19] *Per* Viscount Simon in *Stirland v DPP* [1944] AC 315, 327.

[20] *Maxwell v DPP* [1935] AC 309, 320.

[21] For the background to the 1898 Act, see C Tapper, "The Meaning of Section 1(f)(i) of the Criminal Evidence Act 1898" in C Tapper (ed), *Crime, Proof and Punishment* (1981) pp 296–314.

[22] *Jones v DPP* [1962] AC 635.

them both. For Lord Reid, the words "tend to criminate him as to the offence charged" in section 1(e) meant "tend to connect him with the commission of the offence charged", rather than "tend to convince or persuade the jury that he is guilty".[23] Lord Morris of Borth-y-Gest said:

> Proviso (e) permits questions to be asked; the corollary is that they must be answered. Proviso (f) does not say that certain questions may be asked; it says that certain questions may not be asked. This means that even if the questions are relevant and have to do with the issue before the court they cannot be asked unless covered by the permitting provisions of proviso (f).[24]

4.13 Thus, the prohibition in proviso (f) is to be regarded as "universal" and "absolute" unless the exceptions come into play.[25] The matter was revisited in *Anderson*,[26] in which Lord Lane CJ (giving the judgment of the Court of Appeal) appears to have considered a question revealing an offence other than that charged as permissible if proof of the commission of that other offence "tended to connect the appellant with the offence charged". We take the view that *Blackstone*[27] is right to say that the correct interpretation of the majority decision in *Jones v DPP* is that such a question is permissible only if it falls within the terms of section 1(f)(i).[28]

SECTION 1(f)(i)

4.14 Section 1(f)(i)[29] permits the cross-examination of the defendant as to another offence if

> the proof that he has committed or been convicted of such other offence is admissible evidence to show that he is guilty of the offence wherewith he is then charged … .

It is this exception to the general prohibition against the cross-examination of the defendant on his or her bad character that permits the use of similar fact evidence and evidence of previous misconduct which is an integral part of the offence.[30]

4.15 *Cross and Tapper*[31] points out that the practical effect of the paragraph is greatly reduced by the decision of the House of Lords in *Jones v DPP*.[32] In that case it was

[23] *Ibid*, at pp 662–663.

[24] *Ibid*, at pp 682–683.

[25] See *Maxwell v DPP* [1935] AC 309, 319, *per* Viscount Sankey LC.

[26] *Anderson* [1988] QB 678.

[27] *Blackstone*, para F14.3.

[28] An alternative approach has been taken in the High Court of Australia in *Attwood* (1960) 102 CLR 353, 361–362, whilst accepting the difficulty about the function of s 1(f)(i) if this approach is chosen. The minority view was also recommended in the ALRC Report No 38, para 117.

[29] See also C Tapper, "The Meaning of Section 1(f)(i) of the Criminal Evidence Act 1898", in C Tapper (ed) *Crime, Proof and Punishment* (1981) p 296.

[30] Eg evidence of a previous conviction for a road traffic offence, in later proceedings for driving while disqualified: see para 3.2 above.

[31] *Cross and Tapper*, p 428.

held that, where evidence of a previous offence has been adduced in chief, the accused may be cross-examined about it without reliance on the exception in section 1(f)(i), because the general prohibition imposed by section 1(f) does not apply. However, where no such evidence has been adduced, the paragraph remains of importance, as it refers to "admissible" rather than to "admitted" evidence. The House of Lords in *Jones*, however, held that some evidence of such a matter should normally be adduced before cross-examination, so as to allow the defendant to challenge any supposed points of similarity between the two offences or to cross-examine the witnesses for the prosecution. On occasion, though, the prosecution will be unwilling or unable to offer such evidence in chief.[33]

4.16 Section 1(f)(i) refers only to evidence of the *commission* of the crime or evidence of a *conviction*, not to *charges* or to misconduct falling short of crime. These omissions are unfortunate, since they may require the exclusion of highly probative evidence. Thus in *Cokar*[34] the defendant was charged with breaking and entering with intent to steal. His defence was that he had entered the house in question in order to have a rest; he claimed not to know that such conduct would not be an offence. In order to rebut this claim, the prosecution was permitted to ask him about a previous occasion on which he had been acquitted of the same offence. It was held that these questions, though relevant, should not have been allowed.

THE FIRST LIMB OF SECTION 1(f)(ii): ASSERTING GOOD CHARACTER

4.17 The first limb of section 1(f)(ii) reads as follows:

> he has personally or by his advocate asked questions of the witnesses for the prosecution with a view to establish his own good character, or has given evidence of his good character …

4.18 Where the defendant is of good character, a jury will be directed that this is relevant to the question of how likely he or she is to have done what is alleged and, where applicable, to his or her credibility.[35]

4.19 The rationale of the exception in the first limb of section 1(f)(ii) is that

> if the prisoner by himself or his witnesses seeks to give evidence of his own good character, for the purpose of showing that it is unlikely that he committed the offence charged, he raises by way of defence an issue as to his good character so that he may fairly be cross-examined to show the contrary.[36]

4.20 There are thus three ways in which the defendant's previous misconduct may be revealed as a result of an attempt by the defence to suggest that he or she is of good character. Under the first limb of section (1)(f)(ii), the previous misconduct

[32] *Jones v DPP* [1962] AC 635.

[33] As in *Jones, ibid.*

[34] *Cokar* [1960] 2 QB 207.

[35] *Vye* [1993] 1 WLR 471. The terms of the direction recommended by the JSB are set out at Appendix D, para D.12 below.

[36] *Maxwell v DPP* [1935] AC 309, 319, *per* Viscount Sankey LC.

may be revealed in cross-examination of the defendant; at common law, there can be cross-examination of any witness who has made inaccurate[37] or misleading[38] claims about the defendant's character; and finally, the prosecution may be allowed to call evidence in rebuttal.[39]

4.21 The *use* to which evidence of the defendant's previous misconduct may be put, once elicited under the first limb of section 1(f)(ii), is a difficult question; we examine it in Part XI below.[40]

What is an assertion of good character?

4.22 The prosecution cannot invoke the first limb of section 1(f)(ii) merely because the defendant gives evidence which, though relevant to the charge, may cast him or her in a good light.[41] In *Malindi*,[42] the defendant to a charge of conspiracy testified that at a meeting at which violence was discussed, he had counselled against its use. This was not regarded as "giving evidence" of good character as he did not "independently of giving his account of what had actually happened and of what had actually been said, assert that he was a man of good character".[43]

4.23 The courts have held that a defendant has given evidence of good character where he or she claims to have been earning an honest living for a considerable time,[44] to be a regular churchgoer[45] or to have performed kind or honest deeds (such as returning lost property to its owner) on a previous occasion.[46]

4.24 The shield is not lost where the assertion of good character is elicited in the cross-examination of a defence witness,[47] or is volunteered by such a witness,[48] or is

[37] *Redd* [1923] 1 KB 104.

[38] *Winfield* (1939) 27 Cr App R 139.

[39] See para 4.32 below.

[40] Paras 11.44 – 11.45 below.

[41] *Ellis* [1910] 2 KB 746.

[42] *Malindi* [1967] 1 AC 439 (PC).

[43] *Ibid*, at p 453.

[44] *Powell* [1985] 1 WLR 1364.

[45] *Ferguson* (1909) 2 Cr App R 250.

[46] *Samuel* (1956) 40 Cr App R 8.

[47] *Stronach* [1988] Crim LR 48.

[48] *Redd* [1923] 1 KB 104.

made in opening the defence case but not in evidence.[49]

4.25 Difficulties arise where the accused seeks to suggest a favourable contrast between his or her character and the bad character of others who could have committed the offence. If those others are called as witnesses for the prosecution, the matter is governed by the second limb of section 1(f)(ii).[50] *Cross and Tapper* states that where these witnesses are not called, the question whether the defendant has lost the shield depends on "exactly how pointedly the contrast is made".[51]

4.26 Although this principle is easy to state, it poses difficulties in its application. In *Lee*[52] the accused was charged with theft from the house in which he was lodging, and did not lose the shield by pointing out that others with criminal records had access to the house. In *Bracewell*,[53] however, the defendant to a charge of murder in the course of burglary lost the shield by contrasting his own cool professionalism with the panic-prone inexperience of his companion.[54]

Character is indivisible

4.27 The character of the accused is regarded as indivisible. The accused cannot assert one part of his or her character which happens to be good without risking the exposure of another part which may be bad. In *Winfield*[55] the accused relied upon character witnesses as to his good behaviour towards women, and it was held that he could not then resist the introduction of his previous convictions for dishonesty, as

> there is no such thing known to our procedure as putting half a prisoner's character in issue and leaving out the other half.[56]

Similarly, the accused cannot confine the inquiry to a particular period of time when his or her character was good.[57]

4.28 We will consider in due course the correctness of the notion of the indivisibility of character,[58] especially as it has been the subject of academic criticism.[59]

[49] *Ellis* [1910] 2 KB 746. See paras 11.32 – 11.39 below.

[50] *Ellis* [1910] 2 KB 746.

[51] *Cross and Tapper*, p 431.

[52] *Lee* [1976] 1 WLR 71.

[53] *Bracewell* (1979) 68 Cr App R 44.

[54] But it must be doubtful whether a claim to be a cool, professional burglar can really amount to a claim to good character, and it is arguable that *Bracewell* is best explained as a case on s 1(f)(iii).

[55] *Winfield* (1939) 27 Cr App R 139.

[56] *Ibid*, at p 141, *per* Humphreys J.

[57] *Shrimpton* (1851) 2 Den 319; 169 ER 521.

[58] See paras 6.23 – 6.29 below.

[59] See R N Gooderson, "Is the Prisoner's Character Indivisible?" [1953] CLJ 377, suggesting that character is divisible.

Assertions of character other than good character

4.29 When the defence chooses to reveal some part of the accused's character which is not in any sense *good* character, the prosecution or a co-accused is, in general, not then entitled to add further evidence of bad character.[60] There are, however, two qualifications to this rule.

4.30 First, there may be cases where a certain aspect of bad character is denied for the purpose of suggesting a lack of disposition to commit the offence. The accused may, for example, seek to deny a rape charge by claiming to be a practising homosexual,[61] or claim to be a highly professional burglar who would not be likely to commit the clumsy murder with which he is charged.[62] Such claims appear to put the defendant's character in issue. Second, an accused may not pretend to have made a clean breast of previous misconduct when he or she has not in fact done so.[63]

Cross-examination of witnesses (other than the defendant) who give evidence of the defendant's good character

4.31 It is now accepted,[64] in spite of earlier doubts,[65] that a witness may be asked about the previous convictions of the accused where the witness has spoken for the accused's good character; but the courts will not permit such cross-examination if the assertion is unsolicited.[66]

Evidence in rebuttal

4.32 If an accused falsely asserts good character, the prosecution can respond by calling evidence of bad character or previous convictions, although there is obviously no need to do so if the defendant admits these matters in cross-examination.[67] This is consistent with the modern rule which allows a prosecutor to adduce evidence in rebuttal where he or she could not reasonably have foreseen that the matter would arise.[68]

[60] *Thompson* [1966] 1 WLR 405.

[61] Cf *Redgrave* (1981) 74 Cr App R 10, where the accused sought to put in evidence of his heterosexual disposition (he was accused of importuning in a public lavatory). That evidence was rejected by the Court of Appeal as irrelevant.

[62] *Bracewell* (1979) 68 Cr App R 44; para 4.26 above.

[63] *Wattam* (1952) 36 Cr App R 72, 78, obiter, *per* Oliver J. In that case, the defendant to a charge of murder had given evidence that he was a thief and had spent time in Borstal. The Court of Criminal Appeal held that this was *not* equivalent to a defendant saying that he or she had been convicted of a crime once when in fact he or she has been convicted on several occasions.

[64] *Waldman* (1934) 24 Cr App R 204.

[65] *Wood and Parker* (1841) 5 Jur 225, cited by *Cross and Tapper*, p 351.

[66] *Redd* [1923] 1 KB 104.

[67] See, eg, *Lowery* [1974] AC 85 (PC).

[68] *Scott* (1984) 79 Cr App R 49.

THE SECOND LIMB OF SECTION 1(f)(ii): CASTING IMPUTATIONS AGAINST PROSECUTION WITNESSES

4.33 Section 1(f)(ii) permits a defendant to be cross-examined as to previous misconduct if

> the nature or conduct of the defence is such as to involve imputations on the character of the prosecutor or witnesses for the prosecution; or the deceased victim of the alleged crime …

4.34 The reference to the deceased victim of the alleged crime was recently inserted[69] in order to ensure that the jury should know the character of the person attacking the character of the deceased.[70] Previously, an attack on the character of a murder victim had not entitled the prosecution to cross-examine the defendant as to character, since the deceased was neither the prosecutor nor a witness.[71]

4.35 The section is not limited to cases of homicide, and would, on the face of it, apply to any case in which the victim has died, whether or not the death was the fault of the defendant.[72] Any references, in cases or in the section, to the character of prosecution witnesses must now be regarded as including the character of a victim who has since died.

4.36 On a literal construction, this provision might lead to accused persons being liable to cross-examination on their criminal record whenever they assert their innocence or contend that the prosecution's evidence is false, because of the implied suggestion that at least one of the prosecution witnesses is guilty of perjury. This argument has had some judicial support.[73] However, it has been argued that the literal meaning of the words "cannot … have been intended by Parliament to make a man liable to have his previous convictions revealed whenever the essence of his defence necessitates imputations on the character of the prosecutor. This revelation is always damaging and often fatal to a defence."[74]

[69] By s 31 of the Criminal Justice and Public Order Act 1994, as a result of an amendment proposed by Lord Ackner.

[70] During the debate in House of Lords, Lord Ackner gave the example of a defendant charged with murder, who claims that he was defending himself against homosexual acts by the victim: *Hansard*, 5 July 1994, vol 556, col 1246.

[71] *Biggin* [1920] 1 KB 213.

[72] Thus, as May points out, "if a defendant puts in the driving convictions of the deceased in a case of causing death by dangerous driving, he will be at risk of having his own convictions put before the court": R May, *Criminal Evidence* (3rd ed 1995) p 138.

[73] The case of *Hudson* [1912] 2 KB 464 settled the question of whether the shield is lost in all circumstances where the statute applies, Lord Alverston CJ holding, at p 470, that:

> We think that the words of the section, "unless the nature or conduct of the defence is such as to involve imputations" etc, must receive their ordinary and natural interpretation, and that it is not legitimate to qualify them by adding or inserting the words "unnecessarily", or "unjustifiably", or "for purposes other than that of developing the defence", or other similar words.

[74] *Selve*y v *DPP* [1970] AC 304, 353, *per* Lord Pearce.

4.37 The House of Lords held in *Selvey*[75] that the court has a discretion to restrict the cross-examination permitted by s 1(f)(ii), but rejected the contention that this discretion ought to be exercised in favour of the accused where his or her defence necessarily involves the making of such imputations. The Court of Appeal in *Britzman*[76] sought to lay down guidelines for the exercise of this discretion. These guidelines do not directly take account of the need of the accused person to mount a defence to a charge; rather, they may be seen as a discussion of the practical meaning of the word "imputation". It was said that the discretion should be exercised if the imputation amounts to the denial of a single act or short series of acts relating to a single incident (such as an interview); that it should normally be exercised where the defendant faces overwhelming evidence of guilt; that allowance must be made for the inevitable stresses of cross-examination; and that undue emphasis should not be placed upon the accused's choice of words. "It cannot be pretended that such guidelines offer very substantial protection."[77]

4.38 In addition to the power to disallow cross-examination under section 1(f)(ii) altogether, for reasons of the kind discussed in *Britzman*, *Selvey* recognises a further application of the discretion – namely the power to disallow cross-examination on *particular instances* of previous misconduct. Whereas the *Britzman* guidelines essentially amount to guidance on when the shield should in practice be regarded as lost, this latter form of the discretion is essentially concerned with the need to exclude evidence whose probative value is outweighed by its likely prejudicial effect.

4.39 There are two issues to be considered: first, what are the pre-conditions for the operation of this limb of section 1(f)(ii); and second, the difficult question of the exercise of the court's discretion.

The pre-conditions

4.40 As *Cross and Tapper* points out,[78] it is not possible to set out an exact definition of what amounts to an imputation, as much depends upon the detailed facts of each case. To trigger this limb of the subsection, the imputation must be related to the "character of the prosecutor or the witnesses for the prosecution"; thus an attack upon the conduct of a living person not called as a witness does not endanger the shield.[79]

4.41 As we have said,[80] in deciding what amounts to an imputation the courts have been very conscious that

> unless [this limb] is given some restricted meaning, a prisoner's bad character, if he had one, would emerge almost as a matter of course. Counsel for the defence could not submit that a witness for the

[75] *Ibid*.

[76] *Britzman* [1983] 1 WLR 350.

[77] *Cross and Tapper*, p 441.

[78] *Cross and Tapper*, p 437.

[79] *Westfall* (1912) 7 Cr App R 176.

[80] See para 4.36 above.

> prosecution was untruthful without making an imputation on his character; a prisoner charged with assault could not assert that the prosecutor struck first without imputing to him a similar crime.[81]

The courts have developed a number of doctrines which alleviate the harsh consequences of a literal reading of the second limb.

4.42 Thus, the word "imputation" is given a limited meaning and refers only to situations where there is an attack on the character of the person in question, such as where his or her disposition is impugned by allegations of specific discreditable or disgraceful conduct.[82] It was formerly held that an emphatic denial does not count as an imputation, even though it may take the form of the accused stating in cross-examination that a prosecution witness's evidence is a lie and the witness therefore a liar,[83] but that if the defendant's denial goes beyond what is necessary to challenge the veracity of the accuser, it will amount to an imputation.[84] According to *Britzman*,[85] however, a denial alone may suffice, though the nature of the "imputation" may be relevant to the exercise of the discretion to disallow cross-examination where the shield is technically lost. No exception is made for imputations which are necessary for the accused to establish his or her defence.[86] The motive or purpose of the imputation is irrelevant; the issue is whether an imputation was made.

4.43 The following suggestions have been held to be imputations falling within the second limb so as to deprive the defendant of the shield (subject to the judicial discretion):[87] that the police had obtained formal remands in order to manufacture a confession;[88] that the crime was committed by a prosecution witness;[89] that a prosecution witness was a homosexual;[90] that the police had concocted a

[81] *Cook* [1959] 2 QB 340, 345, *per* Devlin J.

[82] *Dunkley* [1927] 1 KB 323.

[83] *Rouse* [1904] 1 KB 184. In *Selvey v DPP* [1970] AC 304, 339F, Viscount Dilhorne said that a rule had developed whereby "If what is said amounts in reality to no more than a denial of the charge, expressed, it may be, in emphatic language, it should not be regarded as coming within the section".

[84] *Rappolt* (1911) 6 Cr App R 156.

[85] *Britzman* [1983] 1 WLR 350, 355; paras 4.37 above and 4.54 below.

[86] *Selvey v DPP* [1970] AC 304, in which the accused was charged with committing buggery on a young man. The accused denied the charge, saying that the complainant had told him that he was prepared to "go on the bed". Already on that day he had permitted an act of buggery on himself for one pound. The judge asked the accused whether he was inviting the jury to disbelieve the complainant because he was "that sort of young man"; the accused responded in the affirmative and the judge then permitted cross-examination on the accused's record. An appeal against conviction failed in the House of Lords. It is difficult to see how the defendant could have put forward his defence without asserting that the alleged victim had claimed to be a male prostitute.

[87] See paras 4.48 – 4.57 below.

[88] *Jones* (1923) 17 Cr App R 117.

[89] *Hudson* [1912] 2 KB 464.

[90] *Bishop* [1975] QB 274, in which it was argued that it should no longer be regarded as discreditable to suggest that a person had had a lawful homosexual relationship, but the argument was rejected on the grounds that the Court of Appeal believed that reasonable

statement;[91] that various police witnesses had falsely invented admissions;[92] that an admission had been extorted by threatening that the prisoner's wife would be charged;[93] and that a person was drunk in charge of a car.[94]

4.44 On the other hand, it is not every allegation of misconduct or impropriety that will amount to an imputation. *Blackstone* points out that to have a mistress was once regarded as evidence of bad character,[95] but queries whether it would necessarily be so regarded by a modern court, and suggests that what constitutes an "imputation" may vary from one generation to the next.[96]

4.45 Where an allegation would amount to an imputation if it were expressly made, it is no less an imputation because it is merely implied:[97] the courts look at the intention behind the suggestion. The precise words used may be inappropriate to the circumstances: for example, "mistake" may be a euphemism for a lie.[98]

Rape cases

4.46 In cases of rape, a defendant who alleges consent on the part of the victim does not, for the purpose of this limb, make "imputations on the character of the prosecution or witnesses for the prosecution".[99] Three reasons are advanced for this approach. First, it is said that rape is a crime which is sui generis, justifying special rules;[100] secondly, it would be unjust to put the defendant at risk of losing the shield by doing no more than deny one of the ingredients of the offence which

people would still find such conduct immoral or wrong, and a false accusation of homosexual conduct would still be regarded as defamatory.

91 *Clark* [1955] 2 QB 469.

92 *McGee and Cassidy* (1979) 70 Cr App R 247. In *Britzman* [1983] 1 WLR 350, Lawton LJ said, at p 372: "A defence to a criminal charge which suggests that prosecution witnesses have deliberately made up false evidence in order to secure a conviction must involve imputations on the characters of those witnesses".

93 *Cook* [1959] 2 QB 340.

94 *Brown* (1960) 44 Cr App R 181.

95 *Kurasch* [1915] 2 KB 749.

96 *Blackstone*, para F14.24. Indeed, it is questionable whether an imputation necessarily entails an allegation of unlawful or immoral conduct: see *Bishop* [1975] QB 274, 279, and paras 12.31 – 12.33 below. We wonder whether an allegation that a witness had parked his or her car on a double yellow line would necessarily be considered as an imputation.

97 *Britzman* [1983] 1 WLR 350.

98 *McGee and Cassidy* (1979) 70 Cr App R 247, 254–255, *per* Eveleigh LJ. Recent decisions that it was not an imputation for an accused to deny knowing that there was a weapon in his car, although the only other plausible inference was that it had been planted by a police officer (*Goodwin*, *The Times* 26 November 1993), or to suggest that the alleged victim of robbery had miscalculated the amount of money in his possession and was not creditworthy (*Stanton* [1994] Crim LR 834), are hard to reconcile with the earlier authorities and are, perhaps, best explained as implicitly involving the exercise of the *Britzman* discretion to disallow cross-examination even where an imputation has in fact been made.

99 See especially *Selvey v DPP* [1970] AC 304; *Sheean* (1908) 21 Cox CC 561; *Turner* [1944] KB 463.

100 *Per* Devlin J in *Cook* [1959] 2 QB 340, 347. *Blackstone*, at para F14.26, submits that rape should not be treated as an offence sui generis.

the prosecution must prove.[101] This reasoning would apply equally to other offences. Thirdly, although some say that there is no imputation in such a case, it has also been said that if there *is* an imputation then the discretion to prevent cross-examination is always exercised.[102] It would, no doubt, help if the law were clearer about what can and cannot amount to an imputation.[103]

4.47 Following the Heilbron Report,[104] statutory restrictions were introduced on the cross-examination of complainants in rape cases;[105] but these have no effect on the defendant's immunity from cross-examination as to character where consent is alleged. The Heilbron Committee was set up in 1975, shortly after the CLRC had made its evidence recommendations. The Heilbron Committee favoured the compromise solution reached by the CLRC, that if the main purpose of the cross-examination is to attack the credibility of prosecution witnesses the shield should be lost, but if the attack is necessary to put forward the defence then it should not. That solution received support from J C Smith[106] and Lord Wigoder.[107] It is essentially the same as the second option that we put forward in Part XII below.[108]

[101] *Turner* [1944] KB 463, 469, *per* Humphreys J. See *Goodwin, The Times* 26 November 1993, where it was held that the mere denial of the existence of an incriminating fact does not amount to an imputation.

[102] Following Devlin J in *Cook* [1959] 2 QB 340, 347.

[103] See paras 12.31 – 12.33 below, where we consider this omission as a defect in the second limb of s 1(f)(ii).

[104] Report of the Advisory Group on the Law of Rape (1975) Cmnd 6352.

[105] Sexual Offences (Amendment) Act 1976, s 2.

[106] Who commented "Certainly [the defendant] ought to be able to deny the allegation, that the woman with whom he had intercourse did not consent, with impunity; but it does not necessarily follow that he should be able to support his denial with circumstantial evidence with impunity. … [O]nce he … introduces evidence of acts by the complainant on other occasions, whether with others or with himself, there is a case for saying that he should be exposed to cross-examination as to his own bad character": J C Smith, "The Heilbron Report" [1976] Crim LR 97, 105.

[107] During the discussion of the Sexual Offences (Amendment) Bill, Lord Wigoder commented:

> For some reason that I find not entirely easy to follow, there has always been an exception made in rape cases, with the result that a man of bad character, a man who has committed previous offences of rape, nevertheless has complete freedom through his counsel to cross-examine a complainant as much as he likes about her previous sexual misbehaviour, if that be the right word, while he himself remains immune in return from any such cross-examination. I should have thought that there might be something to be said for looking at that rule and seeing whether there is any justification for it in present day circumstances.

Hansard (HL) 22 October 1976, vol 375, col 1779. As a result of the 1976 Act, the defendant cannot cross-examine the complainant "as much as he likes", but where he is permitted to do so, he can do so with impunity.

[108] Paras 12.50 – 12.70. That option is broadly similar to option 3 (see paras 12.71 – 12.79), but we prefer the latter for the reasons given at paras 12.70 and 12.79.

Judicial discretion

4.48 The trial judge has an overall discretion to disallow cross-examination if the prejudicial value of the cross-examination exceeds its probative value.[109] Even if an accused has forfeited the shield by making imputations, the court retains a discretion to restrain the prosecution from unfair cross-examination.[110] Although it has been suggested[111] that the basic rule is that the discretion should be exercised in favour of the accused, this was rejected by the House of Lords in *Selvey*,[112] where the approach of Devlin J in *Cook* was approved.[113]

4.49 The court will have to decide how to exercise its discretion on the particular facts of each case, and precedents are therefore of limited value.[114] There are, however, certain factors to be taken into account. The principles laid down in leading cases,[115] and approved by the House of Lords in *Selvey*, were succinctly and conveniently summarised by Ackner LJ:

> 1. The trial judge must weigh the prejudicial effect of the questions against the damage done by the attack on the prosecution's witnesses, and must generally exercise his discretion so as to secure a trial that is fair both to the prosecution and the defence …
>
> 2. Cases must occur in which it would be unjust to admit evidence of a character gravely prejudicial to the accused, even though there may be some tenuous grounds for holding it technically admissible … . Thus, although the position is established in law, still the putting of the questions as to character of the accused person may be fraught with results which immeasurably outweigh the result of questions put by the defence and which make a fair trial of the accused almost impossible …
>
> 3. In the ordinary and normal case the trial judge may feel that if the credit of the prosecutor or his witnesses had been attacked, it is only fair that the jury should have before them material on which they can form their judgement whether the accused person is any more worthy

[109] *Powell* [1985] 1 WLR 1364. See also *Murdoch v Taylor* [1965] AC 574, 592G, *per* Lord Donovan, and *Thompson* [1966] 1 WLR 405.

[110] *Selvey v DPP* [1970] AC 304.

[111] In *Flynn* [1963] 1 QB 729, the Court of Criminal Appeal held, at p 737 (*per* Slade J), that "where … the very nature of the defence necessarily involves an imputation against a prosecution witness or witnesses, the discretion should, in the opinion of this court, *be as a general rule exercised in favour of the accused*, that is to say evidence as to his bad character or criminal record should be excluded" (emphasis added).

[112] *Selvey v DPP* [1970] AC 304, where the defendant's attack on the character of the prosecution witness was central to his defence, but the House of Lords had little hesitation in holding that the trial judge had exercised his discretion correctly in permitting the defendant to be cross-examined on his previous convictions.

[113] *Cook* [1959] 2 QB 340, 347–8, quoted at para 4.56 below.

[114] In *Selvey v DPP* [1970] AC 304 Lord Pearce said, at p 360: "the courts have been right in thinking the question is whether *this* attack on the prosecution ought to let in *these* convictions on the particular facts of the case and on such a point rules are no substitute for a discretion in producing a fair trial" (emphasis in original).

[115] *Jenkins* (1945) 31 Cr App R 1; *Cook* [1959] 2 QB 340.

> to be believed than those he has attacked. It is obviously unfair that the jury should be left in the dark about an accused person's character if the conduct of his defence has attacked the character of the prosecutor or the witnesses for the prosecution within the meaning of the section….
>
> 4. In order to see if the conviction should be quashed, it is not enough that the court think it would have exercised its discretion differently. The Court will not interfere with the exercise of a discretion by a judge below unless he has erred in principle, or there is no material on which he could properly have arrived at his decision …[116]

4.50 Before looking at the way in which the courts have exercised the discretion, it must be emphasised that the purpose of the cross-examination is to attack the defendant's credit as a witness, not to show that he or she has a disposition to commit the offence[117] – although in some cases it may incidentally have this effect. This is consistent with earlier judicial reasoning.[118]

Similarity of offences

4.51 There is some suggestion that where the previous convictions of the accused are of a similar nature to the offence charged, the jury is likely to regard the previous convictions as being directly relevant to the question of guilt, and so the judge's discretion to exclude cross-examination on the defendant's record ought to be exercised in the defendant's favour.[119] This approach has been roundly rejected by the courts.[120] The purpose of the cross-examination is to attack the defendant's creditworthiness as a witness and not to show disposition to commit an offence.[121] That said, it is quite natural for a jury or magistrates to use similar previous convictions in this way, and it appears from empirical research that juries do so, even when instructed not to.[122]

[116] *Burke* (1985) 82 Cr App R 156, 161, *per* Ackner LJ.

[117] *Per* Gage J, reading a judgment prepared by Stuart-Smith LJ, in *McLeod* [1994] 1 WLR 1500, 1511H. This passage was cited with approval in *Fearon v DPP* (1995) 159 JP 649, 653E–G, *per* Leggatt LJ.

[118] Eg *Watts* (1983) 77 Cr App R 126.

[119] See *Maxwell v DPP* [1935] AC 309, 317, *per* Viscount Sankey LC.

[120] *McLeod* [1994] 1 WLR 1500, 1512G, where Gage J, reading a judgment prepared by Stuart-Smith LJ, stated that "the mere fact that the offences are of a similar type to that charged or because of their number and type have the incidental effect of suggesting a tendency or disposition to commit the offence charged will not make them improper".

[121] *McLeod* [1994] 1 WLR 1500, 1511H; paras 4.82 – 4.84 below. *Blackstone* points out, at para F14.32, that in *Selvey v DPP* [1970] AC 304 (in which the defendant lost his shield by claiming that the man with whom he was alleged to have committed buggery was in fact a male prostitute, who had invented the allegations out of spite because the defendant had declined his services) the exercise of the discretion was subject to close scrutiny by the House of Lords, who might have been expected to say if they had believed it to be an incorrect exercise of the discretion; but no adverse comment was made.

[122] See Appendix D below.

4.52 Although there have been a number of recent cases in which similar previous convictions have been admitted,[123] the true position is probably that "there is no reason … to distinguish between previous convictions of a like nature and previous convictions which are not of a like nature" for the purpose of the second limb.[124] After all, the issue is credibility and not propensity.

Where the convictions do not reveal dishonesty

4.53 There is some authority for the view that the discretion should be exercised so as to exclude a criminal record which does not involve dishonesty,[125] but it now seems clear that it may be right for the jury to know, in general terms, the character of a person making an imputation.[126]

Defence necessarily involving imputations

4.54 The Court of Appeal has laid down guidelines for the exercise of the discretion where the conduct of the defence necessarily involves an allegation that a prosecution witness has deliberately made up false evidence in order to secure a conviction:

> First, [the discretion] should be used if there is nothing more than a denial, however emphatic or offensively made, of an act or even a short series of acts amounting to one incident or in what was said to have been in a short interview. Examples are provided by the kind of evidence given in pickpocket cases and where the defendant is alleged to have said: "Who grassed on me this time?" The position would be different however if there was a denial of evidence of a long period of detailed observation extending over hours and just as in this case and in *Tanner*,[127] where there were denials of long conversations.
>
> Second, cross-examination should only be allowed if the judge is sure that there is no possibility of mistake, misunderstanding or confusion and that the jury will inevitably have to decide whether the prosecution

[123] Eg *Burke* (1985) 82 Cr App R 156. The defendant, who was charged with drug offences, alleged that the prosecution evidence had been fabricated by police officers who had raided his premises. The trial judge decided that Burke's previous convictions for drug-related offences were more probative than prejudicial, and they were admitted. In *Powell* [1985] 1 WLR 1364 the defendant, who was charged with living on the earnings of prostitution, attacked the bona fides of prosecution witnesses, with the result that the judge exercised his discretion to permit the defendant to be cross-examined about previous offences.

[124] *Fearon v DPP* (1995) 159 JP 649, 654B, *per* Leggatt LJ, with whom Buxton J agreed.

[125] *Watts* (1983) 77 Cr App R 126. This fact was given as one reason for excluding the criminal record of the defendant, but this was a very unusual case.

[126] In *Fearon v DPP* (1995) 159 JP 649, Leggatt LJ, with whom Buxton J agreed, said, at p 654B, that "The mere fact that the appellant had no previous convictions for dishonesty was no more than a factor for the justices to consider, as they did. But it did not constitute any bar to their permitting the cross-examination that it did permit." In *Powell* [1985] 1 WLR 1364 the Court of Appeal criticised the decision in *Watts* for "paying too much attention … to the question whether the previous offences did or did not involve dishonesty". Subsequently, *Powell* was approved on this point in *Owen* (1985) 83 Cr App R 100.

[127] *Tanner* (1977) 66 Cr App R 56 (a case in which the defendant denied having made the confession attributed to him by prosecution witnesses).

> witnesses have fabricated evidence. Defendants sometime make wild allegations when giving evidence. Allowance should be made for the strain of being in the witness box and the exaggerated use of language which sometimes result from such strain or lack of education or mental instability. Particular care should be used when a defendant is led into making allegations during cross-examination. The defendant, who, during cross-examination, is driven to explaining away the evidence by saying it has been made up or planted on him usually convicts himself without having his previous convictions brought out. Finally, there is no need to rely upon section 1 (f)(ii) if the evidence against a defendant is overwhelming.[128]

4.55 There are also imputations which are necessary for the defence, but which do not necessarily involve allegations that a witness is lying; for example, an allegation that a confession has been obtained oppressively. If no lie is imputed,[129] the *Britzman* guidelines have no application; but in *St Louis*[130] the Court of Appeal held that a distinction must be drawn between accusations going to the credit of a police officer and suggestions made in cross-examination that are essential to the defendant's plea of not guilty.

4.56 The problem caused where a defendant is driven by the cross-examiner into making imputations was reconsidered by the Court of Appeal in *Powell*,[131] where the following dictum of Devlin J was approved:

> The cases on this subject matter … indicate the factors to be borne in mind and the sort of question that a judge should ask himself. Is a deliberate attack being made on the conduct of the police officer calculated to discredit him wholly as a witness? If there is, a judge might well feel that he must withdraw the protection which he would desire to extend as far as possible to an accused who was endeavouring only to develop a line of defence. If there is a real issue about the conduct of an important witness which the jury will inevitably have to settle in order to arrive at their verdict, … the jury is entitled to know the credit of the man on whose word the witness's character is being impugned.[132]

The duty of the judge to warn the defence

4.57 It has been suggested[133] that the judge should give a warning whenever it becomes apparent that the defence is taking a course which may result in the loss of the accused's shield under the second limb. However, it has been held[134] that the accused has no absolute right to such a warning, at least where he or she is legally

[128] *Britzman* [1983] 1 WLR 350, 355, *per* Lawton LJ.

[129] If the allegation is put to, and denied by, the relevant witness, the suggestion that the denial is untrue will itself be an imputation.

[130] *St Louis* (1984) 79 Cr App R 53.

[131] *Powell* [1985] 1 WLR 1364, 1370A–C.

[132] *Cook* [1959] 2 QB 340, 347–348.

[133] By Viscount Dilhorne in *Selvey v DPP* [1970] AC 304, 342A.

[134] *McGee and Cassidy* (1979) 70 Cr App R 247, 255.

represented, and that the absence of such a warning is therefore not a material irregularity in the trial. The current position is that a warning is desirable in many, if not most, cases, but not obligatory.[135] Where the accused is not represented, it is more important that such a warning be given.[136] It should never, if avoidable, be given in open court, whether the trial is before magistrates or a jury. In summary trials with an unrepresented defendant, the prosecution should seek an adjournment, so that the position may be explained to the accused in the absence of the justices.[137]

Cross-examination by a co-accused under the second limb

4.58 There has been judicial uncertainty as to whether a co-accused is entitled to cross-examine an accused on his or her record if the accused has cast imputations on the character of the prosecutor or witnesses for the prosecution or a deceased victim. It was suggested in *Lovett*[138] that there were cases where such cross-examination might be appropriate; but at that time a co-defendant could not take advantage of section 1(f)(iii) unless charged with the same *offence*,[139] and it was recognised that if cross-examination were not appropriate then it might be prevented as a matter of discretion. Doubt was cast on this latter proposition by *Rowson*,[140] which emphasised the general principle that a defendant must always be free to elicit evidence which advances his or her case; but this case was not directly concerned with section 1(f), and arguably leaves the *Lovett* discretion untouched as an exception to that principle.[141]

SECTION 1(f)(iii): ATTACKING A CO-DEFENDANT

4.59 Under section 1(f)(iii) of the 1898 Act, a defendant is liable to cross-examination on previous misconduct if "he has given evidence against any other person charged in the same proceedings".[142]

4.60 Cross-examination in these circumstances is justified on the grounds that, if

[135] *Stanton* [1994] Crim LR 834.

[136] *Cook* [1959] 2 QB 340, 349, *per* Devlin J.

[137] *R v Weston-Super-Mare JJ, ex p Townsend* [1968] 3 All ER 225.

[138] *Lovett* [1973] 1 WLR 241.

[139] The effect of the Criminal Evidence Act 1979 is that the co-defendant need only be "charged in the same proceedings."

[140] *Rowson* [1986] QB 174.

[141] *Blackstone*, para F14.36. Cf *Phipson*, para 18-48, where it is argued that the effect of *Rowson* is to confer a general *right* of cross-examination in such circumstances (excluding even the *Selvey* discretion to prevent cross-examination), but that the discretion recognised in *Lovett* ought to be preserved.

[142] The words "in the same proceedings" were substituted by the Criminal Evidence Act 1979 for the original words "with the same offence". The amendment reversed the effect of the decision of the House of Lords in *Metropolitan Police Commissioner v Hills* [1980] AC 26, in which it was held that the words "same offence" meant the same in all material respects, so that where two defendants were tried together but not for the same offence, the provision did not apply. See also P Mirfield at [1978] Crim LR 725.

evidence is adduced by D1 against a co-accused (D2),[143] D2 may then show (by reference to D1's previous convictions) that his evidence should not be relied upon.[144] This may arise where the defendants put forward so-called "cut-throat" defences. For example, two parents are charged with the murder of their child. One or both of them must have been responsible for the death. Each denies guilt and maintains in evidence that the other was solely responsible. Both lose the shield.

4.61 Whereas the right to cross-examine under section 1(f)(ii) is subject to the judge's discretion to prohibit it, the right of D2 to cross-examine D1 under section 1(f)(iii) becomes absolute as soon as D1 gives evidence against D2, provided that the cross-examination is relevant.[145] The court has a common law discretion to order separate trials to prevent the prejudice that might otherwise result from the absence of a discretion to prevent cross-examination by a co-accused on his previous misconduct.[146]

The conditions of section 1(f)(iii)

"has given evidence"

4.62 On a literal reading of section 1(f)(iii), it applies only if the evidence against D2 is given by D1 in person, not by a witness *called* by D1. However, it seems to be implicit in some of the authorities on the first limb of section 1(f)(ii)[147] that the words "has given evidence" include calling a witness to give the evidence; and in that case it may be that they mean the same in section 1(f)(iii).

4.63 Where, however, D1's advocate cross-examines D2 (or a prosecution witness) with a view to showing D2's guilt of the offence charged, it seems that this will *not* render D1 liable to cross-examination – although there is some suggestion to the contrary.[148]

4.64 It is immaterial whether the relevant evidence is given in chief, in cross-examination or in re-examination:[149]

> If an accused person becomes a witness his sworn testimony, if admissible, becomes a part of the evidence in the case. What he says in

[143] We use this terminology throughout this section and in Part XIII: D1 is the accused who attacks D2. Under s 1(f)(iii), D2 may then cross-examine D1 on his criminal record. For convenience, D1 is assumed to be male and D2 female.

[144] *Murdoch v Taylor* [1965] AC 574, 584E–F, *per* Lord Morris of Borth-y-Gest, and 590F, *per* Lord Donovan.

[145] *Murdoch v Taylor* [1965] AC 574, applied by the Court of Appeal in *Varley* (1982) 75 Cr App R 242.

[146] *Varley* (1982) 75 Cr App R 242, 246, *per* Kilner Brown J.

[147] *Redd* [1923] 1 KB 104; *Winfield* (1939) 27 Cr App R 139.

[148] In *Bircham* [1972] Crim LR 430 it was suggested that in such a case D1 *would* be liable to cross-examination on his record. *Blackstone* disagrees: para F14.37.

[149] Contrast the position under the first limb of s 1(f)(ii): para 4.24 above.

> cross-examination is just as much a part of that evidence as what he says in examination-in-chief.[150]

The reason is that the effect on the co-accused in the minds of the jury is similar, irrespective of the point at which the evidence was given.[151]

"against any other person charged in the same proceedings"

4.65 As a result of the decision of the House of Lords in *Murdoch v Taylor* it is now established that evidence "against" a co-defendant means evidence "which supports the prosecution's case in a material respect or which undermines the defence of the co-accused".[152] It is irrelevant whether the evidence is given with a hostile intent.[153]

4.66 The courts have laid down a number of factors to be considered in deciding whether evidence is evidence "against" a co-defendant.[154] It has been held by the House of Lords that

> If, while ignoring anything trivial or casual, the positive evidence given by the witness would rationally have to be included in any survey or summary of the evidence in the case which, if accepted, would warrant the conviction of the [co-defendant] then the witness would have given evidence against such other person.[155]

4.67 Evidence that does no more than contradict the evidence given by a co-accused is not evidence "against" him or her; but it will be so regarded if it *necessarily* undermines the co-accused's defence.[156]

4.68 It is immaterial whether the co-accused gives evidence. It is sufficient that D1 gives evidence which supports the prosecution case against D2 or undermines D2's defence; and D2's defence may emerge either from evidence given or called by D2 or from statements made to the police.[157]

4.69 Where D1's evidence undermines the prosecution's case against D2, as well as D2's defence, the shield will be lost if D2's defence is undermined *more* than the prosecution's case,[158] but not if the evidence provides D2 with a *better* defence. Thus in *Bruce*[159] a defendant gave evidence which contradicted the evidence of one of his co-defendants, thereby undermining his defence, but also undermining the

[150] *Murdoch v Taylor* [1965] AC 574, 583G, *per* Lord Morris of Borth-y-Gest.

[151] *Ibid*, at p 590G, *per* Lord Donovan.

[152] *Ibid*, at p 592D, *per* Lord Donovan.

[153] *Ibid*, at p 591A, *per* Lord Donovan.

[154] See R May, *Criminal Evidence* (3rd ed 1995) paras 7-72 – 7-77.

[155] *Murdoch v Taylor* [1965] AC 574, 584B–C, *per* Lord Morris of Borth-y-Gest.

[156] *Davis* (1974) 60 Cr App R 157.

[157] *Adair* [1990] Crim LR 571.

[158] *Hatton* (1976) 64 Cr App R 88.

[159] *Bruce* (1975) 61 Cr App R 123.

case for the prosecution. The Court of Appeal weighed the effect of the evidence given on the prosecution case and on the co-defendant's defence, and upon finding that the evidence was, on balance, in the co-defendant's favour, held that the cross-examination of the defendant on his previous convictions should not have been permitted.

4.70 Where two defendants are charged with an offence, and it is alleged that the commission of the offence was a joint venture, one defendant's denial of participation is to be considered as evidence against the other defendant only if the denial itself indicates that the co-defendant committed the offence;[160] but a view of a joint venture which directly contradicts a view put forward by a co-defendant may be considered as evidence "against" him or her.[161]

4.71 As a result of the substitution in section 1(f)(iii) of the words "in the same proceedings" for "with the same offence",[162] it is necessary only that both the accused should be before the court on the same occasion.

When section 1(f)(iii) is invoked

4.72 The court has no discretion to prevent the attacked defendant from cross-examining the attacking defendant on his or her previous misconduct. However, the court does have a discretion if it is the *prosecution* that seeks to cross-examine an accused under s 1(f)(iii) on the grounds that he or she has given evidence against a co-accused.[163] In exercising the discretion the court has a duty to secure a fair trial, and, to this end, the prejudicial effect of evidence establishing the accused's bad character should not outweigh the probative value of such evidence as tending to show that he or she is guilty of the crime alleged.[164]

4.73 The court has a discretion to refuse to allow D2 to cross-examine D1 where D1 has given evidence against D3.[165]

4.74 The advocate intending such cross-examination of a co-defendant should give notice to the court and to the opposing party.[166] The judge must then determine whether this is permissible, by considering whether the requirements of section 1(f)(iii) have been satisfied.

[160] *Varley* [1982] 2 All ER 519.

[161] *Ibid*.

[162] Substituted by Criminal Evidence Act 1979, s 1.

[163] *Seigley* (1911) 6 Cr App R 106, *per* Hamilton J.

[164] *Murdoch v Taylor* [1965] AC 574, 593D, obiter, *per* Lord Donovan.

[165] *Lovett* [1973] 1 WLR 241. Cf *Russell* [1971] 1 QB 151.

[166] *Murdoch v Taylor* [1965] AC 574, 584 and 585G–586A, *per* Lord Morris of Borth-y-Gest, where he commented that "The temporary withdrawal of the jury might become desirable". The importance of counsel's duty to warn the court is illustrated by *McGregor* (1992) 95 Cr App R 240, where counsel cross-examined the defendant on the basis that she had been convicted of an offence in the United States, while in fact she had entered a plea of nolo contendere.

4.75 The purpose of the cross-examination is to allow an accused person "to discredit someone who has given evidence against him",[167] although some of the evidence thus elicited might have relevance to propensity as well as credit. It is difficult to distinguish between relevance to credibility and relevance to guilt: indeed, credibility may frequently be affected by the details of previous offences, and in particular by similarities between past and present defences.[168] It is incumbent upon the judge to warn the jury that previous convictions revealed in cross-examination of a defendant are relevant only to his or her credibility, and are not indicative of guilt;[169] but this is not of overriding importance because, as *Cross and Tapper* points out,[170] distinguishing between the various purposes of cross-examination in the case of a defendant is extremely difficult. It has been suggested that this is "likely to be no more than ritualistic counsel of psychologically impossible behaviour"[171] or based upon the "naive assumption that prejudicial effects can be overcome by instructions to the jury", something which "all practising lawyers know to be unmitigated fiction".[172]

Section 1(f)(iii) and separate trials

4.76 As we have said above,[173] the court has a discretion to order separate trials where the exercise of a defendant's rights under section 1(f)(iii) would lead to injustice. In *Hoggins*[174] it was argued that, in view of the decision in *Murdoch v Taylor*[175] that the court has no discretion to limit the cross-examination of a defendant who has given evidence against a co-defendant, separate trials ought to have been ordered. The court held, in dismissing the appeal, that this was only one factor to be taken into consideration, and that it must be weighed against the interests of the defendant seeking to cross-examine, and of the public in the proper administration of justice.

[167] *Murdoch v Taylor* [1965] AC 574, 585D, *per* Lord Morris of Borth-y-Gest.

[168] In *Reid* [1989] Crim LR 719 the appellant was one of a number of people charged with the robbery of a minicab driver. He blamed a co-accused, alleging that the co-accused had committed the robbery before the appellant had innocently got into the cab. The co-accused's counsel was permitted to cross-examine on, and go into details of, a previous trial for robbery of a taxi driver at which the appellant had unsuccessfully put forward a similar defence. No reliance was placed upon the similar fact doctrine, but it was argued that the cross-examination went too far. The conviction was, however, upheld as the questioning about the previous trial tended to show that the appellant was disposed to lie and incriminate his co-defendants, with the result that the evidence was admissible on the issue of credibility. It was apparently regarded as immaterial that the evidence also suggested that he was likely to have committed the offence. See paras 6.80 – 6.84 below.

[169] *Hoggins* [1967] 1 WLR 1223.

[170] *Cross and Tapper*, p 448.

[171] *US v Jacangelo* 281 F (2d) 574, 576 (1960) *per* Hastie J, referred to by R Munday in "Reflections on the Criminal Evidence Act 1898" [1985] CLJ 62, n 47.

[172] *Krulewitch v US* 336 US 440, 453 (1948) *per* Jackson J, referred to by R Munday, *op cit*, n 51.

[173] See para 4.61 above.

[174] *Hoggins* [1967] 1 WLR 1223.

[175] *Murdoch v Taylor* [1965] AC 574.

4.77 The courts have shown a marked reluctance to order severance. In the face of an argument that severance should have been ordered because co-accused were liable to cross-examine each other on character, Lawton LJ explained:

> The factor of the public interest in the proper administration of justice is a very powerful factor indeed, and in the majority of cases where men are charged jointly, it is clearly in the interests of justice and the ascertainment of truth that all the men so charged should be tried together.[176]

4.78 In a similar vein, the Court of Appeal has said:

> The truth of the matter is that this was a case where two experienced criminals metaphorically cut each other's throats in the course of their respective defences. If separate trials had been ordered, one or other or both might have succeeded in preventing a just result.[177]

4.79 This approach has been criticised as evidence of

> a strong trend to give preference to the social desirability of trying several connected offences together over the interests of the accused involved in the joint trial. It is very much to be doubted whether the interests of the public in seeing a criminal episode disposed of should be allowed to outweigh so easily the interest of the accused persons in not being exposed to prejudice.[178]

This may ignore the fact that the truth may sometimes be more likely to come out if the evidence of both accused parties is heard. This course also obviates the risk of inconsistent verdicts.

THE PROCEDURE BEFORE CROSS-EXAMINATION

4.80 In the Crown Court, an application should normally be made to the judge for leave to cross-examine the defendant on his or her previous misconduct. *Archbold* states that such leave need not be sought in all cases.[179] In any event the application should be made in the absence of the jury. Different considerations apply in the magistrates' courts, because magistrates are judges of both fact and law, and an application for leave will often mean that they are told of the convictions that are the subject of the application. It has been suggested by May[180] that a possible solution is for the prosecutor to ask the justices to retire so that he or she may discuss the application with the justice's clerk and the advocate for the defence.

[176] *Hoggins* [1967] 1 WLR 1223, 1226c–d.

[177] *Varley* [1982] 2 All ER 519, 522h–j, *per* Kilner Brown J.

[178] A Zuckerman, *The Principles of Criminal Evidence* (1989) p 283.

[179] *Archbold*, para 8-180.

[180] R May, *Criminal Evidence* (3rd ed 1995) para 7.71.

HOW MUCH DETAIL ABOUT THE PREVIOUS MISCONDUCT IS PERMITTED IN CROSS-EXAMINATION?

4.81 If a party is entitled to cross-examine on previous convictions, the question arises whether the defendant can be asked about the details of those previous convictions and of any defences raised in the earlier proceedings. This question does not arise where evidence of previous convictions is adduced under section 1(f)(i), where the very essence of the argument for admission lies in the details of the previous offences.

4.82 In *McLeod*,[181] now the leading authority in this area, Gage J, reading a judgment prepared by Stuart-Smith LJ, reviewed the authorities on the admission of the facts behind previous convictions. From the case itself, and those it examines, it is clear that there is no objection to the examination of the facts behind previous convictions per se: most objections are to the *nature* of the evidence adduced, and the possibility that it may be used by a jury to decide the issue and not on credibility alone.

4.83 From the grounds of appeal and the judgment in *McLeod* it is possible to discern three grounds for objecting to the admission of evidence of the facts behind previous convictions. These are, first, that the facts are similar to some of those in the instant case; second, that a similar defence was advanced but rejected on a previous occasion; and third, that the facts of the case, though in no way similar to those in the present case, disclose exceptionally vicious, depraved or scandalous behaviour.

4.84 Stuart-Smith LJ held that the following propositions ought to be borne in mind:[182]

> (1) The primary purpose of the cross-examination as to previous convictions and bad character of the accused is to show that he was not worthy of belief. It is not, and should not be, to show that he has a disposition to commit the type of offence with which he is charged…
>
> (2) It is undesirable that there should be prolonged or extensive cross-examination in relation to previous offences. This is because it would divert the jury from the principle [sic] issues in the case, which is the guilt of the accused on the instant offence, and not the details of earlier ones. Unless the earlier ones are admissible as similar fact evidence, prosecuting counsel should not seek to probe or emphasise similarities between the underlying facts of previous convictions and the instant offence.
>
> (3) Similarities of defences which had been rejected by juries on previous occasions, for example false alibis or the defence that the incriminating substance has been planted and whether or not the accused pleaded guilty or was disbelieved having given evidence on oath, may be a legitimate matter for questions. Those matters did not

[181] *McLeod* [1994] 1 WLR 1500, 1512–1513.

[182] *Ibid.* The propositions are based on the analysis in the judgment of Ackner LJ in *Burke* (1986) 82 Cr App R 156, followed in *Powell* [1985] 1 WLR 1364, as supplemented by the observations of Neill LJ in *Owen* (1985) 83 Cr App R 100.

show a disposition to commit the offence in question; but they were clearly relevant to credibility.

(4) Underlying facts that show particularly bad character over and above the bare facts of the case are not necessarily to be excluded. But the judge should be careful to balance the gravity of the attack on the prosecution with the degree of prejudice to the defendant which will result from the disclosure of the facts in question. Details of sexual offences against children are likely to be regarded by the jury as particularly prejudicial …

(5) If objection is to be taken to a particular line of cross-examination about the underlying facts of a previous offence, it should be taken as soon as it is apparent to defence counsel that it is in danger of going too far. There is little point in taking it subsequently, since it will not normally be a ground for discharging the jury.

(6) While it is the duty of the judge to keep cross-examination within proper bounds, if no objection is taken at the time it will be difficult thereafter to contend that the judge has wrongly exercised his discretion. In any event, this court will not interfere with the exercise of the judge's discretion save on well established principles.

(7) In every case where the accused had been cross-examined as to his character and previous offences, the judge must in the summing up tell the jury that the purpose of the questioning goes only to credit and they should not consider that it shows a propensity to commit the offence they were considering.

RESOLVING DISPUTES ABOUT THE FACTS BEHIND PREVIOUS CONVICTIONS

4.85 Where the advocate puts it to the accused that he or she has a criminal conviction and the accused denies it, the fact of the conviction may be proved.[183] Section 74(3) of PACE 1984 provides that evidence of a previous conviction is conclusive evidence that the accused committed the offence unless the accused proves, on the balance of probabilities, that he or she did not commit it. Where the defendant accepts that he or she was convicted of the charge but claims that the conviction was mistaken, or denies some of the facts alleged by the prosecuting advocate about the offence (or about the defence put forward in the previous proceedings), the question is whether evidence can be called to resolve the dispute.

4.86 Although a jury will have had to decide some issues beyond reasonable doubt in order to convict, they will not have given reasons for the conviction. It is possible that a jury may have convicted in error or, though not accepting all of the prosecution's circumstantial evidence, found the elements of the offence to be established beyond reasonable doubt. It is difficult to see how, within the present system of procedure, a dispute over the facts behind a previous conviction could be resolved, as any answers on collateral issues are to be treated as final, and

[183] s 6 of the Criminal Procedure Act 1865, as amended by s 119, Sched 7, Part IV of PACE, and supplemented by s 73 of PACE. See Appendix A below.

credibility is a collateral issue. No party can therefore call witnesses to prove what was said in previous proceedings if the point is a collateral one.[184]

4.87 There is, however, a common law exception to this rule which permits the admission of depositions or authenticated transcripts of testimony given at a previous trial.[185] But, as Roderick Munday points out,[186] this exception seems to apply only where the witness cannot attend subsequent hearings of the same proceedings, "and is not intended to afford a means of contradicting an accused's account of evidence he has given in previous proceedings on different charges".[187] Munday goes on:

> If this analysis is correct – and the point seems never to have been argued – the question arises whether the prosecution should be allowed to pursue matters of detail which will be of devastating effect but which it is in no position to prove?[188]

4.88 Some help may be found in a recent civil case[189] in which the court decided that the judge's summing up in a criminal trial could provide proof of the issues on which a jury made its decision if the evidence was admissible under an exception to the rule against hearsay.

[184] *Harris v Tippett* (1811) 2 Camp 637; 170 ER 1277.

[185] *Hall (Peter Barnabas)* [1973] QB 496; *Thompson* (1982) QB 647.

[186] R Munday, "The Paradox of Cross-Examination to Credit – Simply Too Close for Comfort" [1994] CLJ 303, 316.

[187] See generally *Phipson*, para 23.06.

[188] R Munday, "The Paradox of Cross-Examination to Credit – Simply Too Close for Comfort" [1994] CLJ 303, 317 (footnote omitted).

[189] *Brinks Ltd v Abu-Saleh and others (No 2)* [1995] 1 WLR 1487.

The meaning of section 1(f) 64

"shall not be asked, and if asked, shall not be required to answer" 64

"committed or been convicted of or been charged with any offence other than that wherewith he is then charged" 64

"or been convicted of … any offence other than that wherewith he is then charged" 65

The relationship between section 1(e) and section 1(f) 65

Section 1(f)(i) 66

The first limb of section 1(f)(ii): asserting good character 67

What is an assertion of good character? 68

Character is indivisible 70

Assertions of character other than good character 71

Cross-examination of witnesses (other than the defendant) who give evidence of the defendant's good character 71

Evidence in rebuttal 71

The second limb of section 1(f)(ii): casting imputations against prosecution witnesses 72

The pre-conditions 73

Rape cases 75

Judicial discretion 77

Similarity of offences 78

Where the convictions do not reveal dishonesty 79

Defence necessarily involving imputations 79

The duty of the judge to warn the defence 80

Cross-examination by a co-accused under the second limb 81

Section 1(f)(iii): attacking a co-defendant 81

The conditions of section 1(f)(iii) 82

"has given evidence" 82

"against any other person charged in the same proceedings" 83

When section 1(f)(iii) is invoked 84

Section 1(f)(iii) and separate trials 85

The procedure before cross-examination 86

How much detail about the previous misconduct is permitted in cross-examination? 87

Resolving disputes about the facts behind previous convictions 88

PART V
THE PRESENT LAW (IV): SPECIAL CASES WHERE BAD CHARACTER EVIDENCE IS INADMISSIBLE

5.1 Until now we have assumed that if previous misconduct is admissible there is no obstacle to evidence of it being adduced. In this Part we look at two categories of previous convictions which cannot be raised by the prosecution or a co-defendant even if otherwise admissible. First we will examine the provisions that preclude the court from taking any account in a trial of an adult of any findings of guilt made when that person was under 14; and we then go on to consider the effect of old convictions which are "spent" under the Rehabilitation of Offenders Act 1974.[1] We conclude with a brief examination of alleged misconduct which has been ventilated previously in criminal proceedings and led to an acquittal.

SECTION 16(2) OF THE CHILDREN AND YOUNG PERSONS ACT 1963

5.2 It is considered unfair for an adult to be prejudiced at his or her trial by convictions for crimes committed during childhood. Section 16(2) of the Children and Young Persons Act 1963 provides:

> In any proceedings for an offence committed or alleged to have been committed by a person of or over the age of twenty-one, any offence of which he was found guilty while under the age of fourteen shall be disregarded for the purposes of any evidence relating to his previous convictions; and he shall not be asked, and if asked shall not be required to answer, any question relating to such an offence, notwithstanding that the question would otherwise be admissible under section 1 of the Criminal Evidence Act 1898.

5.3 The prohibition is unqualified and overrides the 1898 Act. However, if a conviction is disclosed in breach of section 16(2), it is a question of discretion whether the jury should be discharged. That decision will depend upon the degree of prejudice that the judge estimates is likely to have been caused. Thus in *Dickerson*[2] counsel for the defendant asked a police officer about the defendant's good character, to which the officer replied by referring to the defendant's conviction for larceny when he was 11 years old. The Court of Appeal, dismissing the defendant's appeal against conviction, held that it was not entirely clear whether section 16(2) rendered the officer's reply inadmissible;[3] but even if it did, the discharge of the jury is a matter for the tribunal of law, which, in this case, had corrected any prejudicial impression by saying that the defendant was of excellent character.

[1] See Appendix A below for the text of the Act. We will refer to it in this Part as "the 1974 Act".

[2] *Dickerson and Cavill* [1964] Crim LR 821.

[3] This assertion would seem to run contrary to the spirit, if not also the language, of s 16(2).

SPENT CONVICTIONS

5.4 The philosophy behind the Rehabilitation of Offenders Act 1974[4] is that, once a conviction is "spent", the rehabilitated person should be treated in law as a person who has not been convicted or charged with the offence. The "spent" nature of the conviction is a proper matter to take into account when assessing the balance between probative value and prejudicial effect; the older the "spent" conviction, the less likely it is to have probative value. The 1974 Act specifies the period that must elapse before a conviction becomes spent: apart from those convictions excluded from the Act altogether,[5] the period broadly corresponds to the age of the person at the time when the sentence was imposed and the length of the sentence.[6]

5.5 The Act does not apply to the use of convictions in criminal proceedings.[7] Nevertheless, a Practice Direction was issued[8] under which "it is recommended that both court and counsel should give effect to the general intention of Parliament by never referring to a spent conviction [of a defendant or a witness] when such reference can be reasonably avoided".[9] To achieve this aim, no party may refer in open court to a spent conviction without the authority of the judge or magistrates, "which authority should not be given unless the interests of justice so require".[10]

5.6 While it has been argued that the Practice Direction and the 1974 Act are

[4] The 1974 Act was based on a report *Living it Down* (1972) published by a committee set up by Justice, the Howard League and the National Association for the Care and Resettlement of Offenders.

[5] These include convictions resulting in sentences of life imprisonment, custody for life or sentences of more than 30 months' imprisonment or detention in a young offender institution: Rehabilitation of Offenders Act 1974, s 5(1).

[6] The rehabilitation periods are: ten years for a conviction resulting in a sentence of more than six but not exceeding 30 months' imprisonment or detention; seven years where the sentence is imprisonment or detention for six months or less; five years for a fine or any other sentence, subject to rehabilitation, which is not expressly mentioned; one year in a case of a probation or conditional discharge; six months for an absolute discharge. See Rehabilitation of Offenders Act 1974, s 5(2)–(4) and Table A.

[7] Rehabilitation of Offenders Act 1974, s 7(2)(a).

[8] *Practice Direction (Crime: Spent Convictions)* [1975] 1 WLR 1065. See Appendix A for the text of the Direction.

[9] *Ibid*, para 4.

[10] *Ibid*, para 6. A failure to obtain leave in respect of a defence witness may, but does not necessarily, lead to the conviction being set aside. See *Smallman* [1982] Crim LR 175, where the Court of Appeal stated that a breach of para 6 of the Practice Direction could not be a ground for upsetting a conviction which was otherwise perfectly proper. This is difficult to square with the Court of Appeal's further assertion that the Practice Direction made it *necessary* to seek leave to refer to spent convictions. It may be significant that in *Smallman* the trial judge strongly directed the jury to disregard any prejudice resulting from disclosure of the spent convictions.

compatible,[11] there does remain what Lord Lane CJ once described[12] as a "constitutionally difficult area", as the Practice Direction achieves much the same result as if criminal proceedings had not been expressly excluded from the scope of the Act.

5.7 The Practice Direction was suggested[13] by Mr Alex Lyon QC, MP, the Minister of State at the Home Office, during the Committee Stage on the Bill. It was to embody the principle that

> all criminal courts should be allowed to consider spent convictions in the sense that the matters can be laid before them, and that as a matter of practice they should not place any reliance on spent convictions save and except where it is in the interests of justice either for the prosecution or for the defence that they should do so.[14]

5.8 Munday has raised the question of whether the Practice Direction restricts the right of co-accused to cross-examine one another on the full range of their criminal records under section 1(f)(iii) of the 1898 Act.[15] As we have said,[16] the House of Lords has held that the court has no discretion to prevent such cross-examination.[17] The issue, therefore, is whether the right of co-accused to cross-examine on previous convictions has been affected by the Practice Direction, notwithstanding the apparently absolute nature of the right under the 1898 Act which was unaffected by the 1974 Act. It would appear that the limited interpretation of the Practice Direction that the courts have adopted, which we describe in more detail below, means that the right to cross-examine under section 1(f)(iii) remains unaffected.

5.9 The approach of the Court of Appeal in *Evans*[18] is illuminating. The defendant, charged with wounding, argued that he had been defending himself against the victim's attempt to stab him in the throat with a carving knife. The trial judge refused to allow Evans to cross-examine the victim on her spent convictions. These

[11] See for example, Professor D J Birch at [1982] Crim LR 176, arguing, in a commentary on *Smallman*, that the Practice Direction does no more than require counsel to seek leave to introduce spent convictions in all cases where the residual judicial discretion to exclude evidence which is more prejudicial than probative might be exercised against them.

[12] *Evans* (1992) 156 JPR 539, 541F; [1992] Crim LR 125.

[13] Mr Lyon, *Hansard* (HC) 28 June 1974, vol 875, col 1951: "I have … asked my officials to contact the Lord Chief Justice to ascertain whether, in principle, he would be prepared to issue a practice direction which would dictate the practice to be followed in the Crown courts." Mr Lyon went on to say that the Home Office would draw up guidelines in similar terms to cover the practice in magistrates' courts. In para 2, Part IV, of Home Office circular 98/1975, the Secretary of State suggested that there should be no oral reference to spent convictions unless they had influenced the court in sentencing. In Home Office circular 130/1975 it is further suggested that magistrates' courts will wish to follow the Practice Direction.

[14] Mr Lyon, *Hansard* (HC) 28 June 1974, vol 875, col 1950.

[15] R Munday, "Rehabilitated Offenders and Character Evidence" [1993] CLJ 228, 230.

[16] See para 4.61 above.

[17] *Murdoch v Taylor* [1965] AC 574.

[18] *Evans* (1992) 156 JPR 539.

included offences of dishonesty, possessing an offensive weapon, assault on the police and, most importantly, "an offence which involved an attempt to stab a policeman".[19] Lord Lane CJ referred to the "plain terms" of the 1974 Act and, after doubting whether the Practice Direction gave the trial judge a discretion to exclude evidence of spent convictions at all, stated that the judge

> should have allowed the convictions to be put to the witness … . The jury were entitled to know the criminal record of the witness and indeed, subject to the proper rules, if necessary the criminal convictions such as they may have been of the defendant himself … .[20]

5.10 In any event, the prosecution has a general duty to inform the defence of any previous convictions of a witness.[21] This duty was considered in *Paraskeva*,[22] where the Court of Appeal held that a previous *spent* conviction of a prosecution witness had been wrongly withheld from the defence. While the spent nature of the conviction meant that the defence would have had to obtain leave to put the previous conviction to the witness, the Court of Appeal stated that such leave would have been given, and that the knowledge that the witness was not of good character might have been crucial to the verdict.

5.11 However, in the more recent case of *Lawrence (Irvin)*[23] a different result was reached. The defendant was charged with the unlawful wounding of W, a co-resident in a hostel for the homeless. The defence was self-defence, with a straight conflict of evidence between the defendant and W; the defendant sought leave to cross-examine W on his spent convictions,[24] the majority of which were for offences of dishonesty, although one was for perverting the course of justice. The trial judge refused to allow the defence to refer to any of W's spent convictions, and permitted questions only on four more recent convictions. The defendant appealed. The Court of Appeal held that it was impossible to say that the trial judge had erred in principle in refusing leave. While the Practice Direction gave trial judges a wide discretion, it must be exercised in accordance with the "intent and spirit" of the 1974 Act.[25]

[19] *Ibid*, at p 542D.

[20] *Ibid,* at p 541F–G.

[21] See *Collister and Warhurst* (1955) 39 Cr App R 100.

[22] *Paraskeva* (1983) 76 Cr App R 162.

[23] *Lawrence (Irvin)* [1995] Crim LR 815.

[24] Some of these dated back to 1966.

[25] In her commentary on this case at [1995] Crim LR 815, 816, Professor D J Birch observed that "the limitations imposed by the judge were within the limits of his discretion, bearing in mind, as the Court also points out, that it would undermine the Practice Direction were advocates to have precisely the same latitude with regard to spent convictions as would be afforded where the convictions remain live." Professor Birch acknowledges that the danger with this interpretation of the Practice Direction is that juries may be given a false impression of the credit-worthiness of a particular witness, especially where, as in *Lawrence*, one of the spent convictions relates to perverting the course of justice.

5.12 We suspect that the Practice Direction has had little impact on the disclosure of spent convictions of the defendant, for three reasons.[26] First, judges have not allowed defendants with spent convictions to assert that they are of good character:[27] a rehabilitated person is not a person of good character.[28] If the defence wants to put such a person forward as being of good character then they must first apply to the judge or magistrates, who exercise a judicial discretion.[29] Second, very stale convictions have in any event been traditionally regarded as simply irrelevant to the character of the defendant.[30] Finally, it is at least arguable that in many situations the Practice Direction produces a similar result to that achieved by the exercise of the discretion to avert prejudice to the defendant.[31] All these well known approaches achieve a similar result to the Practice Direction.

ALLEGED MISCONDUCT WHICH HAS PREVIOUSLY RESULTED IN AN ACQUITTAL

5.13 Previous acquittals can never be relevant for the purpose of proving bad character. In the well-known House of Lords case of *Maxwell v DPP*[32] Viscount Sankey LC referred to this principle in the following terms:

> It seemed to be contended on behalf of the respondent that a charge was per se such evidence that the man charged, even though acquitted,

[26] See R Munday, "Rehabilitated Offenders and Character Evidence" [1993] CLJ 228, 230.

[27] *Nye* (1982) 75 Cr App R 247, 250, where Talbot J, for the Court of Appeal, emphatically rejected the argument that the language and "spirit" of the 1974 Act gave the defendant with spent convictions the right to present himself as a person of good character. (But, paradoxically, the courts have allowed defendants with "irrelevant" convictions to present themselves as being of good character: see *Timson and Hales* [1993] Crim LR 58, where the Court of Appeal held that a defendant charged with an offence of dishonesty ought to have been treated as "effectively" a man of good character although he had five years earlier been convicted of driving with excess alcohol. A similar approach to an "irrelevant" previous conviction was taken in *Pigram* [1995] Crim LR 808.)

[28] A striking example of this proposition can be found in *Bailey* [1989] Crim LR 723, in which a defendant with four spent convictions, the most recent of which was 25 years old, was refused leave to present himself as a person of good character. The trial judge was prepared only for him to be presented as a person with no convictions for violent offences and no convictions at all for 25 years. The defendant was convicted and the Court of Appeal, dismissing his appeal, observed that most trial judges would have exercised their discretion in his favour. However, it held that there was nothing to suggest that the trial judge had not exercised her discretion properly. In a commentary on the later case of *O'Shea* [1993] Crim LR 951, 952, Professor Sir John Smith suggested that it is better for the jury to be told about the defendant's spent convictions, rather than to be told that he or she has no *relevant* convictions – the obvious risk being that they will then speculate about the convictions that he or she does have.

[29] *Nye* (1982) 75 Cr App R 247, 250–251, *per* Talbot J, in which it was also stated that the judge should be asked for his or her ruling at the outset of the trial: "The essence of this matter is that the jury must not be misled and no lie must be told to them about this matter. The exercise of discretion of the trial judge … must be carried out having regard to the 1974 Act and to the practice direction. It should be exercised, so far as it can be, favourably towards the accused person."

[30] *Sweet-Escott* (1971) 55 Cr App R 316.

[31] *Christie* [1914] AC 545, 559, *per* Lord Moulton. A similar argument was advanced by Professor D J Birch in her commentary on *Smallman* [1982] Crim LR 175.

[32] *Maxwell v DPP* [1935] AC 309.

> must thereafter remain under a cloud, however innocent. I find it impossible to accept any such view. The mere fact that a man has been charged with an offence is no proof that he committed the offence. Such a fact is, therefore, irrelevant; it neither goes to show that the prisoner did the acts for which he is actually being tried nor does it go to his credibility as a witness.[33]

5.14 It is also not generally permissible for the prosecution or the co-accused to question the accused about the fact that he or she has been previously suspected of an offence. Questions of this kind are inadmissible as they are irrelevant to issues of character:

> The most virtuous may be suspected and an unproved accusation proves nothing against the accused.[34]

5.15 The principle that alleged, but unproven, previous misconduct and irrelevant previous acquittals are inadmissible is buttressed by the additional rule that a party may not adduce evidence whose effect would be to contradict a verdict of acquittal previously given by a competent court.[35] So, if the accused was acquitted on the previous occasion, the prosecution cannot allege that he or she was really guilty.

5.16 Of course, the prosecution might be able to adduce evidence of previous misconduct under the similar fact doctrine, provided that the defendant has not been acquitted:[36] we deal with this possibility in Part II above.

[33] *Ibid*, at pp 319–320.

[34] *Per* Viscount Simon LC in *Stirland v DPP* [1944] AC 315, 324. This general proposition does not affect the rule that if the accused has stated, while giving evidence in chief, that he or she has never previously been suspected of an offence, it may be possible to cross-examine about previous charges which he or she has faced: *ibid*, p 326. The defendant may have put his or her character in issue under s 1(f)(ii) of the 1898 Act.

[35] *Sambasivam v Public Prosecutor Malaya Federation* [1950] AC 458, in which Lord MacDermott said, at p 479:

> The effect of a verdict of acquittal pronounced by a competent court on a lawful charge and after a lawful trial is not completely stated by saying that the person acquitted cannot be tried again for the same offence. To that it must be added that the verdict is binding and conclusive in all subsequent proceedings between the parties to the adjudication. The maxim *res iudicata pro veritate accipitur* is not less applicable to criminal than to civil proceedings.

[36] See *Connelly v DPP* [1964] AC 1254. The general rule is that a defendant may not be tried for a crime of which he or she has previously been acquitted, nor for a crime which is in effect the same, or substantially the same, as a crime of which he or she has previously been acquitted. However, the determination of a fact in issue in favour of a defendant who is acquitted will not necessarily prevent the re-opening of this issue at a later trial for a separate offence, even if acceptance of the veracity of this evidence will lead to the inference that the defendant should not have been acquitted at the first trial: *Humphrys* [1977] AC 1, 26G, *per* Viscount Dilhorne.

PART VI
GUIDING PRINCIPLES (I): THE PROBATIVE VALUE OF BAD CHARACTER EVIDENCE

6.1 Lord Simon of Glaisdale identified the most important guiding principle on the admission of evidence of previous misconduct when he held that it

> is inadmissible … , not because it is irrelevant, but because its logically probative significance is considered to be grossly outweighed by its prejudice to the accused, so that a fair trial is endangered if it is admitted.[1]

(1) In Parts VI–VIII we analyse this approach. In this Part we consider the probative value of evidence of bad character, and in the next we turn to possible reasons for excluding evidence of probative value, including the danger of prejudice to the accused and the different ways in which it may arise. The final general question of principle which seems to us to be pertinent is whether the special position of the accused justifies special rules where he or she appears as a witness, and we address this in Part VIII.

6.2 Evidence has probative value where it is both true and relevant to a fact in issue. We begin by referring to the difficult issue (to which we later return) of how it should be determined, for the purpose of assessing the probative value of the evidence in question, whether it is likely to be true.[2] Next, we attempt to clarify the meaning of "relevance".[3] We then examine how certain assumptions about the relevance of bad character evidence, implicit in English law, stand up in the light of psychological research.[4] Lastly, we discuss how evidence of previous misconduct may be relevant both directly (as bearing on the question of guilt) and indirectly (as going to credibility).[5]

THE COGENCY OF EVIDENCE OF PREVIOUS MISCONDUCT

6.3 In assessing the probative value of bad character evidence, one significant factor is of course whether the evidence is true. It may be that, if the evidence were true, it would be highly probative of the accused's guilt; but if it is not true, it has no probative value at all and can only be prejudicial. The likelihood of its being true,

[1] *DPP v Kilbourne* [1973] AC 729, 757. This view is echoed by Lord Devlin: "a knowledge of the accused's previous convictions might often help in determining whether or not he had committed the crime, but because with a jury the prejudice created might outweigh its value, the evidence, … except for limited purposes, is not allowed": *Trial by Jury* (1956) p 144.

[2] Paras 6.3 – 6.6 below.

[3] Paras 6.7 – 6.9 below.

[4] Paras 6.10 – 6.40 below.

[5] Paras 6.41 – 6.84 below.

as distinct from the probative value that it would have if it *were* true, is conveniently referred to as its *cogency*.

6.4 Where the accused *admits* the previous misconduct alleged, there is no difficulty on this score; but the accused may deny it. In that case the probative value of the evidence may be weakened. The inference that D killed V2 can be drawn more confidently, and more safely, from the *certainty* that D killed V1 than from the *possibility* that D did so.[6] It may therefore be necessary to consider the cogency of the latter allegation.

6.5 In principle the truth of previous misconduct evidence should, like the truth of any other evidence, be a matter for the fact-finders, and it is therefore argued that the judge should not intrude on what is usually the territory of the jury.[7] The difficulty is that, in admitting the evidence and leaving it to the fact-finders to assess its cogency, the court is failing to filter out prejudicial evidence, and the result may be that the accused is not properly protected.[8] The whole object of the exclusionary rule is defeated if the judge does not perform a vetting role; in this instance, therefore, the judge's encroachment on the territory of the jury appears to be justified.

6.6 This issue usually arises most acutely in relation to "similar fact evidence", and we return to it there.[9] At this point, we simply stress that the central concern is to protect the accused from unfair prejudice, while permitting the maximum amount of relevant evidence to be put before the fact-finders.

[6] But the *relevance* of the first fact to the second is unaffected. See the arguments of defence counsel in *Noor Mohamed* [1949] AC 182, 184: "Even if it could be established that the accused intentionally caused [the accused's first wife] to take poison – and he was not charged with her murder at any time – that did not establish a fact relevant to the death of [the accused's second wife, the subject of the charge]."

[7] Lord Devlin has said:

> I am myself convinced that the jury is the best instrument for deciding upon the credibility or reliability of a witness and so for determining the primary facts. Whether a person is telling the truth, when it has to be judged, as so often it has, simply from the demeanour of the witness and his manner of telling it, is a matter about which it is easy for a single mind to be fallible. The impression that a witness makes depends upon reception as well as transmission and may be affected by the idiosyncrasies of the receiving mind; *the impression made upon a mind of twelve is more reliable*. Moreover, the judge, who naturally by his training regards so much as simple that to the ordinary man may be difficult, may fail to make enough allowance for the behaviour of the stupid.

Trial by Jury (1956) p 140 (emphasis added). See also the comments of Lord Griffiths in *H* [1995] 2 AC 596, 613D–G, set out in para 1.23 above.

[8] Lord Hailsham of St Marylebone identified the difficulty about the similar fact rule in *Boardman:* the rule depends on questions of weight and degree, matters best left to a jury, but the function of the rule, because it combines considerations of relevance and prejudice, properly falls to be decided in advance, by the judge: *Boardman* [1975] AC 421, 453C–D.

[9] Paras 10.86 – 10.105 below.

THE MEANING OF "RELEVANCE"

6.7 In legal usage the concept of relevance is a somewhat ambiguous one. There are several reasons why evidence may be excluded although it is logically relevant.[10] Where evidence is excluded for one of these reasons, it is sometimes said to be "irrelevant"; but this seems misleading.[11] The evidence is logically relevant, but not *sufficiently* relevant to be worth receiving.[12] We use "relevance" to mean *logical* relevance.

6.8 It is an accepted common law tenet that only evidence of relevant facts should be admitted; in other words, that "nothing is to be received which is not logically probative of some matter requiring to be proved".[13] But evidence is relevant if it affects the probabilities of the existence or non-existence of material facts in the slightest degree. The definition of "relevant" employed in the Australian Evidence Act 1995 is as follows:

> The evidence that is relevant in a proceeding is evidence that, if it were accepted, could rationally affect (directly or indirectly) the assessment of the probability of the existence of a fact in issue in the proceeding.[14]

6.9 Fact-finders are engaged in an assessment of probability. The verdict reflects the degree of certainty of the fact-finders' belief that the alleged act was committed by the accused with the alleged degree of fault,[15] and the trial should be designed to maximise the chances of their being right.

THE PSYCHOLOGICAL RESEARCH[16]

6.10 We now review what the psychological research has to tell us about the extent to which evidence of bad character might support, directly or indirectly, an inference

[10] See Part VII below.

[11] As it is put in *Cross and Tapper*, "the baneful tendency to use 'relevant' and 'admissible' interchangeably clouds the issue": p 367.

[12] The courts have sometimes referred to such evidence as being *legally* irrelevant: eg *Stephenson* [1976] VR 376, 380–1 (Victorian Supreme Court) *per* Young CJ, Nelson and Harris JJ. See also Lord Du Parcq in *Noor Mohamed* [1949] AC 182, 194.

[13] This is the first leading principle of evidence identified by J B Thayer. The second leading principle is "that everything which is thus probative should come in, unless a clear ground of policy or law excludes it": *A Preliminary Treatise on Evidence at the Common Law* (1898) p 530.

[14] s 55. We note also the definition employed in the United States Federal Rules of Evidence. Relevant evidence is that which has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence": Rule 401.

[15] G F James, "Relevancy, Probability and the Law" (1941) 29 Calif LR 689, 698 n 20: "Probability is not an actual state. Nothing really *is* probable. It is true or false. Probability is a matter of appearance [and] is always relative to the data available at the time judgment is exercised. If all possible data were available we should be dealing not with probability in any ordinary sense but with the approximation of certainty" (emphasis in original).

[16] The ALRC and the NZLC have both reviewed the literature in this field before us, and we acknowledge our reliance, in part, on their work. See ALRC, *Character and Credibility* (1983) Research Paper No 11; NZLC, *Character and Credibility: a Research Paper* (1994) (unpublished).

that a person has committed a crime. In particular, we assess in the light of the psychological research three assumptions implicit in the English rules of evidence, namely:

(1) that all the different aspects of a person's character are connected: the present English law assumes that such a connection exists, and that it justifies (for example) the cross-examination of a defendant about a conviction for an offence of a different type from the offence charged;[17]

(2) that a connection can be drawn between criminal behaviour and truthfulness on oath: again, English law assumes such a connection by regarding previous convictions as being relevant to credibility;[18]

(3) that juries will understand, and obey, a direction to use previous misconduct evidence *only* on the question of the defendant's credibility: this is the direction currently given.[19]

These assumptions appear to relate to two separate issues, namely the relevance of bad character evidence (a) to the question of guilt, and (b) to the defendant's credibility.[20] We deal with them in that order, once we have described some of the psychological research.

6.11 Underlying an assumption that past behaviour is a guide to future behaviour is a belief that human behaviour is predictable and that a person's character can be described in terms of certain character "traits". Psychologists are far from formulating a single, definitive explanation of the causes of human behaviour, or of the concept of personality, and their findings need to be treated with some care; but such results as have emerged from the research may be of value nonetheless.

6.12 In the first half of this century, the prevailing theory of personality was "trait theory": it was based on the notion that there were identifiable aspects of personality ("traits") which remained consistent across different situations, and on which others would be justified in basing predictions of behaviour.[21] For example, it would be meaningful to call someone "dishonest", implying that that individual could reliably be expected to act in a dishonest way in a variety of different situations.

6.13 Such a theory sounds plausible, and matches the way people frequently think and talk about others. However, research has repeatedly failed to find that behaviour is

[17] See paras 6.23 – 6.29 below.

[18] See paras 6.30 – 6.34 below.

[19] See Appendix D, para D.12 for this direction.

[20] "Credibility is indirectly relevant to the accused's guilt because the only value in knowing whether any witness is telling the truth or not is in order to assess the weight of that witness's evidence, which should itself have some direct bearing on the issues in the case. Sometimes the credibility of one or more witnesses *is* the issue": J McEwan, *Evidence and the Adversarial Process* (1992) p 34.

[21] One of the principal proponents of this theory was G Allport: *Personality – A Psychological Interpretation* (1937).

straightforwardly consistent or predictable across varying situations.[22] The ALRC concluded:

> The theory of personality underlying the admission of character evidence, premised on the existence of stable "traits", has not been supported by empirical research. A person's "character" is not so highly integrated as to motivate trans-situational consistency of behaviour. Rather, valid predictions about human behaviour are unlikely unless an individual is placed in similar situations.[23]

6.14 In the 1970s, "situationism" (also known as "specificity theory") came to the fore; this theory accepted that behaviour is extremely specific to the features of each unique situation, and therefore that opposing character "traits" may exist in the same person, and even small variations in the situation may affect the predictability of an individual's actions.

6.15 "Situationism" was succeeded by the theory that both a person's disposition and the features of a specific situation affect behaviour in complex and variable ways.[24] Some people behave more consistently across a variety of situations than others. A situational feature producing a difference in behaviour in one person will not produce a change in behaviour in another.[25] Some character traits, such as honesty, tend to be more susceptible to differences between situations than others.[26] Prediction of an individual's behaviour based on how he or she has behaved in the past is not impossible, but is a very uncertain business: "Contemporary trait theorists willingly concede that they are unable to predict a single instance of behavior on a particular occasion with confidence."[27]

6.16 The NZLC sums up the findings from the accumulated research that are most significant for criminal lawyers as follows:[28]

- even if an individual has a specific character trait, its existence cannot be inferred with confidence from a single observation of a person's character;

[22] See, eg, H Hartshorne and M A May, *Studies in Deceit* (1928); W Mischel, *Personality and Assessment* (1968).

[23] ALRC Report No 26, vol 1, para 394.

[24] S M Davies, "Evidence of Character to Prove Conduct: A Reassessment of Relevancy" (1991) 27 Crim L Bull 504, 518: "behavior is simultaneously a function of disposition and situation, and their mutual interaction".

[25] "Not only will consistency be observed for only some people or in only some situations but for certain people in certain situations and for other people in other situations": Sherman and Fazio, "Parallels Between Attitudes and Traits as Predictors of Behavior" (1983) 51 Jo Personality 308, 318, cited by D P Leonard, "The Use of Character to Prove Conduct: Rationality and Catharsis in the Law of Evidence" (1986–7) 58(1) U Colo LR 1, 29 n 161.

[26] S M Davies, "Evidence of Character to Prove Conduct: A Reassessment of Relevancy" (1991) 27 Crim L Bull 504, 521.

[27] *Ibid*, at p 517.

[28] NZLC, *Character and Credibility: a Research Paper* (1994) (unpublished) p 9.

- even if a character trait is known, it will not necessarily assist in predicting an instance of conduct in isolation;

- true predictive value is dependent upon a number of instances of conduct and a degree of similarity between the situations.

6.17 Later in the same paper, however, the NZLC states that "psychological research does show that there is some correlation between past antisocial behaviours and the readiness to lie". One of the sources cited in support of this statement is an article by Professor Friedman[29] in which he asserts that "criminologists seem to be in consensus that various different deviant behaviors are positively correlated",[30] and in which he gives some support for the proposition that "lying is closely related to a general deviant tendency".[31] Yochelson and Samenow[32] carried out their research largely through observations of "criminals" undergoing therapy. The research was based on the individual impressions of the researchers in an ongoing relationship with the subjects, it thus lacks controls and is highly subjective. It is also perhaps questionable whether the concepts of "criminals" and "lying" are as simple as Yochelson and Samenow suggest. We are therefore reluctant to place much weight on a correlation between antisocial behaviour and a tendency to lie on oath.

6.18 This research concerns the *predictability* of the behaviour of the person on trial; but there are also significant psychological findings about how individuals *interpret* the behaviour of others. These findings may cast light on the inferences that a jury or magistrates are likely to draw, in respect of the accused's behaviour on the occasion charged, from knowledge of his or her behaviour on other occasions.

6.19 One of the consistent findings is the existence of what is sometimes known as the "halo" effect: this means that there is a tendency for people to form a complete, integrated impression of another person's personality, even where only limited information about that person is available to them. Thus the person is presumed to have attributes which fit with what is known, but which he or she may or may not have.[33]

[29] R Friedman, "Character Impeachment Evidence: Psycho-Bayesian Analysis and a Proposed Overhaul" (1991) 38 UCLA LR 637.

[30] *Ibid*, at p 652.

[31] Citing Yochelson and Samenow's study over more than a decade, *The Criminal Personality* (1976). Yochelson and Samenow conclude, at p 357, that lying is "a pattern of thought and action that is a universally recognised and obvious characteristic of the criminal". Friedman refers also, at pp 653–654, to a specific personality disorder, identified by the American Psychiatric Association, of which one of the symptoms is a low regard for the obligation to tell the truth.

[32] *The Criminal Personality* (1976).

[33] Asch, "Forming Impressions of Personality" (1946) Journal of Abnormal and Social Psychology 258; H H Kelley, "The Warm–Cold Variable in First Impressions of Persons" (1950) 18 Journal of Personality 431; S Rosenberg and K Olshan, "Evaluative and Descriptive Aspects in Personality Perception" (1970) 16 Journal of Personality and Social Psychology 619–626.

6.20 The research also tends to show that people tend to explain their own actions in terms of the situation in which they find themselves, but the actions of others by reference to character traits.[34] Moreover, a listener's response to what is said by another person can be influenced by the character traits that the listener attributes to that person.[35] Davies interprets the research as indicating, not that people cannot form an accurate impression of how someone else might behave, but that accurate predictions are possible only if based upon a certain depth of knowledge of the person in question.[36]

6.21 These findings, taken together, lead us to the tentative view that, where insufficient *instances* are provided of someone's past conduct, and that past conduct has insufficient *similarity* to the alleged offence, there is a danger that the jury or magistrates will use this information to conclude that that person is not only a dishonest witness but is also likely to have committed the offence. In other words, the evidence of misconduct provokes an unduly hostile response.

6.22 We now look at the implications of the research for the assumption made by English law that all the different aspects of a person's character are connected.

Is the unitary concept of "character" justified?

6.23 In English law "character" is held to be indivisible:[37] one trait cannot be considered independently of others. If, for example, a defendant claims to be of good character in one respect, the prosecution can adduce evidence that he or she is not of good character in another respect. Where a person's criminal record is admitted in evidence, ostensibly on the question of how truthful he or she is likely to be on oath, there is no restriction in law on the *type* of previous convictions that may be adduced. This concept of a unitary "character" must be founded on the notion that there is some inherent and inevitable connection between the different character traits of one person, and that those traits will persist across different situations.[38]

6.24 The fallacy behind the assumption that character is indivisible is that

[34] "Attribution theory". See Ichheiser, "Misunderstandings in Human Relations" (1949) 55 American Journal of Sociology 27, 46–7; E Jones and R Nisbett, "The Actor and the Observer: Divergent Perceptions of the Causes of Behavior" in E Jones and others, *Attribution: Perceiving the Causes of Behavior* (1971); Davis, "From Acts to Dispositions: The Attribution Process in Person Perception" in L Berkowitz (ed), *Advances in Experimental Social Psychology* (1965).

[35] H C Kelman and F Eagly, "Attitude Toward the Communicator, Perception of Communication Content and Attitude Change" (1965) 1 Jo Pers and Social Psychol 63.

[36] In her survey of the research, Davies found that people make more accurate assessments of others if told of specific past behaviour rather than traits, and that the better assessors were acquainted with the subject the more accurate their assessments were: S M Davies, "Evidence of Character to Prove Conduct: A Reassessment of Relevancy" (1991) 27 Crim L Bull 504, 531–532.

[37] *Winfield* (1939) 27 Cr App R 139, 141, *per* Humphreys J; para 4.27 above.

[38] As the ALRC noted, "the assumption behind the law is that there are such things as character traits and that knowing a person's character traits would help the fact-finder to determine whether a witness is or is not telling the truth": Interim Report No 26, para 405, p 224.

> If a man is charged with forgery, cross-examination as to his conviction for cruelty to animals can have no purpose but prejudice; and so, if a man is charged with indecency, cross-examination as to convictions involving dishonesty is irrelevant to the charge, though it may show the accused is a "bad man".[39]

6.25 At its crudest the assumption is that someone who behaves immorally in one way will behave immorally in all other ways too. An example can be found in the Court of Appeal decision in *Jenkins*,[40] where the defence had adduced evidence that the witness, a married woman, had had a sexual relationship with the defendant. The court accepted that this evidence was relevant to show that she was "a worthless and abandoned woman whose evidence ought not to be relied upon by the jury".[41] As we have seen from our brief survey of the literature, such an assumption about an inherent connection between different character traits is not supported by the findings of psychologists. Indeed, as one commentator has pointed out,[42] this has been so since the 1920s.

6.26 English law explicitly recognises an exception to the rule that character is not divisible. Where the charge is rape, the defence's right to attack the complainant's character is restricted by statute. The complainant may not be asked about his[43] or her sexual experience with people other than the defendant without the leave of the court.[44] Leave may be given only if the judge is satisfied "that it would be unfair to that defendant to refuse to allow … the question to be asked". The impetus for the introduction of this provision was not only a matter of social policy (in that genuine complainants were deterred from giving evidence because their sexual history would be brought out in court) but also a recognition of the fact that a person's sexual history is irrelevant to that person's credibility as a witness.[45] As J C Smith commented at the time, the rationale behind it applies equally to other offences:

[39] Nokes, *An Introduction to Evidence* (4th ed 1967) p 140.

[40] *Jenkins* (1945) 31 Cr App R 1.

[41] *Ibid,* at p 11, *per* Singleton J. Such a connection was explicitly rejected in the Report of the Advisory Group on the Law of Rape (1975) Cmnd 6352, para 131, which led to the Sexual Offences (Amendment) Act 1976.

[42] See, eg, R Munday, "Reflections on the Criminal Evidence Act 1898" [1985] CLJ 62, 66.

[43] Rape now includes non-consensual buggery of a male: Criminal Justice and Public Order Act 1994, s 142 (amending Sexual Offences Act 1956, s 1).

[44] Sexual Offences (Amendment) Act 1976, s 2(1).

[45] Lord Willis explained: "Under present practice a woman can often be subjected to searching irrelevant cross-examination, resulting in unnecessary and hurtful revelations of her private sexual history, which did nothing to advance the course of justice": *Hansard* 22 October 1976, vol 375, col 1765. Lord Willis echoes the report of the Heilbron Committee which led to the 1976 Act: "It is very dubious whether it [ie evidence of the personal history and character of the rape victim] is today of very much relevance and often it serves only to cloud the real issues": Report of the Advisory Group on the Law of Rape (1975) Cmnd 6352, para 92. See also para 131 of the same report.

> The rule [permitting cross-examination on sexual history] presupposes that a witness is the less likely to tell the truth because he is sexually immoral. If the rule is bad for rape trials it is bad generally.[46]

6.27 A slightly more refined version of this assumption is that criminals can be classified into mutually exclusive types:[47] for example, that a person may be "dishonest" or "violent", and that any convictions for offences of a given type will be probative on a charge of another offence of that type. For example, experienced judges have taken the view that offences of dishonesty must be an indicator of dishonesty in all spheres of life.[48] The research referred to above indicates that this notion is as likely to be untrue of any individual as it is to be true: some people will act consistently across different situations, but others will not, and one should be very cautious in attempting to make firm predictions about another's behaviour on the basis of his or her past behaviour.

6.28 Thus the notion that "character" is indivisible is not supported by the research. The research does, however, offer support for the rationale behind the rules on the admission of similar fact evidence, in that the greater the similarities between instances, and the more instances that are known, the safer it will be to infer that the same behaviour will be repeated.

6.29 We referred above to "the halo effect",[49] the tendency for people to make for themselves an integrated concept of another's character, based on partial information. This tends to show that although a propensity to behave in one way does not in fact suggest the existence of other character traits, people are likely to assume that it does. However, the Oxford Report suggests that jurors do not necessarily regard character as "indivisible" or unitary – not, at least, in the way that English law holds it to be. While a previous conviction for an offence of dishonesty or violence[50] was seen as predictive of future *similar* offences, it did not seem to alter the mock jurors' *global* assessment of the defendant's character. Defendants with a previous conviction for an offence of dishonesty or violence were not seen as being significantly less credible, or more likely to have got away with criminal offences in the past, or more deserving of punishment, than those of good character. A previous conviction for an indecent assault on a child, on the other hand, *was* seen as reflecting on the whole of the defendant's character. Mock jurors who were told that the defendant had such a previous conviction tended to regard the defendant in a generally more negative light.

[46] J C Smith, "The Heilbron Report" [1976] Crim LR 97, 102.

[47] It appears from two studies that mock jurors may make this assumption. In the Oxford study (see Appendix D) it was found that the mock jurors were less likely to convict where they knew that the defendant had a conviction for an offence which was dissimilar to the charge (unless the conviction was for indecent assault of a child) and more likely to convict where they knew that the defendant had a conviction which was similar to the charge. The Oxford Report confirmed the findings of the 1973 LSE research in this regard: W R Cornish and A P Sealy, "Juries and the Rules of Evidence" [1973] Crim LR 208, 222; see Appendix C below.

[48] See paras 6.55 – 6.56 below.

[49] See para 6.19 above.

[50] The dishonesty offence used in the Oxford study was handling stolen property, while the violence offence was a section 18 assault.

What connection is there between a criminal record and truthfulness on oath?

6.30 In cross-examination, evidence of previous misconduct on the part of the accused, or of any other witness, is in theory admitted not for its probative value on the primary issues in the case, but for the light that it casts on the witness's general credibility[51] – in other words, on the likelihood that he or she is telling the truth. In the Crown Court, the jury will be directed in the following terms:

> you must not assume that a defendant is guilty or that he or she is not telling the truth because he or she has previous convictions. Those convictions are not relevant at all to the likelihood of his having committed the offence. They are relevant only as to whether you can believe him or her. It is for you to decide the extent to which, if at all, his previous convictions help you about that.[52]

6.31 A blanket assumption that a criminal will lie on oath, irrespective of his or her particular criminal history, is not supported by the research. There is one exception: in the research referred to by Professor Friedman and the NZLC[53] a correlation has been noted between the number of instances of delinquent or antisocial behaviour by an individual and the likelihood that the individual will lie.

6.32 On the principle that if a situation is repeated, an individual will behave in the same way on the second occasion as on the first, it would seem that a conviction for perjury may be probative of an individual's truthfulness. Yet – apart from the point that a single instance is insufficient evidence on which to base a prediction – there will inevitably be other factors at work in each situation, and it cannot be assumed with certainty that, because someone has lied in court before, he or she will do so again. For example, a conviction and punishment for perjury may have had a salutary effect.

6.33 We have referred already to the assumption by some judges that a person who acts dishonesty in one context will do so in another. Offences of dishonesty may therefore be thought particularly relevant to a witness's credibility; but this is not necessarily the case. Honesty is one of the character traits found to be more susceptible to differences between situations, and one should therefore be wary of translating a propensity to steal into a propensity to lie in court.

6.34 It may be that jurors do not accept the view that a previous conviction for a dishonesty offence is indicative of a tendency to lie in court. In the Oxford study it was found that, if mock jurors were told that the defendant had a previous conviction for a dishonesty offence, they were not significantly more likely to say that they disbelieved his evidence, or that he was untrustworthy, or that he was more likely than other men of his age and background to lie on oath to a court of

[51] *Inder* (1977) 67 Cr App R 143.

[52] Such a direction is required where there is a danger of the jury using previous convictions on the issue of guilt, rather than confining them to the question of the credibility of the accused: *Inder* (1977) 67 Cr App R 143.

[53] See paras 6.16 – 6.17 above.

law. If told that he had a previous conviction for an indecent assault on a child, however, they regarded him as a significantly less credible witness.

What use are juries likely to make of evidence of previous convictions?

6.35 In a comprehensive analysis in the United States of jury behaviour it was found that

> studies of jury behavior support the popular wisdom that jury instructions limiting the use of an accused's prior convictions to impeachment purposes are ineffective.[54]

6.36 Subsequent studies have tended to confirm this finding.[55] In Canada, Doob and Kirshenbaum investigated how the record was used by mock jurors in reaching their verdicts. They concluded that the judge's instruction that the record was relevant only to the defendant's credibility was not heeded.[56] In another study, recordings of the "jury" deliberations showed that the judge's instructions had not been followed.[57]

6.37 In a more recent study, Wissler and Saks[58] set out specifically to discover whether juries were using previous convictions as an indication of guilt, and not merely as a guide to credibility. One of the premises of the study was that a conviction for perjury is more relevant to credibility than any other conviction;[59] thus, if the "jury" was instructed to use the record solely on the issue of credibility, the rate of conviction should be highest (other things being equal) when the accused had a conviction for perjury. The "jurors" acknowledged in their responses that they had used the records as an indication of the likelihood that the defendant was guilty,

[54] Kalven and Zeisel, *The American Jury* (1966). Kalven and Zeisel concluded that 10% of the cases in which the jury convicted when the judge would have acquitted were attributable to the jurors' knowledge or presumptions of the defendants' criminal records. However, it has been pointed out that the authors did not distinguish between cases where the accused did not give evidence, and cases where the record was revealed. As it has been shown that defendants' refusal to testify increases the likelihood of conviction (D R Shaffer and C Sadowski, "Effects of Withheld Evidence on Juridic Decision, II; Locus of Withholding Strategy" (1979) 5 Personality and Social Psychology Bulletin 40), it is impossible to be sure in what proportion of cases knowledge of the record did in fact influence the verdict: F C Dane and L S Wrightsman in Kerr and Bray (eds), *The Psychology of the Courtroom* (1982) ch 4.

[55] See, eg, M A Myers, "Rule Departures and Making Law: Juries and their Verdicts" (1979) 13 Law and Society Review 781, 792.

[56] A Doob and H Kirshenbaum, "Some Empirical Evidence on the Effect of Section 12 of the Canada Evidence Act upon an Accused" (1972) 15 Crim LQ 88. The results of this research must be treated with some caution. First, there are indications from other research that the form in which evidence is presented affects its credibility in the eyes of a jury, and as the "jury" was given a kind of transcript, it is not safe to assume that a real jury would react to a live trial in the same way. Secondly, the "jury" was told that the accused gave evidence but nothing significant emerged, which is possibly quite damning in itself.

[57] V Hans and A Doob, "Section 12 of the Canada Evidence Act and the Deliberations of Simulated Juries" (1975) 18 Crim LQ 235.

[58] R L Wissler and M J Saks, "On the Inefficacy of Limiting Instructions" (1985) 9 Law and Human Behavior 37.

[59] See para 6.53 below.

despite the instruction not to. The conclusion must be that they either did not understand the judge's instructions or deliberately chose to ignore them.[60]

6.38 Some research has found that "jurors" can follow judicial instructions and ignore inadmissible evidence. Pickel[61] found that "jurors" in a theft case were no more likely to convict the defendant if they knew that he had a previous conviction for perjury than if they did not – provided that they were told to ignore that fact. If they were not told to ignore it, they *were* more likely to convict. Perhaps "jurors" find it easier to ignore evidence completely than to use it only in assessing the defendant's credibility.[62]

RELEVANCE TO PROPENSITY

6.39 We now move on to consider *how* evidence of previous misconduct may be relevant to a fact in issue. In the first place it may be *directly* relevant to the defendant's guilt, in that it makes it more likely that the defendant committed the crime charged because he or she has a propensity to act in that way. Evidence of bad character is a kind of circumstantial evidence.[63] It may increase the probability that the offence in question was committed *by the defendant* if it shows that the culprit employs a system, or commits crimes in such a way as to leave a "hallmark" or "signature", which is similar to the defendant's;[64] it may make it more likely that the offence took place at all, for example where the actus reus is denied;[65] or it may make it more likely that the defendant had the requisite criminal intent.[66]

6.40 Evidence of how someone has behaved in the past is thought to indicate how he or she has acted on a particular occasion because of a belief in the consistency and stability of human personality. The past behaviour is taken to indicate not only a continuing *desire* to act in a specific way, but also a lack of inhibition from *acting* on

[60] There are, however, some serious limitations to this study. First, the conviction record may have been more prominent in the experiment than it would normally be in a real trial. Secondly, the trial was not real and neither was the conviction, and the "jurors" were inevitably aware of this. Thirdly, in the experiment, each "juror" had arrived at his or her decision independently, whereas real verdicts are a group decision. Finally, no example was included of an accused who the "jury" was told had no convictions: the control group was simply given no information about the record and had to make assumptions, but these were not explored in the survey.

[61] K L Pickel, "Inducing Jurors to Disregard Inadmissible Evidence: A Legal Explanation Does Not Help" (1995) 19 Law and Human Behavior 407.

[62] Interestingly, Pickel also found that if the "jurors" were told to ignore the evidence and given an explanation of why they should do so, they were more likely to convict than if told simply to ignore it.

[63] *Pfennig* (1994) 127 ALR 99, 116 (High Court of Australia) *per* Mason CJ, with whom Dane and Dawson JJ agreed.

[64] See, eg, *Straffen* [1952] 2 QB 911, and *Pfennig* (1994) 127 ALR 99 (High Court of Australia).

[65] See, eg, *Ball* [1911] AC 47, in which the previous conduct demonstrated the disposition of the accused to an incestuous relationship and made it more likely that it was continuing.

[66] *Rance and Herron* (1975) 62 Cr App R 118. The previous occurrences did not of themselves prove dishonesty, but if they were taken all together, it became less credible that the accused had not been dishonest. See P N Mirfield, "Similar Facts: *Makin* Out?" [1987] CLJ 83, 91. See also *Smith* (1915) 11 Cr App R 229.

that desire, whether from consciousness of wrong-doing, criminality, or fear of detection. The psychological research indicates, however, that if a person displays one character trait, one cannot necessarily infer that he or she has a different trait, nor make firm predictions about the likelihood that he or she would act in a particular way in particular circumstances. **Our provisional view is that**

(1) **past behaviour can be probative on the question whether the defendant is likely to have acted in the way alleged; but**

(2) **the probative value of a single previous instance can be easily over-estimated; and**

(3) **the psychological research supports the emphasis currently placed on the importance of close and unusual similarities between the past conduct and that now alleged.**

RELEVANCE TO CREDIBILITY

6.41 Courts frequently state that evidence of previous misconduct is relevant to the defendant's credibility, but the meaning of "credibility" varies according to its context. We therefore start by attempting to identify these different guises.[67] We examine whether some convictions are more relevant than others,[68] and how the defendant's credibility may be affected by his or her plea to an earlier charge,[69] or by the nature of any defence previously raised.[70]

The differing meanings of credibility

6.42 "Credibility" usually means the extent to which a witness can be believed by the fact-finders,[71] and entails an examination of the truthfulness, accuracy and plausibility of the witness and of his or her evidence. However, it has a number of shades of meaning which we think it useful to distinguish.

The credibility of statements made otherwise than in oral evidence

6.43 Just as fact-finders assess the credibility of a person who testifies in front of them, they may also assess the credibility of what a person has said out of court, where that person does not give oral evidence.[72] Similarly, there is a sense in which a

[67] Paras 6.42 – 6.49 below.

[68] Paras 6.50 – 6.63 below.

[69] Paras 6.66 – 6.70 below.

[70] Paras 6.71 – 6.73 below.

[71] "Credible" is defined in the *Oxford English Dictionary* as "capable of being believed".

[72] Eg, if a written statement by a person who is too ill to attend court is admitted in evidence, the fact-finders will form a view on what weight to give the contents of that statement. Similarly, if the defendant's words on arrest or responses in interview are recounted to the court, the fact-finders will consider whether to accept them as true. See, eg, *Chapman* [1989] Crim LR 60 (CA); *Douglass* (1989) 89 Cr App R 264; *Aziz, Tosun and Yorganci* [1996] 1 AC 41; Evidence in Criminal Proceedings: Hearsay and Related Topics (1995) Law Commission Consultation Paper No 138.

defendant's credibility may be in issue even if he or she does not testify.[73] The defendant's version of events may be apparent either from evidence of his or her out-of-court statements or from the questions put to witnesses by the defendant's representative. For example, where the defence advocate says to a prosecution witness "You told my client that you would do anything to ensure he went to prison, didn't you?", the jury or magistrates will naturally infer that it is part of the defendant's case that the witness is biased; and it is reasonable for them to ask themselves whether, coming from this defendant, the assertion is likely to be true.

The inherent credibility of a defence

6.44 It is not only *people* who may be described as "credible": a *defence* may also be credible or incredible, in the sense of being inherently probable or improbable, irrespective of what kind of person puts it forward. For example, if a drink-driver asserts that the level of alcohol in his blood can be explained by the three pints he drank in the ten-minute interval between the accident and his arrest, he will have an uphill struggle to be believed, even if his character is impeccable. This sense of "credibility" may be combined with the previous one: the credibility of the defence, like that of the defendant, may be in issue whether the defendant testifies or not.

The credibility of a defence when put forward by a particular defendant

6.45 There is a further sense of "credibility" which refers not to the *inherent* plausibility of a defence, but to its plausibility *as put forward by a particular defendant*. For example, a woman charged with handling stolen antiques tells the police in interview that she did not know or believe them to be stolen. This defence may at first sight be plausible; but if her previous convictions for perjury are made known to the court it becomes less believable, and if it is known that she has 25 convictions for handling stolen antiques it will probably become incredible.

6.46 A court may be concerned with some or all of these different kinds of credibility at the same time, and the term "credibility" may then refer to them all in combination. They become important in the context of the 1898 Act, because it is said that the defendant's credibility enters the picture only if he or she testifies;[74] in particular, they need to be borne in mind when considering the second limb of section 1(f)(ii) and the rule in *Butterwasser*,[75] that only when the defendant testifies can section 1(f)(ii) be invoked.

The credibility of witnesses

6.47 The purpose of cross-examination as to credit is "to show that the witness ought not to be believed on oath, the matters about which he is questioned must relate to

[73] See *Woodward and Dobson* [1996] Crim LR 207, where the court held that the defendants, being of previous good character, were entitled not only to a propensity direction but also to a direction about the significance of their good characters on their credibility (following *Vye* [1993] 1 WLR 471, para 4.18 above), because, although neither testified at trial, out-of-court answers in interviews had been admitted in evidence.

[74] For example, the defendant's credibility is said not to be relevant where imputations are cast on prosecution witnesses by the advocate but the accused does not testify.

[75] *Butterwasser* [1948] 1 KB 4; para 12.81 below.

his likely standing after cross-examination with the tribunal which is trying him".[76] The credibility of a witness (including a testifying defendant) can be looked at in two different ways. First there is the *specific* credibility of the witness in the particular case – for example, where the witness's testimony is at variance with known facts, or where the witness has a grudge against the accused or stands to benefit from a conviction. The other type of credibility is the witness's *general* or *moral* credibility, which may be attacked in order to show not only that his or her word is unreliable but that "the morality and humanity of the witness is so inferior that no verdict can be based on his testimony".[77]

6.48 Questions bearing on the witness's *specific* credibility are more likely to affect the witness's standing than are questions about his or her character in general, as the Divisional Court has recently observed.[78] The fact-finders should be encouraged to concentrate primarily on the evidence given by a witness[79] (including a defendant) and "limit the extent to which the moral credibility of the accused and of the witnesses can colour [their] judgment … and distract [them] from a correct assessment of [the actual evidence in the case]".[80] A conviction which goes to the witness's "moral credibility" may wholly discredit the witness,[81] but a "purely collateral act of dishonesty" does not mean that a witness's evidence on a wholly unrelated matter is not credible. In *R v Haringey JJ, ex p DPP*[82] the court went so far as to say that the witness should not have been cross-examined on an allegation of stealing money, because the theft was denied. We agree with this view.

6.49 When we examined the implications of the psychological research for the assumption that there is a connection between mendacity and the possession of a criminal record, we provisionally concluded that the connection is not as strong as

[76] *Sweet-Escott* (1971) 55 Cr App R 316, 320, *per* Lawton J.

[77] This point has been made by a number of writers, eg A Zuckerman, who distinguishes the two types of credibility referred to above as "probative credibility" and "moral credibility": *The Principles of Criminal Evidence* (1989) p 248. R Munday suggests that there is a distinction between hard evidence directed at the issues in the case and evidence of bad character which, "without pointing sufficiently specifically to guilt, is liable to induce a tribunal of fact to convict upon the basis of general character traits": "The Paradox of Cross-Examination to Credit – Simply Too Close for Comfort" [1994] CLJ 303, 312 n 53. Lord Devlin seemed to recognise the distinction between "specific" and "general" morality in *Jones v DPP* when he said: "When Lord Herschell [in *Makin*] used the term 'relevant to an issue before the jury' he meant, of course, an issue upon facts relevant to the accused's guilt of the offence with which he was charged; he did not mean to include an issue about the accused's character, credit or credibility *as shown by matters unconnected with that offence* ": *Jones v DPP* [1962] AC 635, 691 (emphasis added).

[78] *R v Haringey JJ, ex p DPP* [1996] 2 WLR 114.

[79] Which may be directly affected by other evidence, such as that showing bias by the witness against the particular defendant.

[80] A Zuckerman, *The Principles of Criminal Evidence* (1989) p 249.

[81] As in *Edwards (Maxine)*, *The Times* 31 January 1996, where the conviction was quashed because the evidence of police officers in other cases had become infected with suspicions of perjury, even though the officers had not been prosecuted for perjury and no disciplinary proceedings had been brought against them.

[82] *R v Haringey JJ, ex p DPP* [1996] 2 WLR 114.

is sometimes assumed.[83] This suggests that evidence relating only to "general" or "moral" credibility may be of limited value.

The relevance of previous convictions to credibility

6.50 Where the evidence of bad character consists of a previous conviction, its probative value will vary substantially according to the nature of the conviction and the plea entered. For example, a plea of guilty to a charge of dangerous driving will tell the fact-finder less about the defendant's credibility than will numerous convictions for perjury after contested trials. We now consider the factors that may affect the probative value of previous convictions, and identify five possible factors: the nature of the previous convictions, their age, their number, whether the defendant pleaded guilty or was convicted after a contest, and the nature of any defence previously raised.

The nature of the previous convictions

6.51 There is a view that *any* conviction is indicative of, at the least, a lack of respect for the law, and therefore of the untrustworthiness of the convicted person.[84] As we have seen, the psychological research does not support such a generalisation;[85] nor, it seems, does the behaviour of the mock jurors who took part in the Oxford study.

6.52 It has often been suggested that cross-examination of a defendant should be limited to offences of certain types.[86] For example, the Common Law Commissioners recommended in 1853 that cross-examination should be confined to "offences which implied turpitude and want of probity, and more especially absence of veracity – as for instance, perjury, forgery, obtaining money or goods under false pretences and the like".[87] This recommendation was not implemented. In 1972 the CLRC recommended that a condition for cross-examination of the accused on his or her previous convictions should be an explicit link between the conviction and the accused's credibility – though the interpretation of such a provision would have been left to the court without further guidance.[88] It may

[83] Consider also the view of Richard Eggleston (an Australian judge for 14 years) in *Evidence, Proof and Probability* (2nd ed 1983) p 195:

> it has been my experience that honest witnesses, that is to say, witnesses who would not be prepared to lie to gain a personal advantage, will nevertheless lie to protect their good name or the good name of their friends or relations if the questions asked do not seem to them to have any bearing on the case. This may be expressed as a general rule, that the willingness of an honest witness to commit perjury will vary inversely with the [perceived] relevance of the question to the facts in issue.

[84] Eg *Clifford v Clifford* [1961] 1 WLR 1274, 1276, *per* Cairns J: "It has never, I think, been doubted that a conviction for any offence could be put to a witness by way of cross-examination as to credit, even though the offence was not one of dishonesty".

[85] See paras 6.30 – 6.34 above.

[86] Eg *Cross and Tapper*, p 333.

[87] Second Report of Her Majesty's Commission for Inquiry into the Process, Practice and Pleading in the Superior Courts of Law (1853) p 21, quoted in *Cross and Tapper*, p 332.

[88] Evidence Report, para 120, and draft Bill, cl 6(4). However, the CLRC accepted that previous convictions for offences of dishonesty might not in fact be relevant to the accused's

therefore be helpful to consider what light may be thrown on a witness's credibility by convictions for different types of offence.

6.53 The clearest example of an offence which may indicate a propensity to tell lies in court is, of course, perjury. If a witness can be shown to have lied in court before, it may be reasonable to suspect that he or she may be lying again. A conviction for perjury is therefore clearly relevant to credibility;[89] but it is not conclusive. The witness may have had a motive to lie on the previous occasion, but may now have no such motive. It is, in any case, unwise to infer much from a single instance.

6.54 Convictions for offences of a similar nature to perjury, such as perverting the course of justice or contempt of court, or offences which entail deliberately lying on oath to authorities, may be relevant to credibility in so far as they "indicate an accused's willingness to cock a snook at the majesty of the law, [and] might also be argued to signal a possible propensity to tell lies in court".[90] But again we would argue that fact-finders should be wary of inferring that a person who has lied in the past, or has shown no regard for the authority of the law, is therefore likely to lie on any particular occasion.

6.55 The courts have repeatedly regarded a conviction for dishonesty as being particularly relevant to credibility.[91] Thus in *Watts*[92] the defendant, charged with indecent assault on a young housewife, claimed that police evidence was fabricated. The judge acceded to an application for leave to cross-examine the defendant about his convictions for indecent assaults on his young nieces some years before. The Court of Appeal allowed the appeal on the grounds that the judge ought to have refused leave for the cross-examination to take place, given the prejudice it would arouse in a jury's mind, pointing out that

> [The jurors] were warned that such evidence [of previous convictions] was not to be taken as making it more likely that [the defendant] was guilty of the offence charged, which it seems it plainly did, but only as affecting his credibility, which it almost certainly did not … . *The previous offences did not involve dishonesty.*[93]

truthfulness on oath. They cite the example of *Morris* (1959) 43 Cr App R 206, in which a previous conviction for dishonesty was admitted where the defendant was accused of having sexual intercourse with his 11-year-old stepdaughter. The CLRC implies that it is doubtful whether the conviction really shed any light on who was telling the truth in the proceedings: Evidence Report, para 120.

89 It has been shown in one study that juries do not see it this way: see the Wissler and Saks study (para 6.37 above), where more notice was taken of a similar previous conviction than of one for perjury.

90 R Munday, "Reflections on the Criminal Evidence Act 1898" [1985] CLJ 62, 71.

91 For example, Judge Burger has said: "A 'rule of thumb' thus should be that convictions which rest on dishonest conduct relate to credibility whereas those of violent or assaultive crimes generally do not; traffic violations, however serious, are in the same category ": *Gordon v US* 383 F 2d 936, 940 (1967).

92 *Watts* (1983) 77 Cr App R 126.

93 *Ibid*, at pp 129–130 (emphasis added). Note also the views of Zuckerman [1983] All ER Annual Review 201–202.

6.56 There have been other cases in which courts regarded convictions of dishonesty as being more relevant on credibility than other convictions;[94] and in Canada it has been held that what makes a conviction for theft relevant to a witness's credibility is the dishonesty inherent in such a conviction, not the value of the property stolen.[95]

6.57 Under the US Federal Rules, it is permissible to attack the credibility of a witness by adducing evidence that he "has been convicted of a crime which involved dishonesty or false statement regardless of punishment".[96] There was uncertainty as to what was meant by "dishonesty or false statement".[97] The Conference Committee[98] was required to reconsider the definition and decided that it referred to

> crimes such as perjury or subornation of perjury, false statement, criminal fraud, embezzlement or false pretence or any other offence in the nature of crimen falsi,[99] the commission of which involves some element of deceit, untruthfulness or falsification bearing on the accused's propensity to testify truthfully.[100]

6.58 Even if it is true that convictions for offences of dishonesty are especially relevant to credibility, it may not be as straightforward as at first appears to determine which offences are "offences of dishonesty". For example, some drugs offences will necessarily involve an element of dishonesty, such as the illegal importation of a

[94] A similar example can be found in the unreported case of *Helliwell* (1994) CA No 94/4660/Y3, where the charge was unlawful wounding. The trial judge, as he was required to do, referred to the accused's caution for assault occasioning actual bodily harm and directed the jury that they had to consider it as it affected the defendant's credibility, but then pointed out: "It is not an offence of dishonesty, not an offence of deceit, an offence of violence which he admitted." The appeal was allowed because the jury were not specifically directed not to use the caution as indicating that the defendant had a tendency to violent behaviour. Had they been so directed, it is difficult to see what use they could have made of the caution at all.

[95] *Turlon* 70 CR 3d 376 (1989).

[96] Rule 609(a).

[97] For example, it was said that "crimes of violence, theft crimes and crimes of stealth do not involve dishonesty or false statement within the meaning of" this rule: *US v Givens* 767 F 2d 574, 579, n 1 (1985).

[98] This committee was established in order to resolve differences between the House of Representatives' and the Senate's Committees on the Judiciary during the debates over the Federal Rules of Evidence.

[99] This term now means crimes which are of a similar nature to, and share characteristics with, the crimes of dishonesty and deception listed: see *Black's Law Dictionary* (5th ed 1979).

[100] Offences such as theft and drug offences will not automatically fall within this class; if, however, the prosecution can prove that the facts of a particular class rested upon proof of a defendant's deceit or dishonesty, the previous conviction may be used. Thus in *Hayes* 553 F 2d 824, 827–828 (1988) the court held that a conviction for importation of cocaine would not be admissible if it was simply a question of stealth, but if the accused had been involved in the production of false documents or statements in the commission of the main crime, the conviction would be admissible.

controlled drug;[101] conversely, many offences commonly thought of as dishonesty offences do not in law require proof of dishonesty.[102]

6.59 Where the previous convictions are for offences which are not on any view offences of dishonesty, it is highly questionable whether they really indicate a propensity to lie on oath. Yet under our present law, any witness (other than the defendant) can be questioned about *any* previous conviction, irrespective of its nature.[103] This rule does not seem to have a sound foundation: it permits questioning on convictions which can have no bearing on the witness's truthfulness on oath. For example, fact-finders will not be helped on the question of the *credibility* of a witness by knowing that he is short-tempered, resorts to violence rather than argument, and has previous convictions for assault.[104] But, although various law reform bodies have proposed that convictions should be admitted only if genuinely relevant to credibility, none have recommended that only convictions for dishonesty can be relevant.[105]

6.60 The research that has been conducted shows that the conviction that will carry most weight with a jury is one which is similar to the charge,[106] as in *Watts*.[107] The study by Wissler and Saks showed that this was so even when the "jury" was expressly directed to consider the criminal history as relevant only to the defendant's credibility.[108]

[101] Misuse of Drugs Act 1971, s 3.

[102] Eg taking a vehicle without consent, contrary to s 12 of the Theft Act 1968, or burglary where the accused committed grievous bodily harm or rape, but not theft. We note that, according to United States case law, a conviction for theft will count as an offence of dishonesty only if the prosecution can prove that the facts of the particular case rested upon proof of the defendant's deceit or dishonesty: see Appendix B below, paras B.94 – B.96.

[103] Section 6 of the Criminal Procedure Act 1865 provides:

> A witness may be questioned as to whether he has been convicted of any … misdemeanor, and upon being so questioned, if he either denies or does not admit the fact, or refuses to answer, it shall be lawful for the cross-examining party to prove such a conviction … .

[104] Such convictions might, of course, be relevant on the issue of whether he committed an assault, and in particular whether he instigated it or acted in self-defence.

[105] In Canada the Law Reform Commission proposed that a test of "substantial probative value" be satisfied before any evidence of a witness's "character for truthfulness" could be advanced: Report on Evidence (1975), p 95; see also Report on the Law of Evidence, p 199, for a similar recommendation by the Ontario Law Reform Commission. The Evidence Act 1995 of the Commonwealth of Australia adopts a similar approach at s 103: evidence elicited in the cross-examination of a witness is admissible provided that it has "substantial probative value", and the defendant is further protected in that the leave of the court must be obtained before he or she can be cross-examined about a matter that is relevant only to his or her credibility; but there is no provision which limits cross-examination on credibility to matters involving dishonesty.

[106] See the LSE research and the Oxford Report: Appendices C and D below.

[107] See para 6.55 above. Of course, it was precisely because his previous convictions for indecent assaults on children suggested that Watts was the type of man who would commit assaults on women that the convictions bore on the credibility of his denial of the instant offence.

[108] See para 6.37 above.

> In other words, convictions [which] show that the defendant is the kind of man who might commit a particular type of offence prove highly useful aids to a jury in endeavouring to decide whether to believe the testimony of the accused. However, this is to introduce a form of reasoning which is normally forbidden to the jury.[109]

6.61 Similarly, the Oxford Report found that while a recent conviction for an offence similar to that charged significantly increased the rate of conviction, knowledge of a previous conviction did not alter the mock jurors' assessment of the defendant's credibility (unless the previous conviction was for an indecent assault on a child).[110] This was so even if the previous conviction was for an offence of dishonesty. However, this finding must be seen in the context of the limitations of the Oxford study.[111] It would be remarkable if the knowledge that the defendant is a professional confidence trickster, for example, had no effect whatever on a jury's assessment of his or her credibility. Whether a defendant's credibility is likely to be undermined by a record of dishonesty must, we think, depend on all the circumstances.

6.62 It is understandable that jurors should be more persuaded by the fact that the defendant has several convictions for (for example) assaults similar to the one now alleged than by the fact that he or she has a conviction for perjury.[112] But the primary relevance of the criminal history in such a case will be to the question of the defendant's *guilt*: the relevance to his or her *credibility* will be indirect. In other words, the fact-finders will decide that the defendant is not to be believed because they think, on the strength of what has been revealed about the defendant's propensities, that he or she is guilty. This is the reverse of the reasoning that they

[109] R Munday, "Reflections on the Criminal Evidence Act 1898" [1985] CLJ 62, 71. In the same article, at pp 71–2, Munday writes: "In fact, the category of offences which is most likely to help a tribunal of fact to decide whether the accused is an untruthful witness comprises precisely those which, although falling outside the narrow bounds of similar fact evidence, fairly closely resemble the offence charged." See also R Munday, "The Paradox of Cross-Examination to Credit – Simply Too Close for Comfort" [1994] CLJ 303, 323:

> the more closely that prior criminality resembles the offence charged, the more obviously consistencies in the defendant's history of misconduct bear upon the tribunal of fact's anxious question, 'Is the defendant telling the truth when he denies this offence?' Yet in these very cases, where past offending is most relevant, lies the greatest risk that the tribunal of fact will take the intellectual short-cut and, in the absence of compelling evidence, convict simply because from his record the accused looks the kind of person to commit this sort of offence.

[110] See Appendix D below, paras D.37 – D.41.

[111] See Appendix D below, paras D.55 – D.58.

[112] There is undoubtedly evidence that those with convictions are more likely to be convicted in the future (see n 116 below). There is also evidence that those with convictions are more likely to be convicted for *similar* offences. Discussing the findings of the Home Office Research Study no 53, Phillpotts and Lancucki conclude that "both male and female offenders tended to be convicted of similar types of offences in consecutive convictions". We should, however, be wary of exaggerating the likelihood that those convicted will reoffend, or of assuming that individuals cannot change. It is possible that the very fact that an individual has a conviction makes reconviction for the same offence more likely. An individual with a record for a particular offence is more likely to be targeted and arrested by the police.

are supposed to employ – namely to assess the defendant's truthfulness (in the light of the previous convictions) and *then* decide on guilt.[113]

6.63 **Our provisional view is that**

(1) **the instances of previous misconduct most relevant to credibility are convictions for perjury;**

(2) **convictions for dishonesty may be relevant in some circumstances;**

(3) **behaviour not involving dishonesty is unlikely to be relevant to credibility;**

but we do not think it appropriate to prescribe in a statute which kinds of conviction are and are not probative.

The age of the previous convictions

6.64 In many cases, the matter is covered by the Rehabilitation of Offenders Act 1974,[114] and the courts naturally regard old convictions as less probative on credibility than more recent ones.[115]

The number of previous convictions

6.65 Other things being equal, a number of similar convictions will be more probative than a single conviction.[116] Caution is required about inferring too much from a single instance of misconduct. But the similarities or dissimilarities between the circumstances of the convictions and those of the present case may be more significant than the number alone.

[113] We discuss the distinction between evidence which goes directly to guilt and evidence which goes to credibility at paras 6.74 – 6.75 below.

[114] See paras 5.4 – 5.12 above.

[115] In *Sweet-Escott* (1971) 55 Cr App R 316, Lawton J said, at p 320:

> An elderly man, for instance, giving evidence in a case of causing death by dangerous driving, having his credit challenged by a suggestion that as a boy at school he had been caned for stealing from another boy's desk. Judges nowadays would not allow such cross-examination. Another type of suggestion might have been that he had had a series of motoring convictions when he was a young man; and again most judges would adjudge that such questioning did not affect the witness's present-day credibility. In practice the judge has to draw the line somewhere.

In *Latimer* [1988] 11 NIJB 1 a witness's credibility was attacked by cross-examination about the theft of a pound of butter 19 years before.

[116] G Phillpotts and L Lancucki, *Previous Convictions, Sentence and Reconviction: A statistical study of a sample of 5000 offenders convicted in January 1971* (1979) discuss the findings of Home Office Research Study no 53. The study looked at the reconviction rates for those convicted in January 1971. It was found that the higher the number of previous convictions an individual had in January 1971 the higher the probability of his or her being reconvicted within six years.

The significance of a previous plea or verdict

6.66 There are limited circumstances in which a previous plea can be relevant to the defendant's credibility in subsequent proceedings. If, for example, a defendant can say that he or she has been convicted of assault on previous occasions, but always after a plea of guilty, this might indicate an honest witness (albeit an aggressive one).

6.67 Where a defendant has pleaded "not guilty", that plea is most unlikely to become relevant *in itself*: it cannot be treated as equivalent to an assertion of innocence. There may be many reasons for it which do not reflect adversely on the defendant's integrity.[117]

6.68 However, where the defendant has previously pleaded not guilty and been convicted, the *verdict* may be significant if it means that the fact-finders disbelieved the defence. A verdict of guilty does not necessarily imply an adverse reflection on the defendant's credibility: such an inference might not be drawn, for example, where, charged with dangerous driving, the defendant admits the driving but disputes that it was dangerous. Alternatively, where a plea of not guilty was entered simply to put the prosecution to proof, and no specific defence was raised, the defendant has not been disbelieved at all.

6.69 It will often be difficult to tell whether the verdict reflects on the defendant's credibility. If, in an assault case, the prosecution claims (but the defence disputes) (a) that the defendant started the fight, and (b) that even if the defendant was acting in self-defence, the force used was excessive, a verdict of guilty is ambiguous. It could mean that the fact-finders accepted (a) and disbelieved the defendant's account; or that they convicted on the basis of (b), perhaps because they accepted the defendant's version of the facts but believed that his or her actions constituted unreasonable force.

6.70 **Our provisional view is that**

(1) **a previous plea of guilty will be irrelevant to the prosecution case in later proceedings;**

(2) **a previous plea of guilty *may* be relevant to the defence case;**

(3) **where the defendant previously pleaded not guilty, the fact that the defendant was convicted will not usually prove that he or she lied; but**

(4) **where it *can* be inferred that the defendant has lied to a court on a previous occasion, that fact may be relevant to his or her credibility.**

[117] A defendant may have pleaded not guilty because, even on the statements, the prosecution case did not appear strong enough, or it might have appeared likely that certain witnesses would either not appear at court or not come up to proof, or that the trial judge might exercise his or her discretion to prevent the prosecution from relying on certain evidence, eg under the common law discretion (*Sang* [1980] AC 402) or under s 78 of PACE.

The significance of similar unusual defences

6.71 "Similarities of defences which have been rejected by juries on previous occasions, for example false alibis or the defence that the incriminating substance has been planted and whether or not the accused pleaded guilty or was disbelieved having given evidence on oath, may be a legitimate matter for questions. These matters do not show a disposition to commit the offence in question; but they are clearly relevant to credibility."[118] Thus in *Reid*[119] the defendant, charged with robbing a mini-cab driver at knife-point, claimed that he had entered the cab only after the robbery had taken place – which was almost identical to a defence which he had earlier raised, unsuccessfully, to a similar charge of robbery. The previous conviction was therefore admissible on the question of the defendant's specific credibility. We note that the similarity of the defence would still have been probative even if it had previously been successful.

6.72 In that case the similar defences were unusual, and their similarity was therefore probative in itself; but there is usually a limited range of defences available to most criminal charges, and it has therefore been argued that a court should not place too much weight on the fact that the accused has used a similar general defence (such as self-defence) in the past.[120] A further complication is that a "similar defence" will often be put forward to similar crimes, and there will therefore be a particular danger in such cases that the fact-finders will be tempted to reason that the defendant has a propensity to commit such crimes.[121]

6.73 **Our provisional view is that where a defendant has previously put forward substantially the same, unusual defence, that fact may be relevant to his or her credibility.**

The distinction between guilt and credibility

6.74 Similar fact evidence is relevant to show the guilt of the defendant, and is adduced as part of the prosecution case. Previous misconduct adduced in cross-examination, on the other hand, is supposed to be relevant solely on the issue of credibility, and not on the defendant's propensity to commit the crime. A jury will be directed expressly not to use the evidence of previous misconduct on the issue of guilt.[122]

[118] *Per* Gage J, in a judgment prepared by Stuart-Smith LJ, in *McLeod* [1994] 1 WLR 1500, 1512H–1513A.

[119] *Reid* [1989] Crim LR 719.

[120] R Munday, "The Paradox of Cross-Examination to Credit – Simply Too Close for Comfort" [1994] CLJ 303, 315.

[121] *Reid* is an example of how, although the similar defence was relevant to the likely truth of the instant defence, it would be impossible for D's propensity not to enter into the jury's assessment of D's truthfulness.

[122] The direction is given in full at Appendix D, para D.12 below.

6.75 It is therefore of vital importance to establish whether such a direction is logical and can be acted upon.[123] The distinction between credibility and propensity has been described as "hard to operate in practice, and possibly unsound in theory".[124]

Assertions of good character

6.76 Assertions of good character are usually made to show that the defendant did not commit the crime with which he or she is charged. Indeed, the specimen JSB direction, which has just been published, includes the reminder that

> the fact that [the defendant] has not previously committed any offence [*or* reached the age of … without committing an offence] may mean that he is less likely than otherwise might be the case to commit this crime now.
>
> I have said that these are matters to which you should have regard in the defendant's favour. It is for you to decide what weight you should give to them in this case. In doing this you are entitled to take into account everything you have heard about the defendant, including his age, […] and […]. *(Obviously the importance of good character will vary from case to case, and becomes stronger if the defendant is a person of unblemished character of mature years, or has a positively good character, and at this stage the benefit of this to a defendant whose good character justifies it should be pointed out to the jury, with words such as:)* Having regard to what you know about this defendant you may think that he is entitled to ask you to give [considerable] weight to his good character when deciding whether the prosecution has satisfied you of his guilt.

6.77 When the prosecution is permitted to cross-examine the defendant because he or she has wrongly claimed to be of good character, it is in effect putting in evidence to show not only that the defendant is not credible as a witness but also that he or she is likely to have committed the offence.[125] **Our provisional view is that the evidence of previous misconduct adduced in those circumstances is relevant to the defendant's guilt, and the fact-finders should be able to use it in this way.**

Imputations against prosecution witnesses

6.78 Imputations against a prosecution witness may relate not only to the witness's credibility but also to his or her propensities, and thus be relevant to guilt. For example, where the dispute in an assault case is as to who started the fight, and the alleged victim is shown to have numerous convictions for serious assaults, that fact may tend to suggest that he, and not the defendant, may have been the aggressor. If the prosecution is then permitted to cross-examine the defendant about his own convictions for similar assaults, it would seem that they may be relevant not just to the credibility of his evidence but to the question of who started the fight. **Our provisional view is that it is difficult to know for certain in those cases**

[123] See, eg, *Richardson and Longman* [1969] 1 QB 299, 311B–C, *per* Edmund Davies LJ.

[124] *Per* Mustill LJ in *Wright* (1989) 90 Cr App R 325, 333.

[125] See paras 11.11 – 11.12 below.

whether the convictions go merely to credibility or point to guilt. It all depends on the circumstances.

6.79 Previous convictions adduced in cross-examination as a result of an attack on a co-defendant fall into exactly the same category. In some instances they may relate solely to credit, while in others they may be relevant to guilt.

The difficulty of distinguishing between guilt and credibility

6.80 In many trials, the primary question for the jury or magistrates will be whether the defendant's guilt is proved, and so the distinction between guilt and credibility is easy to lose sight of. Evidence of bad character may be directly relevant to the defendant's guilt, where it shows a specific propensity to commit the crime charged; once the fact-finders have decided that the defendant is guilty it may follow that he or she is not to be believed, but the decision about guilt will already have been made.[126]

6.81 Problems arise where the previous misconduct relates to charges similar to those before the count and yet is inadmissible as similar fact evidence. It is difficult to distinguish between using the previous misconduct for credibility and for propensity. This is clearly illustrated in *Watts*,[127] where the Court of Appeal allowed an appeal because the trial judge had wrongly allowed cross-examination of a defendant charged with indecent assault on a young housewife to be cross-examined on previous convictions for indecent assaults committed some years earlier on his young nieces. The appeal was allowed because this knowledge required the jury to perform "difficult feats of intellectual acrobatics"[128] if they were to use it only in assessing the defendant's credibility and not in determining his guilt. In *Watts* it was clear that the criminal record was relevant to the accused's propensity to commit indecent assaults,[129] and not (or not directly) to his truthfulness at all.

6.82 There are other cases in which it is doubtful whether a jury can resist the temptation to reason from propensity to guilt – for example, where the previous misconduct involves dishonesty, and suggests that the defendant is not only a liar but also has a propensity to commit offences of dishonesty, and the offence charged is one of dishonesty.[130] "To say the accused is a bad man and not to be

[126] See para 6.62 above.

[127] *Watts* (1983) 77 Cr App R 126; para 6.55 above.

[128] *Ibid,* at p 129, *per* Lord Lane CJ.

[129] Where the offence charged is perjury and the record reveals several convictions for perjury, the theoretical distinction between propensity and credibility can just about be maintained – the credibility question is "Do the convictions for perjury mean that the defendant is lying now when he denies lying?", whereas the propensity question is "Do the convictions for perjury make it likely that the defendant committed perjury as alleged?" – but we think it is probably impossible for fact-finders to restrict themselves to the first question on hearing of the convictions.

[130] See also R Cross, "An Attempt to Update the Law of Evidence: the 11th Report of the English Criminal Law Revision Committee" (1974) 9(1) Israel LR 1, 21; R Munday, "Stepping Beyond the Bounds of Credibility" [1986] Crim LR 511, 512; J McEwan, *Evidence and the Adversarial Process* (1992) pp 33 and 86; A Zuckerman, *The Principles of Criminal Evidence* (1989) pp 95 and 258; D W Elliott, "The Young Person's Guide to

believed is hardly distinguishable from saying that he is a bad man and is guilty of the offence".[131] As Lord Goddard CJ observed,

> It is very difficult to see how if it is permissible to cross-examine a prisoner with regard to convictions, for instance, if he is a thief and he is cross-examined on previous convictions of larceny, the jury is not, in effect, being asked to say: "The prisoner is just the sort of man who will commit these crimes and therefore it is highly probable he did."[132]

6.83 More recently, it was said that "it is difficult to pretend that [a criminal history for offences similar to that charged] does not show a propensity to commit the instant offence".[133] We agree.

6.84 **We provisionally believe that juries and magistrates are likely to use previous convictions not only on credibility (as they are supposed to)[134] but as showing that the defendant committed the offence.**

PROVISIONAL CONCLUSIONS

6.85 Our provisional conclusions are as follows.

The relevance of previous misconduct to propensity

6.86 Even if an individual has a specific character trait, its existence cannot be inferred with confidence from a single observation of a person's character.

6.87 Even if a character trait is known, it will not necessarily assist in predicting an instance of conduct in isolation.

6.88 True predictive value is dependent upon a number of instances of conduct and a degree of similarity between the situations.

6.89 The notion that "character" is indivisible is not supported by the research.

6.90 If fact-finders hear that a person has acted in a particular way in one situation, they will make assumptions about how that person will act in a different situation, assuming that a character trait will persist across different situations, and that the kind of person who has one character trait will have other associated traits.

6.91 A blanket assumption that a criminal will lie on oath, irrespective of his or her particular criminal history, is not supported by the research. Previous convictions for dishonesty do not necessarily indicate a tendency to lie on oath.

Similar Fact Evidence – I" [1983] Crim LR 284; *Reid* [1989] Crim LR 719, para 4.75 n 168 above; NZLC, *Character and Credibility: a Research Paper* (1994) p 55.

[131] M Friedland, "Comment" (1969) 47 Can Bar Rev 656, 658.

[132] *Samuel* (1956) 40 Cr App R 8, 12.

[133] *Per* Gage J, in a judgment prepared by Stuart-Smith LJ, in *McLeod* [1994] 1 WLR 1500, 1505G.

[134] See Appendix D, para D.12 below, where the standard form of direction is set out.

6.92 Fact-finders who are told of a defendant's similar previous convictions are more likely to convict. A direction that they should treat the convictions as relevant only to the defendant's credibility is likely to be ineffective, particularly where the convictions are of a similar nature to the charge. A conviction for a sexual assault on a child is likely to prejudice fact-finders against a defendant, whether or not it is similar to the charge.

6.93 Past behaviour can be probative on the question whether the defendant is likely to have acted in the way alleged, but the probative value of a single previous instance can be easily over-estimated. The research supports the present approach, that past misbehaviour can be admitted where there are close and unusual similarities between the past and the present situations.

The relevance of previous misconduct to credibility

6.94 The factors that make evidence of previous misconduct relevant to the credibility of a defendant are:

- the nature, age and number of instances of previous misconduct;
- whether the defendant can be shown to have lied in previous criminal proceedings; and
- the repetition of an unusual defence.

6.95 Although it seems that the most probative instances of misconduct will be convictions for perjury, that instances of dishonesty may possibly be probative, and that behaviour not involving any dishonesty is unlikely to be probative, we do not think it appropriate to prescribe in a statute what will or will not be probative.

6.96 We ask whether consultees believe that fact-finders understand that previous convictions are supposed to be relevant directly to credibility, and that they are able to put this into effect.

6.97 Once the court is satisfied that the bad character evidence does demonstrate the propensity in question, and that that propensity is relevant to a fact in issue, the next question is: what *degree* of probative value must the evidence have? The need for a threshold rests on the fear that it may be *unfair*, or otherwise undesirable, to admit bad character evidence; and so we turn in the next Part to consider the ways in which it may be unfair or undesirable.

PART VII
GUIDING PRINCIPLES (II): THE PREJUDICIAL EFFECT OF BAD CHARACTER EVIDENCE

REASONS FOR EXCLUDING EVIDENCE OF PROBATIVE VALUE

7.1 If evidence is relevant it must be prima facie worth receiving: "Why exclude any data which if admitted would change the apparent probabilities and hence serve, even to a slight degree, to aid the search for truth?"[1] The exclusion of evidence of a relevant fact may be justified if it would be unfair to admit it in an individual case (which entails an assessment in each case of the potential prejudice to the accused), or if it is decided that, as a matter of policy, certain kinds of evidence should be inadmissible *generally*, to safeguard the fairness of the criminal process. In addition, evidence of some probative value may be excluded because of the danger of the fact-finders being distracted, because of the time it would take to hear the evidence, or because of the lack of notice to the defendant. We now consider each of these factors in turn.

Unfairness to the accused: prejudice

7.2 We take "prejudicial effect" to mean that a verdict is reached, not as a valid conclusion from a logical line of reasoning, but either by giving too much weight to the evidence of bad character ("reasoning prejudice"), or by convicting otherwise than on the evidence ("moral prejudice").[2]

7.3 It has been shown in several studies that if a jury is given certain information about the defendant's criminal history, it is more likely to convict.[3] However, it does not automatically follow from an increased conviction rate that a jury has given too

[1] G F James, "Relevancy, Probability and the Law" (1941) 29 Calif LR 689, 700.

[2] As Willes J explained in *Rowton* (1865) LE & CA 520, 540–541; 169 ER 1497, 1506: "if the prosecution were allowed to go into [character] evidence, we should have the whole life of the prisoner ripped up … ; and the result would be that the man on his trial might be overwhelmed by prejudice, *instead of being convicted on that affirmative evidence which the law of this country requires*" (emphasis added).

[3] An interesting example is *Bills*, *The Times* 1 March 1995: the jury gave verdicts of guilty on a s 20 charge of unlawful wounding and not guilty on a s 18 charge of wounding with intent to cause grievous harm, but then it heard of the accused's convictions, which included other offences of violence such as assault occasioning actual bodily harm and robbery. A juror told the usher that the wrong verdict had been given. The jury was reconvened and convicted the accused on the s 18 charge instead. The Court of Appeal reinstated the original verdicts. It is obvious that had the record been revealed to the jury in the course of the trial it would have made a difference to the verdict, at least if a judicial warning about its use had not been given. In both the Oxford study and the LSE research it was found that mock jurors who were told that the defendant had a recent conviction for an offence similar to the current charge were more likely to convict than mock jurors who were told nothing about previous convictions. Interestingly, both studies also found that in some circumstances mock jurors who were told that the defendant had a recent *dis*similar previous conviction were *less* likely to convict than mock jurors who were told nothing about the defendant's character.

much weight to character evidence, or has convicted without being satisfied that the charge is made out.

7.4 There are two drawbacks to some of the studies available. First, they do not necessarily shed light on the *reasons* why a jury is usually more likely to convict someone when it is aware of his or her criminal past. Secondly, most of the studies are conducted on *mock* juries, because this gives control over variables which research on real trials would not allow; and, in this jurisdiction, studies on real juries are prohibited by section 8 of the Contempt of Court Act 1981.

7.5 What mock jury research cannot tell us, of course, is whether a jury reaches more *accurate* conclusions when told of previous convictions. In answer to those who criticised the CLRC for not referring to empirical evidence before it produced its Evidence Report in 1972, Cross wrote:

> But would [the CLRC] have been any wiser with regard to the crucial question whether the disclosure of the record increases the risk of the conviction of an innocent man?[4]

7.6 The various studies conducted in this jurisdiction and in the United States which simply correlate the disclosure of record with conviction do not give a uniform answer to the question whether a record is prejudicial.[5] As the Oxford Report suggests, the relationship between the record and the likelihood of conviction may not be a simple one: the number of convictions, their staleness, their similarity to the instant offence, the relative gravity of the convictions and the charge, and the type of crime may all affect the chances of the accused being convicted.[6] However,

[4] R Cross, "Clause 3 of the Draft Criminal Evidence Bill, Research and Codification" [1973] Crim LR 400, 403; but cf Appendix D, para D.60 below.

[5] We cannot agree with the United States Department of Justice, which stated: "While the notion that evidence of other offenses carries such an extraordinary risk of prejudice has acquired the status of dogma through sheer force of repetition, there is really no reason to believe that such a risk exists". The Department of Justice, writing in 1989, examined only one study, that conducted by Kalven and Zeisel in 1966, and reached the opposite conclusion from that reached by Kalven and Zeisel themselves. The only other study (of which we are aware) to conclude that a defendant's legal history did not affect the verdict is that of E G Clary and D R Shaffer, "Effects of Evidence Withholding and a Defendant's Prior Record on Juridic Decisions" (1980) 112 Jo of Social Psychology 237. A later study comments on this result: "Given the number of studies that show that jurors are clearly influenced by evidence of previous convictions, this is a surprising result and possibly attributable to the nature of the previous offense (ie, a prior juvenile offense for an adult defendant)": E Greene and M Dodge, "The Influence of Prior Record Evidence on Juror Decision Making" (1995) 19 Law and Human Behavior 6, 69.

[6] For example, the LSE researchers (see W R Cornish and A P Sealey, "Juries and the Rules of Evidence" [1973] Crim LR 208) concluded that the admission of convictions does increase the chance of a guilty verdict, but only if the revealed convictions are for offences similar to that charged. If they are dissimilar it is possible for them to have an effect that is positively favourable to the accused. This effect was found also in the Oxford study, unless the conviction was for a particularly repugnant crime: see Appendix D, para D.22 below. We are aware of one study where knowledge of similar misconduct did not significantly affect the conviction rates: E G Schaefer and K L Hansen, "Similar Fact Evidence and Limited Use Instructions: An Empirical Investigation" (1990) 14 Crim LJ 157. This result could be explained by the fact that most jurors believed the defendant was guilty even without the "prejudicial" information. In the Oxford study, in which a greater number of "jurors" was studied and the evidence was more realistically presented, the evidence presented in the

more help is available from the studies on the effect of judicial directions warning juries not to use a criminal record in an impermissible way.[7]

Reasoning prejudice:[8] *the jury or magistrates may assess the evidence wrongly, giving too much weight to the disposition evidence*[9]

7.7 It is feared that fact-finders may rely on what is known of the accused's character to reason that, because he or she has convictions for, say, burglary, he or she is guilty of the charge of theft. Both the Oxford Report and the LSE research found that mock jurors were more likely to convict a defendant if told that he had a recent previous conviction for a similar offence. Such reasoning may not be illogical,[10] but it entails certain dangers. Significantly, in so reasoning a person may over-estimate the strength of the inference that can be drawn from evidence of the accused's past behaviour, and fail, for example, to give sufficient weight to the possibility that the defendant has reformed.[11]

7.8 Fact-finders may overestimate the weight to be accorded to the disposition evidence in that they will not discount enough for the likelihood of the accused being arrested in the first place. The chances of the defendant being in the dock are likely to be higher than the fact-finders estimate.[12] For example, the jury may assume that the chances of being charged with a crime of which one is innocent are very low: there must be a large number of people who could have been

case without the "prejudicial" information was far less conclusive of guilt. See Appendix D, para D.60 below.

7 See paras 7.18 – 7.20 below.

8 A Palmer's phrase: "The Scope of the Similar Fact Rule" (1994) 16 Adel LR 161, 169.

9 In *Boardman* [1975] AC 421, 456G–H, Lord Cross said: "it is believed that if it were generally admitted jurors would in many cases think that it was more relevant than it was, so that, as it is put, its prejudicial effect would outweigh its probative value."

10 There is undoubtedly evidence that those with convictions are more likely to commit crimes in the future. The Home Office Research Study no 53 found that 60% of males from a sample taken from those convicted of a standard list offence in January 1971 had a previous conviction. D P Farrington in "The Development of Offending and Antisocial Behaviour from Childhood" (1995) 360 J Child Psychology and Psychiatry 929 discussed the findings of the Cambridge Study in Delinquent Development. He concluded, at p 956, that "offending may increase or decrease over time, but the worst offenders at one age still tend to be the worst at another age". We should, however, be wary of exaggerating the likelihood that those convicted will reoffend, or of assuming that individuals cannot change. It is possible that the very fact that an individual has a conviction makes reconviction (as opposed to reoffending) more likely, as such people are more likely to be monitored, arrested, and charged. Also, high conviction rates for those with previous convictions does not make reconviction inevitable: as Farrington argues, "relative stability is quite compatible with absolute change". Such change is clearly something the law should encourage, rather than presuming that it does not occur.

11 P B Carter, "Similar Fact Evidence" in Z Cowen and P B Carter (eds), *Essays on the Law of Evidence* (1956) p 139; and "Forbidden Reasoning Permissible: Similar Fact Evidence a Decade After *Boardman*" (1985) 48 MLR 29.

12 See R O Lempert, "Modeling Relevance" (1977) 75 Mich LR 1021, 1035; E Ratushny, *Self-Incrimination in the Canadian Criminal Process* (1979) p 341, cited by R Munday, "The Paradox of Cross-Examination to Credit – Simply Too Close for Comfort" [1994] CLJ 303, 304 n 7; M Maguire and C Norris, *The Conduct and Supervision of Criminal Investigations*, Research Study No 5 for the Royal Commission (1992) p 8.

arrested, and so there must have been good reason for the police to select this accused. Indeed, there *is* likely to have been good reason for that individual to be questioned by the police. An investigating authority may well start its investigations by questioning those members of the population whom they know to have a propensity to commit the sort of crime in question – in other words, the local known offenders. Thus the likelihood of someone with previous convictions being investigated for a crime may well be far higher than the fact-finders assume. Moreover, the prospect of being charged with, rather than cautioned for, an offence may well increase as a defendant receives more convictions.

7.9 There is a danger that, although not sure of the accused's guilt on any single charge, the jury or magistrates will nevertheless return a verdict of guilty on one or more of them. They may reason in a circular fashion, where several allegations are presented together and the evidence is not conclusive on any one of them. For example, a jury thinks the evidence on count A is thin, and, on that evidence alone, it would definitely acquit. The evidence on count B is much stronger, almost strong enough to convict on count B alone. On count C, the evidence is finely balanced, but, taking into account the defendant's disposition as revealed by the evidence on count B, the jury is sure that the accused is guilty of count C. Having reached this point, the jury then uses its certainty about count C to bolster the evidence on count B, and has no difficulty in convicting on that count as well. It is then persuaded that, as the defendant is guilty on two counts, it is now sure that he or she is guilty on the first one as well.

Moral prejudice: the jury or magistrates may reach a verdict on the accused's character, rather than on the evidence

7.10 "Moral prejudice" is the kind of prejudice which contravenes two fundamental principles of the criminal justice system: the principle that a person shall be judged only on the charge faced, and the principle that a person shall not be convicted unless the case is proved beyond all reasonable doubt.

7.11 There is a danger that the accused will be judged on his or her character, not on whether the instant charge is made out.[13] The fact-finders may form such a low opinion of the defendant that they will be tempted to convict, guessing that a conviction will result in imprisonment.[14] This is particularly likely where the evidence of bad character discloses crimes for which the accused has not been punished. The Oxford Report found that if the defendant had a previous conviction for an indecent assault on a child, the mock jurors were not only more likely to convict him, but were also more likely to believe that he would commit other (similar or dissimilar) offences in the future, was more deserving of punishment and was more likely to lie on oath.

[13] "Character evidence … tends to distract the trier of fact from the main question of what actually happened on the particular occasion. It subtly permits the trier of fact to reward the goodman and to punish the badman because of their respective characters despite what the evidence in the case shows actually happened": Advisory Committee on the US Federal Rules of Evidence (1979) p 27 (cited by R Pattenden, "The Character of Victims and Third Parties in Criminal Proceedings other than Rape Trials" [1986] Crim LR 367, 377).

[14] See, eg, *Watts* [1983] 3 All ER 101.

7.12 The fact-finders may convict because they reason that even if the accused did not commit this crime, there will have been others that he or she has got away with. To convict on this basis is contrary to the principle that a person should be tried on the charge and nothing else.

7.13 Fact-finders may effectively use a lower standard of proof for those with convictions;[15] in failing to give the evidence of previous misconduct its true weight they fail to give the accused the benefit of any reasonable doubt. They may be satisfied with a lower standard of proof because they feel less regret at convicting than they would at "letting off" someone who already has a criminal record.[16] To convict on this basis is contrary to the second of the two principles mentioned above.

7.14 Moral prejudice erodes the presumption of innocence: the fact-finders view the accused with suspicion because of the evidence of discreditable incidents, and are more likely to be inclined to convict unless he or she can produce some convincing exculpatory evidence.[17] If this possibility exists, there is the danger that the prosecution will put in as much previous misconduct evidence as possible, aware that the cumulative effect may secure a conviction in this way.

7.15 The kinds of prejudice listed above may arise not only where the misconduct in question amounts to a criminal offence, but also where the conduct is lawful, and even where it would not be universally considered as *mis*conduct.

The effectiveness of a judicial direction

7.16 We now consider whether these kinds of prejudice can be effectively counteracted by a direction from the judge to the jury, or by a reminder of the law from the magistrates' clerk. There are two possible pitfalls: the jury may not understand the direction; and even if it is understood, the jury may not obey it.

7.17 In a survey conducted for the Royal Commission some general questions were asked about the jury's attitude to legal directions in summings up. It was found

[15] As the Privy Council feared in *Noor Mohamed* [1949] AC 182, 193, *per* Lord Du Parcq: "The effect of the admission of the impugned evidence may well have been that the jury came to the conclusion that the appellant was guilty of the murder of [the accused's first wife], with which he had never been charged, and having thus adjudged him a murderer, were satisfied with something short of conclusive proof that he had murdered [the victim of the charge]."

[16] This view is founded on the "regret matrix", which proposes that people seek to minimise the regret they anticipate they will feel at the outcome of decisions they make: R O Lempert and S A Salzburg, *A Modern Approach to Evidence* (2nd ed 1982) pp 162–165. There is seen to be less stigma attached to second and subsequent convictions: D Matza, *Becoming Deviant* (1969); E Schur, *Labeling Deviant Behavior: Its Sociological Implications* (1971).

[17] See *Perry* (1982) 150 CLR 580, in which the accused was charged with attempted murder by arsenic poisoning of her third husband, and the prosecution argued for the admission of evidence that her second husband and her brother had both died from arsenic poisoning and that her de facto husband had died from a barbiturate overdose. There was no other evidence to show that she had poisoned the alleged victim. Murphy J put it thus, at p 594: "The allegation that a number of the accused's relatives died or suffered from arsenic poisoning immediately conjures up a highly suspicious prejudicial atmosphere in which the presumption of innocence tends to be replaced with a presumption of guilt."

that 61 per cent of jurors and 71 per cent of foremen found the judge's summing up on the law "not at all difficult", with an additional 33 per cent of jurors and 25 per cent of foremen finding it "not very difficult".[18] When asked if other jurors found it difficult to understand the judge's directions on the law, over a quarter said they were not sure; but, of those who answered, 65 per cent of jurors and 60 per cent of foremen thought that other jurors did not find them difficult.[19] The reaction of judges was similar: 42 per cent thought it was easy for the jury to understand the summing up of the law and a further 42 per cent thought it was "fairly easy", 13 per cent thought it was "fairly difficult" and 3 per cent "difficult".[20] No doubt some directions are easier to follow than others, and directions which require "intellectual acrobatics" are inevitably hard to follow, so these general responses may be of limited use. We note also that in the case study just examined the "jurors" thought they understood the directions, but this clearly did not mean that they put them into practice.

7.18 Much research has been undertaken on the effect of a judge's instructions to jurors. The results have been contradictory. Researchers have found that jurors do not understand a majority of judicial directions.[21] Some research indicates that jurors do respond as intended to instructions,[22] while others have found that instructions are often ignored.[23] Research has also found that jurors may strive to compensate for any prejudice they might feel, following the direction from the judge, and may in fact "over-correct", making decisions that are particularly favourable to the defendant in an effort to avoid prejudice.[24] In the Oxford study the mock jurors who were told that the defendant had a previous conviction were directed that they must not assume that he was guilty because of the previous conviction. Despite this, knowledge of the defendant's criminal history clearly affected the verdicts.

7.19 It may be that some kinds of instruction are more effective than others.[25] For example, it may be more realistic to expect a jury to be able to overcome the

[18] The Royal Commission on Criminal Justice, Crown Court Study: Research Study No 19 (1993) para 8.6.2 and table 8.14.

[19] *Ibid*, para 8.6.3 and table 8.15.

[20] The judges were asked: "in your view, how easy was it for the jury to understand the summing up on the law?": *ibid*, para 8.6.1, p 216.

[21] A Reifman, S M Gusick and P C Ellsworth, "Real Jurors' Understanding of the Law in Real Cases" (1992) 16 Law and Human Behavior 539.

[22] E Borgida and R Park, "The Entrapment Defence" (1988) 12 Law and Human Behavior 19; K L Pickel, "Inducing Jurors to Disregard Inadmissible Evidence: A Legal Explanation Does Not Help" (1995) 19 Law and Human Behavior 407. Pickel found that "jurors" followed judicial instructions to ignore inadmissible previous conviction evidence only if no explanation was given by the judge.

[23] S Tanford and M Cox, "The Effects of Impeachment Evidence" (1988) 12 Law and Human Behavior 477.

[24] E G Schaefer and K L Hansen, "Similar Fact Evidence and Limited Use Instructions: An Empirical Investigation" (1990) 14 Crim Law J 157.

[25] The extent to which the direction is obeyed may depend on the scope of the direction. It may be easier for juries to ignore evidence which they have been told is inadmissible than to take account of evidence for limited purposes only: S Wolf and D A Montgomery, "Effects

"reasoning" kinds of prejudice than the "moral" kinds of prejudice listed above. Or, for example, it may be easier to ignore a record altogether than to use it only as to credibility.[26] The effects of each of the different types of possible prejudice itemised above have not been isolated, and the effectiveness of judicial instructions in respect of each of them tested, but the general impression is nevertheless instructive:[27] as an American judge has put it, "The naive assumption that prejudicial effects can be overcome by instructions to the jury … all practising lawyers know to be unmitigated fiction."[28] Research has suggested that jurors may respond in different ways to judge's directions if explanations are given for the direction. Pickel[29] found that if "jurors" were given an explanation for a direction to ignore previous conviction evidence they were more likely to convict than if simply told to ignore the evidence. Pickel concludes that this is because the explanation draws the attention of the jurors to the evidence and makes it harder to ignore. Wolf and Montgomery[30] use "reactance theory" to explain why admonishment from the judge may backfire: jurors assert their independence when told too strongly to treat evidence in a certain way.

7.20 It may not be simply that a jury ignores a judge's direction.[31]

> The ways in which inadmissible or extralegal evidence may influence a juror can range from blatant intentional disregard of the judges' instructions to subtle alterations in the construal of the rest of the evidence in jurors who make a sincere effort to ignore the inadmissible evidence and believe that they have succeeded.[32]

of Inadmissible Evidence and Level of Judicial Admonishment to Disregard on the Judgments of Mock Jurors" (1977) 7 Jo Applied Social Psychology 205, 217.

[26] This would accord with the findings of Pickel: see para 6.38 above.

[27] S M Davies, "Evidence of Character to Prove Conduct: A Reassessment of Relevancy" (1991) 27 Crim L Bull 504, 525. See also J D Casper and K M Benedict, "The Influence of Outcome Information and Attitudes on Juror Decision Making in Search and Seizure Cases", pp 65–83 at p 66 in R Hastie (ed), *Inside the Juror* (1993): "intuitions and the results of scientific research suggest that judge's [sic] instructions are ineffective in blocking the influence of the extralegal information on a juror's decisions". Greene and Dodge's study (see n 5 above) confirms this conclusion.

[28] *Krulevitch v US* 336 US 440, 453 (1949). Cf *US v Adams* 443 F 2d 7 (2nd Cir) (1971).

[29] K L Pickel, "Inducing Jurors to Disregard Inadmissible Evidence: A Legal Explanation Does Not Help" (1995) 19 Law and Human Behavior 407.

[30] S Wolf and D A Montgomery, "Effects of Inadmissible Evidence and Level of Judicial Admonishment to Disregard on the Judgements of Mock Jurors" (1977) 7 Journal of Applied Psychology 205.

[31] P C Ellsworth, "Some Steps Between Attitudes and Verdicts" pp 42–64 at p 47 in R Hastie (ed), *Inside the Juror* (1993).

[32] Studies cited in support: K C Gerbasi, M Zuckerman and H T Reis, "Justice Needs a New Blindfold: A Review of Mock Jury Research" (1977) 84 Psychological Bulletin 323 and L Ross, "The Problem of Construal in Social Inference and Social Psychology" in N Grunberg, R E Nisbett and J Singer (eds), *A Distinctive Approach to Psychological Research: The influence of Stanley Schachter* (1987).

Safeguarding the fairness of the criminal justice process

7.21 The ALRC believed that[33]

> One ideal that is highly relevant in this context is the belief, fundamental in our social system, that people are not limited by their past behaviour, that the criminal can reform, that once a criminal has "paid his debt to society" he should not be additionally penalised for that behaviour.

7.22 This principle lies behind the Rehabilitation of Offenders Act 1974, which, when read in conjunction with the relevant Practice Direction,[34] directs that "spent" convictions, of a witness or of a defendant, may not be referred to in open court without the leave of the judge, and that such leave should not be given unless the interests of justice so require.[35]

7.23 In addition, there are a number of practical objections to the admission of a defendant's criminal record as a matter of course. As we have said above,[36] once someone has a record, he or she is more likely to be questioned than if he or she had no record; if at the trial a previous conviction is admitted and is for a similar offence to the current charge, a conviction is more likely to follow;[37] the record gets longer and so he or she is even more likely to be questioned when there is next a crime of that type committed in that locality. There is thus a cumulative effect,[38] which could make it difficult for someone with a criminal record to be acquitted.

7.24 People with criminal records would be particularly vulnerable to conviction on fabricated evidence where other people know their modus operandi, if it is known that evidence of all similar crimes will automatically be admitted;[39] finally, as McHugh J put it: "law enforcement officers might be tempted to rely on a suspect's antecedents rather than investigating the facts of the matter".[40]

Distraction and confusion

7.25 There is a danger that the focus of the trial will be diverted on to the previous misconduct evidence, or the accused's character in general, and away from the offence charged.[41] Although this danger exists whenever a criminal record is put in,

[33] ALRC, *Character and Conduct* (1983) Research Paper No 11, p 102. The failure to give effect to this principle is identified by Peter Carter as the main source of danger of prejudice to the accused in individual cases: see n 11 above.

[34] *Practice Direction: Crime (Spent Convictions)* [1975] 1 WLR 1065.

[35] This statute and the Practice Direction are discussed at paras 5.4 – 5.12 above.

[36] See para 7.8 above.

[37] See Appendix D below.

[38] As described by, eg, C Tapper, "Proof and Prejudice" in E Campbell and L Waller (eds) *Well and Truly Tried* (1982) p 207.

[39] D McBarnett, *Conviction* (1983) p 113.

[40] McHugh J in *Pfennig (No 2)* (1995) 127 ALR 99, 136.

[41] One can envisage a trial in which the case against a defendant consists very largely of allegations of previous misconduct. In such cases, where the Crown can adduce very little direct evidence, it may be very difficult for a jury to keep sight of the offence as charged.

it is increased where, for example, the previous convictions are numerous, where the cogency of the evidence of bad character is in doubt, or where the details of the previous misconduct are explored in court. Not only will time be spent hearing evidence of the previous misconduct, but it will be referred to in the closing speeches and in the summing up. The distraction may work in favour of either party: in favour of the prosecution where so much dislike of the defendant is created that the jury is less concerned about the quality of the evidence; in favour of the defence where the jury becomes swamped with detail of little value, and acquits because the important prosecution evidence has been lost sight of.

The waste of court time

7.26 Previous misconduct evidence may be relevant, but only remotely so, with the result that the court's time may be wasted. The longer the court spends hearing the evidence of bad character, the greater the danger of time-wasting. Where the accuracy of the discreditable evidence is disputed, that in itself can lead to a disproportionate amount of time being spent on the matter, with the concomitant increased danger that the real issue in the trial will become submerged. The risks that the court's time will be wasted and the court's attention diverted have to be weighed in the balance, along with the potential kinds of prejudice, against the probative value of the evidence.

7.27 In our consultation paper on hearsay in criminal proceedings,[42] we tentatively put forward the possibility of giving the court an additional statutory power to exclude evidence along the lines of Rule 403 of the Federal Rules of Evidence or section 135 of the Evidence Act 1995 of the Commonwealth of Australia – namely where the evidence might be misleading, confuse the issues or result in the undue waste of court time. Such a discretion might be particularly useful in the case of previous misconduct evidence.

Surprise

7.28 The accused may be unfairly disadvantaged in the trial if he or she has not anticipated that acts other than those alleged in the charge will be raised. This was historically one of the reasons for the rule against evidence of bad character,[43] and also justifies the view that bad character evidence which is admissible in chief should not be saved until the cross-examination of the accused.[44] There are now obligations on the prosecution to disclose evidence,[45] so the defendant should not

[42] Evidence in Criminal Proceedings: Hearsay and Related Topics (1995) Consultation Paper No 138, para 11.35.

[43] Section 8 of the Treason Act 1695 provided that "no evidence shall be admitted or given of any overt act that is not expressly laid in the indictment against any person or persons whatsoever." Foster explains this as arising "lest the prisoner should be surprised or confounded by a multiplicity and variety of facts which he is to answer upon the spot": *Crown Law* (1st ed 1762) p 244. See also *Phillips' Case* (1829) 1 Lew CC 105, 168 ER 977; *Knapp and another v Haskall* (1831) 4 CAR & P 590, 172 ER 838; *Whiley and Haines* (1804) 2 Leach 983, 168 ER 589; *Gray* (1866) 4 F & F 1102, 176 ER 924.

[44] See, eg, *Jones v DPP* [1962] AC 635, 646, *per* Ashworth J (CA); at p 668, *per* Lord Denning; and at p 685, *per* Lord Morris.

[45] At least in the case of indictable offences: Magistrates' Courts (Advance Information) Rules 1985 (SI 1985 No 601) (offences triable either way); Magistrates' Courts Act 1980, s 5, as

be ambushed by an attack on his or her character. In theory, a defendant may be ambushed by an attack by a co-accused, as there is no obligation for the defence to disclose its case in advance (except for alibis[46] and expert evidence in Crown Court trials[47]), but we doubt that in practice such an attack, when it occurs, has not been anticipated.[48] If one party is taken by surprise, it may always apply for an adjournment. For all these reasons, this danger does not seem to be as significant as it has been historically.

"BALANCING" PROBATIVE VALUE AND PREJUDICIAL EFFECT

7.29 There is a conflict between the need to protect the accused from conviction on insufficient evidence and the aim of not depriving courts of evidence which is necessary for establishing guilt.[49] To what extent is it possible to balance the weight of evidence against its potential for prejudice?

7.30 Some argue that a balancing act between probative value and prejudicial effect is not in fact feasible.[50] Others argue that it is not only feasible but that an assessment of likely prejudice is *inherent* in an assessment of probative value.[51]

7.31 We identify above the different forms that prejudice may take, and classify them into "reasoning prejudice" and "moral prejudice". The former arises where the jury or magistrates indulge in the "forbidden reasoning", and infer, from the

substituted by Criminal Justice and Public Order Act 1994, Sched 4 (cases transferred to the Crown Court); and *Brown (Winston)* [1994] 1 WLR 1599 (offences triable only on indictment). In practice, the prosecution frequently, but not invariably, gives disclosure of evidence in summary only cases.

[46] Criminal Justice Act 1967, s 11.

[47] PACE, s 81; Crown Court (Advance Notice of Expert Evidence) Rules 1987, SI 1987 No 716.

[48] Under the Criminal Procedure and Investigations Bill (HL) the defence is required, once certain disclosure requirements have been met by the prosecution, to disclose sufficient particulars of its case to identify the issues in dispute: cl 5. Failure to do so may result in adverse comment being made: cl 10. There is no requirement that an accused person should make disclosure to a co-accused, and it is therefore possible in theory that a defendant might be surprised by an attack on his or her character by a co-accused; but this seems unlikely to occur often in practice, particularly since the prosecution may have to make secondary disclosure to one accused in the light of the defence statement of another.

[49] J Stone, "The Rule of Exclusion of Similar Fact Evidence: England" (1932) 46 Harv LR 954, 983: "Defendants must be protected against conviction upon inadequate testimony, but at the same time the jury must not be deprived of testimony which is both necessary and sufficient to establish the guilt of the accused."

[50] See A Zuckerman, *The Principles of Criminal Evidence* (1989) p 233; J McEwan, *Evidence and the Adversarial Process* (1992) pp 44–45; P B Carter, "Forbidden Reasoning Permissible: Similar Fact Evidence a Decade After *Boardman*" (1985) 48 MLR 29, 36; McHugh J in *Pfennig (No 2)* (1995) 127 ALR 99, 147; C Tapper in his commentary on *Pfennig* at [1995] 111 LQR 381, 384.

[51] C Tapper, "Proof and Prejudice", in E Campbell and L Waller (eds), *Well and Truly Tried* (1982) p 197: "When relevance is examined in the context of particular cases and sets of circumstances it becomes clear that the standard of proof and type of similar fact evidence which is relevant depends entirely upon the issues raised, the arguments advanced and the means of proof available. Exactly the same factors determine the extent to which such evidence is unduly prejudicial."

information that the accused has committed certain discreditable acts in the past, that he or she is likely to have committed this one. Another way of putting this is that the fact-finders ascribe too much weight to the evidence of bad character. The "moral" type of prejudice arises where the jury or magistrates are drawn to convict the accused, *not on the basis of the likelihood that he or she is guilty on the evidence before them* but because of what they know about the accused's character. Examples given included the jury being so repulsed by the crime itself that it convicts the accused so that *someone* is punished for it, or convicting the accused because it is suspected that he or she has committed other crimes and deserves punishment for those. To what extent is it possible to weigh probative value against these different kinds of prejudice?

7.32 As regards "reasoning prejudice", it seems to us that as the probative value of the evidence increases, so the danger of fact-finders placing too much weight on it decreases. In other words, where the evidence really is probative (and we know that it is because we are satisfied of the strength of the generalisation underlying the inference to be drawn from it), then it is not unfairly prejudicial to rely on it.[52]

7.33 But the situation is quite different as regards "moral prejudice", as Adrian Zuckerman points out:

> The principle of confining the verdict to the charge and the principle of full proof represent social choices. Such choices are not derived from the canons of factual reasoning. This factor has important implications for our admissibility test. Since "prejudice" means also violation of these non-inductive principles, it follows that the test of admissibility requires the balancing of incommensurable factors: the probative weight of the evidence, which is controlled by inductive reasoning, against the likely risk to the two principles of criminal justice, which represent non-factual choices.[53]

7.34 No logical rule can guide a magistrate or judge in this assessment of what will produce a fair trial. They weigh off probative value and prejudice against each other every day. Clearly they are dealing with a question of fairness, and this is not a matter which can be dissected into intellectually measurable quantities. It does not necessarily follow that the fairness of a decision cannot be measured at all.

7.35 Some evidence of previous misconduct will be so probative that there is only one conclusion that can reasonably be drawn from it: that the defendant is guilty. In this case "reasoning prejudice" cannot be over-estimated, and it does not matter if "moral prejudice" exists too, because no group of reasonable fact-finders could reach any other conclusion.

[52] A E Acorn, "Similar Fact Evidence and the Principle of Inductive Reasoning: *Makin* Sense" (1991) 11 OJLS 63, 91.

[53] A Zuckerman, *The Principles of Criminal Evidence* (1989) pp 232–233 (footnote omitted).

PROVISIONAL CONCLUSIONS

7.36 If the jury or magistrates hear evidence of the accused's bad character, they may give too much weight to that evidence; they may also be inclined to convict without being sure that the defendant is in fact guilty as charged.

7.37 We are uncertain whether juries adequately understand, or carry out, directions given to them by judges on the use they are to make of evidence of previous misconduct. In the absence of convincing evidence that fact-finders will not be affected by prejudice, our view is that the rules of evidence should err on the side of caution.

7.38 There is a danger that unfairness to those with criminal records would be built into the criminal justice system if previous convictions were freely admitted: law enforcement officers might be tempted to rely on the previous misconduct of the defendant, rather than on a thorough investigation of the offence.

7.39 In deciding on the admissibility of evidence of previous misconduct, the court should take into account the dangers that (a) the focus of the trial might be diverted on to the previous misconduct, and away from the question of the defendant's guilt of the offence charged; and (b) the court's time might be wasted hearing evidence which is of low probative value.

7.40 Any system permitting the admission of previous misconduct evidence should contain safeguards against such evidence taking the defendant by surprise.

7.41 There is no reason why a court cannot weigh probative value and prejudicial effect against one another, adequately and fairly.

Reasons for excluding evidence of probative value 121

Unfairness to the accused: prejudice 122

Reasoning prejudice: the jury or magistrates may assess the evidence wrongly, giving too much weight to the disposition evidence 124

Moral prejudice: the jury or magistrates may reach a verdict on the accused's character, rather than on the evidence 125

The effectiveness of a judicial direction 126

Safeguarding the fairness of the criminal justice process 129

Distraction and confusion 129

The waste of court time 130

Surprise 130

"Balancing" probative value and prejudicial effect 131

Provisional conclusions 133

PART IX
SOME OPTIONS WE REJECT, AND OUR PREFERRED APPROACH

9.1 At present there are a number of radically different rules for the admission of evidence of previous misconduct, depending on the circumstances in which the issue of admissibility arises. The rules applicable to the introduction of such evidence as part of the prosecution's case (as "similar fact" evidence[1] or under the provisions of section 27(3) of the Theft Act 1968[2]) are completely different from those that determine whether the defendant can be cross-examined about his or her previous convictions under section 1(f) of the 1898 Act.[3]

9.2 In this Part we consider whether it is possible to devise some general rules which would determine the admissibility of evidence of previous misconduct *irrespective of how that issue arises*. We start by considering some possible rules under which there is no question of any discretion being exercised: these are *category-based* regimes, under which evidence of previous misconduct automatically qualifies (or fails to qualify) for admission if it falls within a particular category, irrespective of its probative value or likely prejudicial effect.[4] We then move on to consider options which involve the exercise of *discretion*. Our discussion of these options begins by examining the respective merits of different *types* of discretion – namely, a discretion coupled with clearly specified indications as to how it should be exercised (which we shall call "structured discretion"), and a discretion without such indications ("ordinary discretion").[5]

9.3 We provisionally conclude that any such general rule would be undesirable,[6] and our preferred approach therefore involves retaining the distinction between the admissibility of bad character evidence in chief and the admissibility at a later stage (in cross-examination, for example) of evidence that was not initially admissible.[7] We then discuss how the kind of evidence that falls within our proposed exclusionary rule should be defined; and finally we explain why there is no place in our scheme for a counterpart to section 1(f)(i) of the 1898 Act.

[1] See Part II above.

[2] See paras 3.8 – 3.22 above.

[3] See Part IV above.

[4] Paras 9.4 – 9.44 below.

[5] Paras 9.45 – 9.57 below.

[6] Paras 9.58 – 9.71 below.

[7] Paras 9.72 – 9.73 below.

OPTIONS INVOLVING NO JUDICIAL DISCRETION

Option 1: adduce the accused's criminal record at the start of every trial

Arguments in favour of this option

IRRATIONALITY

9.4 One reason put forward to support the argument that the accused's criminal record should be put before the jury is that it is irrational not to do so.[8] The argument runs that it would be better simply to acknowledge, as Continental courts do, that it is irrational to try an individual without knowing what sort of person he or she is.[9] There is no doubt that those with previous convictions are more likely than others to be convicted in the future;[10] but we should be wary of equating likelihood of being *convicted* with likelihood of *offending*, of exaggerating our ability to predict future offending from recidivism rates, and of assuming that individuals cannot change.

MINIMISING PREJUDICIAL EFFECT

9.5 The CLRC considered whether details of previous convictions should be made available to the fact-finders at the start of the trial.[11] While this suggestion was ultimately rejected, it does appear to have been supported by some members of the Committee[12] for reasons similar to those referred to in the preceding paragraph. The CLRC cautiously suggested that, in the event of this proposal being adopted, the following "controls" would minimise the prejudicial effect of the information as to previous convictions. First, the judge should direct the jury that the information was to be treated, and magistrates would treat it, not as evidence but as background to the evidence presented in the case. Second, the record would not be referred to unless[13]

(1) the accused consented to this;

(2) evidence of the conduct in question was admissible under the ordinary law (as amended under the CLRC proposals);[14] or

(3) the judge thought it right to refer to the record in the summing-up.

9.6 Further, the CLRC tentatively suggested that the prior convictions referred to should, perhaps, be limited to those with general relevance for the purpose of

[8] See J R Spencer, "Jurors' right to know", *The Times* 13 August 1992.

[9] *Ibid*; and J McEwan, *Evidence and the Adversarial Process* (1992) p 155.

[10] See para 6.65, n 116 above.

[11] Evidence Report, para 90; see also para 9.13 below.

[12] Sir Rupert Cross, a member of the CLRC, once cautiously canvassed the possibility of adopting a practice of this kind: R Cross, "The Problem of an Accused with a Record" (1969) 6 Sydney L Rev 173, 175–176.

[13] Evidence Report, para 90.

[14] *Ibid*, paras 70 – 101.

providing a "picture of the accused – perhaps the range of convictions commonly taken into account in passing sentence".[15]

THE JURY OR MAGISTRATES KNOW ANYWAY

9.7 Any lay magistrate or jury with a week's experience knows that if the court is not told that the defendant is of good character then he or she must have a criminal record; so, the argument runs, it might as well be put in.

9.8 This argument fails to recognise the difference between knowing that the accused has a criminal record and knowing that the accused has, for example, ten convictions for the same offence. To adduce details of the record draws attention to its contents; but the record in itself does not tell the court a great deal, and the truly probative information may lie in the facts *behind* the convictions.[16]

9.9 An extension of this argument is that the record should go in because fact-finders who realise that the defendant must have a record may imagine that it is worse than it is. The answer to this is that that is a risk for the defence to assess. If the defence thinks it prudent to reveal the details of the defendant's record then it is free to do so.

SIMPLIFICATION

9.10 A further argument is that, given the tortuous nature of section 1 of the 1898 Act and the uncertainties of the similar fact rules, the course of a trial would be more predictable if a criminal record were put in automatically. It would also avoid the judge or magistrates having to hear detailed submissions, and the defence would be freed from the present inhibitions about how it presents its case.

9.11 We accept that it is desirable to simplify the confusing morass of case law on section 1, which is difficult to understand and follow, but query whether this option really would make trials run more smoothly. This option does not resolve how instances of previous misconduct which have not resulted in a conviction would be dealt with, and in particular does not address the problems thrown up by the similar fact rule. Would the prosecution be allowed simply to read out the detail of the facts behind the record? If so, how would limits be set to this, and what would happen if, as is likely, the defence seeks to challenge the accuracy of the information given to the court? We should be interested to hear from proponents of this option how they envisage that these practicalities would be addressed.

THE EXAMPLES OF OTHER CRIMINAL JUSTICE SYSTEMS

9.12 Professor Spencer and Jenny McEwan both point to Continental practice, where the record is always part of the information available to the court,[17] and ask why English and Welsh juries (and, presumably, lay magistrates) are thought to be so much less trustworthy than Continental juries.

[15] *Ibid*, para 90.

[16] See paras 6.11 – 6.17 above.

[17] See Appendix B below, paras B.104 – B.119.

9.13 The CLRC in its Evidence Report refers to the way in which this works satisfactorily in France, where the judge sits with the jury and retires with them.[18] It is sometimes said that the presence of the judge in the jury-room is significant; but this view assumes that judges are capable of ignoring prejudicial information[19] and ensuring that jurors do so too. Roderick Munday cites a study[20] of 35 Dutch cases where convictions were quashed on appeal or the lawyers were sure that their clients had been wrongly convicted:[21]

> Interestingly, thirteen of the selected cases that reveal anomalies in their reasonings – although the authors do not call them such, one might see these as putative miscarriages of justice – involve defendants whose previous heavy criminal records were revealed to the judges whose decisions, in turn, appear to have been critically affected by this.[22]

9.14 In the same study, reference is made[23] to an experiment conducted to establish the persuasive force on legally qualified full-time judges of introducing criminal records before a trial begins.[24] One group of judges was instructed to read the file (which, following Dutch practice, contained the accused's criminal record) before the trial, while the other group was instructed not to read the file beforehand. Of the first group, all the judges convicted the accused. Of the second group, on identical evidence, only 27% convicted the accused. The order in which the information was presented should not have made any difference to the verdict, but it evidently did.

9.15 These findings cast doubt on the suggestion that, because of the presence of the judge in the jury-room, Continental juries may be less prone to prejudice than

[18] See para 75 of the Evidence Report, where the confidence of M Manfred Simon in French juries is referred to in support of the belief that juries in this jurisdiction can equally be trusted. The CLRC said that it made "due allowance" for the fact that juries sit with judges, but it is difficult to see how it could have discounted that fact.

[19] Stipendiary magistrates would presumably fall into the same bracket as judges for this purpose. The argument is sometimes put forward that judges are able to withstand prejudice because they are legally trained. Lay magistrates are in an anomalous position in that they may be very experienced, but are not legally trained. In England and Wales, however, it is assumed that magistrates have the same ability as judges in this regard: *R v North Avon JJ, ex p ICI Chemicals and Polymers* [1994] Env LR D4.

[20] W A Wagenaar, P J van Koppen and H F M Crombag, *Anchored Narratives* (1993).

[21] R Munday, "Comparative Law and English Law's Character Evidence Rules" (1993) 13 OJLS 589, 597.

[22] A recent statement of the status of a Dutch defendant's antecedents ran as follows: "the prosecutor and the court are always informed about previous convictions. An excerpt of the defendant's criminal record is included in the case file before the case is sent to court for trial. The record has relevance in determining a sentence, not in determining guilt": H Lensing and L Rayar, "Notes on Criminal Procedure in the Netherlands" [1992] Crim LR 623, 625 (footnote in original).

[23] W A Wagenaar, P J van Koppen and H F M Crombag, *Anchored Narratives* (1993) p 27.

[24] B Schünemann, "Experimentelle Untersuchungen zur Reform der Hauptverhandlung in Strafsachen" in H J Kerner, H Kurry and K Sessar (eds), *Deutsche Forschungen zur Kriminalitätsentstehen und Kriminalitätskontrolle* (1983).

English ones. On the other hand, there is the conclusion of the Crown Court Study undertaken for the Royal Commission, which tried to discern whether knowledge of the defendant's criminal record affected the way in which the judge summed up. Professor Zander concluded[25] that, bearing in mind the fact that the summing up usually reflected the weight of the evidence, the existence of a criminal record made "remarkably little difference".

Arguments against this option

THE IRRELEVANCE OF THE CRIMINAL HISTORY

9.16 As we have seen from the psychological research,[26] the prediction of future behaviour from past behaviour depends on the existence of similarities between the past and present situations. We saw also that it is dangerous to base a prediction on a single instance of behaviour. It therefore follows that the bare bones of a criminal record do not give adequate information from which fact-finders may reasonably make an assessment of whether the accused is likely to have repeated past behaviour. If the record is admitted automatically, evidence of little or no probative value is admitted.

THE RISK OF PREJUDICE

9.17 The justification of this option is that it assumes that the fact-finders will be able in every case to gauge satisfactorily and fairly the probative value of previous convictions. The traditional view, as we have said,[27] is that fact-finders (and in particular juries) are incapable of doing this.

9.18 We are conscious of the comment by Lord Griffiths[28] that we should reconsider old rules of evidence which are based upon the fear that juries cannot gauge evidence properly, because, he says, juries are now better educated. Nevertheless, because of the comprehensive nature of this option, it has to be tested against extreme cases where prejudice can be anticipated, even in a modern jury.

9.19 We believe that a jury faced with a defendant on a theft charge might well be unfairly prejudiced by the fact that the defendant has a previous conviction, albeit of a different nature – say, for a sexual offence. The Oxford Report shows that mock jurors may not be prejudiced by being told of an old or dissimilar conviction, but are likely to be prejudiced (whatever the current charge) by a conviction for a sexual assault on a child. We are aware of the limitations of the Oxford Report,[29] but this finding is of very great significance. Given that the consequences of a defendant being convicted as a result of prejudice are so serious, in the absence of convincing evidence that fact-finders will *not* be affected by prejudice, our

[25] Research Paper No 19 for the Royal Commission, para 4.10.11 and table 4.23.

[26] See paras 6.11 – 6.17 above.

[27] See, eg, para 6.1 above.

[28] See para 1.23 above.

[29] See Appendix D, paras D.52 – D.62 below.

provisional view, as we say above,[30] is that proposals should err on the side of caution. We regard this point as a valid and serious objection to this option.

THE CONCEPT OF REHABILITATION

9.20 At present, it appears to be widely accepted that after a period of time a defendant's convictions are regarded as "spent" and should not normally be referred to.[31] If all previous convictions, whether spent or not, were freely admissible, this principle would be undermined.

9.21 One way of dealing with this problem is to say that "spent" convictions would be exempt from disclosure. As we have said,[32] the court at present has a discretion as regards old convictions; to retain that discretion would undermine the principle behind this option. We would be interested in hearing from supporters of this option how they think we should address this difficulty.

9.22 We pose the following questions to supporters of this option:

(1) How is the accused to be protected from the prejudicial effect of previous convictions, especially those for sexual offences?

(2) Should spent convictions be inadmissible, as an exception to the general rule that a criminal record is automatically admissible?

9.23 **Our provisional view is to reject this option.**

Option 2: adduce the defendant's criminal record in sex cases

9.24 Recent legislation in the United States has altered the Federal Rules of Evidence on the admissibility of evidence of bad character in relation to sexual offences. In 1994 Rules 413–415[33] were added to the Federal Rules. In cases of sexual assault or of molestation of children a party is now entitled to introduce evidence that a defendant has previously committed such an offence if it is relevant to any matter, including, presumably, the defendant's disposition or tendency to commit the act charged.[34] We examine here the arguments that were put forward in support of this change to the Federal Rules.

"Sexual offences should be treated differently because of the particular psychology of the perpetrators"

9.25 One of the main reasons given for treating sex offences differently from other offences is that the perpetrators are psychologically different from the rest of the

[30] See para 7.37 above.

[31] See paras 5.4 – 5.12 above.

[32] See para 5.12 above.

[33] Rule 413 refers to offences of sexual assault, 414 to sexual abuse of children, and 415 to civil cases arising out of such offences. See Appendix B below, paras B.83 – B.85, for more detail on the new Rules.

[34] This has not been tested by the courts, but was clearly the intention of Congress: 140 *Congressional Record* H8991, 21 August 1994.

population in a way that other offenders are not.[35] It is argued that sex offenders are motivated by compulsions not shared by "normal people". While burglars, for example, attempt to pursue the normal social goal of acquiring property, but by illegal means, the desires of sex offenders are themselves deviant. This argument entails a belief that sexual offences result from the character traits of the perpetrator to a greater extent than other offences.[36] If this is the case, the fact that the defendant has such character traits, demonstrated by evidence of previous convictions, would be highly probative.

9.26 There has been much debate about whether the majority of sexual offenders are psychologically "abnormal", and much research has been conducted in an attempt to ascertain whether such offenders have particular character traits that differentiate them from the rest of the population. Findings have not been conclusive. Some researchers have concluded that sex offenders share identifiable psychological characteristics, or are aroused by different stimuli from other people; others have concluded that sex offenders do not psychological traits different from those of the rest of the population.

9.27 If it is not accepted that sexual offenders are recognisably different, then evidence of previous convictions would not be as probative as the supporters of the new rules suggest.

"Sexual offenders should be treated differently because of the particular danger they pose to society"

9.28 The new rules were supported by a large majority in Congress.[37] It was felt by many members of Congress that, because sexual offences are such abhorrent and increasingly prevalent crimes, it should be made easier for the state to secure convictions of sex offenders in order to protect society. Some academics have also supported the changes for this reason.[38]

9.29 Assuming that sexual offences have increased more than other crimes in recent years (which is questionable), is a change in the law of evidence a worthwhile deterrent? Given that a large number of sexual assaults do not result in the perpetrator being charged, let alone convicted,[39] it is not clear that altering the law of evidence would discourage potential attackers.

[35] It was said in Congress that rapes are committed by a "small class of depraved criminals": 137 *Congressional Record* S3241, 13 March 1991.

[36] Ie, while non-sexual crimes may be the product of certain situations, sex offences stem from an inherent character defect in the offender.

[37] 348 voted in favour of including Federal Rules 413–5 in the Crime Bill, compared to 62 against: 140 *Congressional Record* H5440, 29 June 1994.

[38] Hickey, for example, writes that "With the explosion of reported rape and sexual assault cases since 1960, [making it easier to admit] prior act evidence is justified by compelling social interests": T J Hickey, "Expanding the Use of Prior Act Evidence in Rape and Sexual Assault Cases" (1993) 29 Crim Law Bull 195, 218.

[39] It has been estimated that only 10% of all rapes are reported: S Nelton, "Learning How to Cry Rape" [1987] Nation's Business 67, referred to in R M Holmes, *Sex Crimes* (1991).

9.30 A further response to this argument is that the change in the law in effect lowers the standard of proof required in sex offence cases. Indeed, Pickett[40] goes so far as to argue that the new rules reverse the presumption of innocence, in that evidence of previous convictions will be so strongly prejudicial that the defendant will have to prove his or her innocence to avoid conviction.[41] People's disgust at sexual offences means that those found guilty already suffer more stigma and opprobrium than those found guilty of other crimes. This fact could support an argument that those accused of sexual crimes should enjoy *more* rather than less protection from wrongful conviction, because the consequences of conviction are particularly severe. It is certainly questionable whether the threat to society is so great as to warrant removing protection from defendants.

"Sexual offences should be treated differently because of the particular problems they pose in gathering evidence"[42]

9.31 As the majority of sexual offences are committed in private, they often leave no evidential traces beyond the word of the victim. Many sexual offence cases therefore come down to a "swearing match" between the defendant and the complainant. The defence will be either that the acts alleged did not happen, or that they did but someone else committed them, or that they did but the complainant consented (or the defendant *believed* that he or she consented). Academics such as Karp[43] have argued that evidence of a defendant's previous conviction for a similar offence will be highly probative, enabling the jury to decide whether to believe the defendant or the complainant.

9.32 Evidence of the defendant's previous convictions may however be less probative than the supporters of the changes to the law assume, because the chance of the defendant being arrested and charged is affected by his or her criminal history.[44] There is a risk, in cases of sexual assault where the assailant is unknown to the victim, that the defendant will become a suspect *because* of his or her previous convictions. The police are likely to show the victim photographs of those who have previous convictions for similar crimes in the area. At trial, evidence of the defendant's previous convictions are likely to prove so prejudicial that the

[40] J G Pickett, "The Presumption of Innocence Imperilled: The new Federal Rules of Evidence 413–5 and the use of other sexual-offense evidence in Washington" (1995) 70 Washington Law Review 883, 902.

[41] The Oxford Report clearly suggests that in a sexual offence case, where the jury are told that the defendant has a similar previous conviction, they are much more likely to convict. Both the similarity of the previous conviction to the current charge, and the abhorrent nature of the previous conviction, increase the likelihood of conviction. See Appendix D, para D.28 below.

[42] Peter Mirfield comments that similar concerns may explain the policy behind the Court of Appeal's decision in *Hunt* [1995] Crim LR 42 and the House of Lords' decision in *H* [1995] 2 AC 596: because it is so likely that in cases of alleged sexual abuse the complainants will have spoken to each other about the allegations, if similar fact evidence were excluded where there was a danger that this had happened, such evidence would rarely be inter-admissible: "Proof and Prejudice in the House of Lords" (1996) 112 LQR 1.

[43] Karp, "Evidence of Propensity and Probability in Sex Offense Cases" (1994) 70 Chicago Kent Law Review 15.

[44] See para 7.8 above.

defendant may be convicted on the grounds of his or her past. This is not only unjust but may discourage the police from searching for "genuine" evidence, because they will know that they can rely on the evidence of the defendant's previous conduct to obtain a conviction.

9.33 Even in situations where there is no dispute as to the identity of the defendant, such as cases where the issue is that of consent, or where it is denied that an assault took place at all, there is still a risk that the defendant's past record will increase the likelihood of being charged. Those who know that a defendant has a previous conviction may be more likely to accuse him or her, and the police are more likely to believe the accuser, and bring charges, if the defendant has previous convictions for similar offences.

9.34 Even if the defendant's criminal history is of some probative value, it is not, in English law, the only factor to consider: the prejudicial effect must also be taken into account.[45] There is no mention of prejudicial effect in the new Federal Rules, and they do not even make it clear whether they are subject to the existing Rule 403 discretion to disallow evidence of an unduly prejudicial or burdensome nature.

Further arguments against the new Rules

9.35 Prior to 1994 the Federal Rules of Evidence were, with a few exceptions, of a unitary nature: they were the same regardless of the offence charged. Academics have argued that altering the law solely with regard to sexual offences undermines the uniformity of the law, and renders it more complex.[46] It has also been argued that the decision by Congress to use the law of evidence as a political tool to make changes to society creates a dangerous precedent. If altering the laws of evidence comes to be seen as a legitimate method of tackling social problems, this will undermine the neutrality of the evidence rules, and could disrupt the "delicate balance",[47] between protecting the defendant and enabling convictions to be secured when needed, that has grown up over the years.

Conclusions

9.36 The arguments for the new laws do not seem to be particularly convincing. They seem to be based on an ideological conception of the psychology of sex offenders which is not unequivocally supported by research. There are undoubtedly some individuals who form a "small but important sub-group of offenders … for whom clinical or 'special' psychogenic[48] explanations remain highly relevant".[49] A possible

[45] The Oxford Report clearly suggests that a previous conviction for a sexual offence, and in particular for an indecent assault on a child, is highly prejudicial. Mock jurors told that the defendant had such a previous conviction were not only more likely to believe that the defendant had committed the offence charged, but were also less likely to believe his evidence: Appendix D below, paras D.36 – D.41.

[46] D P Leonard, "The Federal Rules of Evidence and the Political Process" (1994) 22 Fordham Urban LJ 305.

[47] *Ibid*, at p 342.

[48] Something is "psychogenic" if it has an emotional or psychological origin.

[49] R G Broadhurst and R A Maller, "The Recidivism of Sex Offenders in the Western Australian Prison Population" (1992) 32 British Journal of Criminology 54, 72 (footnote added).

solution would thus be to allow evidence of a defendant's past conduct to be adduced only if a psychiatrist were able to give evidence that the defendant has a personality defect that "causes" him or her to commit sexual offences. While they are probably the minority of sex offenders, it is such "abnormal" offenders that Congress seems to have had in mind at the time when the new Rules were being debated.

9.37 Against this, it must be remembered that the Oxford Report shows that if jurors are aware of a defendant's previous conviction for a sexual offence, they are likely to find it exceptionally easy to convict that defendant of another sex offence.[50]

9.38 **We provisionally reject this option.**

Option 3: allow evidence of the defendant's previous misconduct to be adduced *only* where it is an ingredient of the offence charged

9.39 Under this option neither the prosecution nor the defence would be able to adduce evidence of, or refer to, any previous misconduct of any defendant, save where the previous misconduct was an ingredient of the offence charged.[51]

Advantages

9.40 This option has the attraction of being simple and easy to apply. Court time would not be spent resolving disputes on the admissibility of evidence of previous misconduct.

Disadvantages

9.41 It is widely accepted that previous misconduct can be relevant to many issues before the court. For example, in *Straffen*[52] we believe that the court was right to admit evidence that the defendant had, on his own admission, committed two murders with unusual features very similar to those of the crime before the court. We believe that such evidence can be of great value to jurors, and should not be excluded.

9.42 This option would mean that, if a defendant falsely claimed to be of good character, the prosecution could not show that he or she was in fact of bad character. The jury would thus be misled.[53]

9.43 By the same token, defence counsel could launch into vicious attacks on the character of prosecution witnesses without the fact-finders knowing, and being

[50] See Appendix D, para D.28 below.

[51] Eg, showing that the defendant had been previously disqualified from driving on a subsequent charge of driving whilst disqualified, contrary to the Road Traffic Act 1988, s 103(1)(b).

[52] *Straffen* [1952] 2 QB 911; see para 2.52 above.

[53] See paras 4.17 – 4.32 above for the way in which, under the present law, a defendant who does this can be cross-examined on his or her previous convictions.

able to take account of, the previous convictions of the defendant.[54] At present, defendants and their lawyers know that there is a sanction for attacks on the integrity of prosecution witnesses; if previous convictions ceased to be admissible in any circumstances, that sanction would disappear.[55]

9.44 **Our provisional view is that this option should be rejected.**

OPTIONS INVOLVING JUDICIAL DISCRETION

9.45 So far we have been looking only at category-based options, with the common feature that the court is given no discretion. Our provisional view is that none of these options should be adopted, and we turn to consider discretionary solutions. We start by outlining the merits and disadvantages of judicial discretion, and then consider how the disadvantages may be tempered where the discretion is "structured".

Judicial discretion

The merits of judicial discretion

9.46 The main advantage of a discretion is that it enables the judge or magistrates to reach a decision, on the facts of a particular case, which is tailor-made to those facts so as to ensure that justice is achieved; it is unfettered by rules, and the greater the discretion the greater the freedom. We agree with Adrian Zuckerman[56] that if a judge or magistrate has to give reasons for deciding to admit or exclude items of evidence, and those reasons have to be based on the reliability of the evidence in question, such decisions are less likely to be reached on spurious grounds. The same reasoning would apply to an assessment of the evidence's probative value and of its likely prejudicial effect.

The disadvantages of judicial discretion

9.47 The principal drawback of a discretion is the corollary of its principal attraction – the scope for manoeuvre that it gives the court. This can result in unpredictable decisions which may vary from one case to the next. This creates difficulties for prosecutors where the decision whether to prosecute depends on the admissibility of evidence of previous misconduct; by the same token, the defence in such a case will not know how to plead. Moreover, it will be hard for the defence to plan how to conduct its case if it is not reasonably predictable which tactics will and will not result in the loss of the shield.

9.48 This problem is compounded by the limited value of the exercise of a right to appeal against a decision of a judge or magistrate to admit evidence of previous misconduct. The prosecutor has no right of appeal, save in preparatory hearings in serious fraud trials.[57] The defence may challenge the ruling, but the Court of

[54] See paras 4.33 – 4.58 above, which show that under the present law the court could in appropriate cases permit cross-examination of the defendant on his or her previous convictions.

[55] We are critical of this argument, for the reasons set out in paras 12.18 – 12.19 below.

[56] A Zuckerman, *The Principles of Criminal Evidence* (1989) p 12.

[57] Criminal Justice Act 1987, s 9.

Appeal or the Divisional Court cannot substitute its own decision for that of the judge or magistrate.[58] The appellate court can only interfere with a judicial discretion which has not been lawfully exercised – that is, where the judge or magistrate reached a decision which no reasonable tribunal could have reached, or took irrelevant factors into account, or left relevant factors out of account or gave them too little weight.[59] This led in *Mackie*[60] to the worrying position that the Court of Appeal may say that the prejudicial effect of the bad character evidence let in at trial was "enormous" and "far outweighed" its probative value, and yet hold that the judge's decision cannot be interfered with.[61]

9.49 We suspect that the problem of discretion might be similar to the position that has arisen with hearsay. The CLRC concluded that, while provisions giving the courts discretion to allow hearsay evidence would be "of the simplest",[62] they should not be adopted because to do so would lead to serious difficulties. Among those were the considerations that

> differences of opinion about the value of hearsay evidence … would [lead to] large differences in practice between different courts … [I]t would make it much more difficult for the parties to prepare their case, because there would be no way of knowing in advance whether a court would admit a particular piece of hearsay evidence.[63]

9.50 The CLRC also referred to a difficulty peculiar to summary trials, that the magistrates, who are the tribunal of fact, will normally have to hear the disputed matter in order to decide whether to exercise their discretion to admit it: this point applies equally to evidence of previous misconduct. Our provisional view is that these are valid concerns. Once the magistrates have heard the evidence and ruled it inadmissible, the only way to eliminate the risk of prejudice is to hold a new trial before a different bench, with the obvious consequences in terms of delay and cost.

[58] Cf an appeal against the application of a rule, where the superior court may substitute its own view for that of the trial court if it holds that the rule has been wrongly applied.

[59] *Ward v James* [1966] 1 QB 273, 293, *per* Lord Denning MR. See, for example, the recent case of *Wheeler* [1995] Crim LR 312, in which the trial judge allowed the prosecution to cross-examine a defendant charged with assault occasioning actual bodily harm about four previous convictions for the same offence. The conviction was upheld on the ground, inter alia, that the trial judge had referred to the proper principle governing the admission of a defendant's criminal record. While the Court of Appeal stated that the trial judge had not erred in principle, and also had ample material on which to base the exercise of the discretion, it did not provide any guidelines on the way in which the discretion ought to be exercised.

[60] *Mackie* (1973) 57 Cr App R 453.

[61] It might be argued that the judge's decision in that situation is wholly unreasonable or perverse: P Mirfield, "Similar facts – *Makin* Out?" [1987] CLJ 83, 96; T R S Allan, "Some Favourite Fallacies about Similar Facts" (1988) 8 LS 35, 42–43.

[62] Evidence Report, para 246.

[63] *Ibid* (footnote added).

Structured discretion

9.51 We now ask to what extent these disadvantages may be mitigated by attaching guidelines to the discretion – in other words, employing a structured discretion.

9.52 An example is afforded by the treatment of hearsay statements in Part II of the Criminal Justice Act 1988,[64] under which, once a hearsay statement is prima facie admissible, the court then has a discretion to exclude it pursuant to section 25, or, if section 26 is applicable, a discretion to admit it. Sections 25 and 26 each list a number of factors which the court must take into account, where appropriate, in exercising the discretion. These discretions are therefore *guided* (though not as structured as they might be, because there is no indication in the statute whether a particular factor militates in favour of admitting the hearsay or of excluding it). Before publishing our consultation paper on hearsay in criminal proceedings[65] we sought to ascertain from practitioners how these discretionary powers were, in practice, exercised. It became clear that this varied very greatly, with some judges exercising their discretion quite freely in favour of hearsay evidence, while others, perhaps steeped in the traditional dislike of hearsay, were noticeably reluctant to admit it.

9.53 The significance of this is that the greater the degree of discretion, the greater the uncertainty; but that, even with a structured discretion, it is inevitable that there will be a degree of unpredictability.

9.54 As regards the possibility of an appeal against the exercise of a discretion, the power of the superior court to interfere will be much more limited in the case of an ordinary discretion than in that of a structured discretion because, in the latter case, the court will be able to see more easily that the judge or magistrates took irrelevant factors into account or left relevant factors out.

9.55 We are worried that there should be uncertainty in such a vital area of the law of evidence. This factor has serious implications for possible reform. It is possible that present attitudes on the part of some judges to evidence of previous misconduct might continue, even if the intention were to make such evidence more or less easily admissible than at present. In that case the value of such reforms would be defeated, or at least undermined.

9.56 Our provisional view is that it would be preferable to make the law as certain and predictable as is practicable, although we appreciate that there will always be difficult cases which will provoke appeals. As we said in the consultation paper on hearsay,[66] it is also desirable that policy decisions about how the balance should be struck between the admission of evidence on the one hand and the protection of the accused on the other should be debated and decided by Parliament, rather than being left to the courts. Although there will have to be some degree of

[64] Under those provisions, the court has the power to admit statements of the types covered by s 23 (first-hand documentary hearsay) or s 24 (statements in business documents).

[65] Evidence in Criminal Proceedings: Hearsay and Related Topics (1995) Consultation Paper No 138.

[66] *Ibid*, para 9.22.

unpredictability, the existence of a structured discretion reduces this as far as is possible.

9.57 **Our provisional view is that, where any of the options for reform advanced in this paper involves the exercise of discretion, it would be better to adopt a "structured" discretion than an "ordinary" discretion.**

Option 4: a single inclusionary rule with an exception for evidence whose likely prejudicial effect outweighs its probative value

9.58 Under this scheme, evidence of a defendant's previous misconduct would be admissible unless its likely prejudicial effect (or the danger of the fact-finders being confused, misled or distracted, or of the court's time being wasted) outweighs its probative value. As regards the admission of bad character evidence in chief, the result would not be radically different from the current position under *DPP v P*, except that it would fall to the defence to argue for the *exclusion* of the evidence, and not (as at present) to the Crown to argue for its admission. The effect on the circumstances in which a defendant can be *cross-examined* on previous misconduct would be much greater, as, under the present law, the loss of the shield against such cross-examination must be triggered by one of certain specific events.[67]

9.59 The advantages of this option would be that the court would be encouraged to focus on the central question, namely the balance between probative value and prejudicial effect, and not get caught up in technicalities (such as what constitutes an imputation). Further, this option would allow a tailor-made solution for each case.[68]

9.60 However, there are both principled and practical objections to this option.

Uncertainty

9.61 Even if the discretion were structured, this option would in our view be too vague and unpredictable in its application, because the balance between probative value and prejudicial effect may be affected by the course of the trial. Evidence which is insufficiently probative to be adduced as part of the prosecution's case may later, as the trial develops and the case for the defence emerges, acquire sufficient probative value to outweigh the risk of prejudice and thus justify its admission. For example, the fact that the defendant has previously committed a similar offence will usually have insufficient probative value to justify adducing that fact in chief; but if the defendant claims to be of good character, the previous conviction then becomes directly relevant to an issue which the defence has chosen to introduce, and its probative value is therefore increased.

9.62 Option 4 would deal with these possibilities simply by stating that the question is *always* whether the probative value of the evidence outweighs its likely prejudicial effect; that this question should be asked afresh at whatever point in the trial it is sought to introduce the evidence; and that the answer to it may be different at different stages of the trial. Exactly the same rule would apply whether it was

[67] See Part IV above.

[68] See para 9.46 above.

sought to adduce the evidence in chief or to elicit it in cross-examination (or otherwise in the light of the conduct of the defence), and that rule would have to cover all the situations now covered by section 1(f)(ii) and (iii) of the 1898 Act.

9.63 The effect would be that, instead of Parliament deciding on certain fundamental rules of evidence, namely when the shield should be lost, the decision would be up to the court in each case to work out what was fair. For example, one recorder might decide that an imputation against a prosecution witness was so heinous that the shield should be lost, while another, faced with identical facts, might give more weight to the need to protect the accused against prejudice, and so rule that the record should remain undisclosed.

Over-simplification

9.64 There is a more fundamental objection to this option: not only does it give too little guidance on how to determine the question whether probative value outweighs prejudicial effect, but it assumes that that is the *only* question. This, we think, is an over-simplification. The fact that bad character evidence has probative value which outweighs its likely prejudicial effect is *one* reason for admitting it; but it is not the *only* reason. Where the defendant undermines the defence of a co-accused, for example, the probative value of the defendant's record may be little greater than before, and the risk of prejudice no less; but considerations of fairness to the co-accused may nevertheless make it desirable to allow the record in.

9.65 The 1898 Act recognises that, even if the probative value of bad character evidence does not outweigh its likely prejudicial effect, it may still be fair to admit the evidence in view of the way in which the defence has been conducted. We think that this is a sensible principle, but option 4 would disregard it.

A presumption of admissibility

9.66 The inadmissibility of evidence of other misconduct has been described as "one of the most deeply rooted and jealously guarded principles of our criminal law",[69] and this option would turn this principle on its head. It proposes an inclusionary rule with an exclusionary (structured) discretion – in other words, a presumption that the misconduct evidence is admissible, putting the onus on the accused to persuade the court to exercise its discretion to exclude it. We suspect this would concern many of our readers: as we have seen,[70] the probative value of such evidence is easily over-estimated.

Practical drawbacks

9.67 There would also be many practical disadvantages to this option. Some of them are inherent in the element of judicial discretion,[71] but there are others. The defendant's previous convictions might be irrelevant at the start of a trial, but become relevant as a result of developments such as the cross-examination of the prosecution witnesses, or evidence given by the defendant, by his or her witnesses

[69] *Maxwell v DPP* [1935] AC 309, 317, *per* Viscount Sankey LC.

[70] See Part VI above.

[71] See paras 9.47 – 9.50 above.

or by a co-defendant. A difficulty therefore arises as to the point at which the court would have to exercise its discretion. It would seem preferable that this should be at a very late stage in the trial, when the probative value of the previous convictions could be determined on the basis of the fullest possible information; otherwise the question of the admissibility of the evidence might be repeatedly re-opened in the course of the trial, thus leading to endless arguments. On the other hand it would not be desirable that the last evidence heard by the jury before it retires should be the evidence of previous convictions. Nor does this option offer any guidance on how conflicts of interest between co-defendants are to be resolved.

9.68 There would be particular problems in the magistrates' court, where the nature of the previous misconduct evidence would probably have to be disclosed in the course of the application for it to be admitted.

9.69 **Our provisional view is that this option is unacceptable**.

Option 5: an exclusionary rule with a single exception for evidence whose probative value outweighs its likely prejudicial effect

9.70 This option is the reverse of the previous option: evidence of previous misconduct would be *inadmissible* unless its probative value outweighs its likely prejudicial effect (and any other reasons for excluding it, for example its potentially distracting effect), so that it is in the interests of justice to admit it.

9.71 This option would in our view be preferable to option 4, in that at least the onus would be on the party seeking to adduce the evidence to show why it should be admitted; but, with that exception, it suffers from all the same drawbacks. **We provisionally reject this option.**

Option 6: an exclusionary rule with separate exceptions for evidence admissible in chief and for evidence subsequently becoming admissible

9.72 This, our preferred option, follows automatically from our reasons for rejecting options 4 and 5. It would involve, first, a rule that certain kinds of evidence are prima facie inadmissible; and second, a number of *separate* exceptions for different situations where evidence would be admissible although falling within the scope of the exclusionary rule. These exceptions would, as far as possible, be formulated in specific rather than general terms.

9.73 **We provisionally propose**

(1) that there should be a single exclusionary rule; and

(2) that there should be two distinct categories of exception to this rule, namely

(a) a rule permitting, in certain circumstances, the admission *in chief* of evidence falling within the scope of the exclusionary rule; and

(b) further rules to the effect that evidence which falls within the scope of the exclusionary rule, and is not admissible under the first exception, may in certain circumstances *become*

admissible in consequence of the course that the trial has taken.

The proper scope of the former exception is considered in Part X, and that of the rules in the latter category in Parts XI–XIII.

THE SCOPE OF THE EXCLUSIONARY RULE

9.74 Before turning to the *exceptions* to the exclusionary rule, however, we must consider the question of how that rule should itself be formulated: in other words, what *kinds* of evidence should be inadmissible unless they fall within one of the exceptions that we propose in Parts X–XIII? We have identified three possible approaches to this question. They focus, respectively, on

(1) the nature of the *facts* that the evidence tends to establish;

(2) the nature of the *reasoning* by which the evidence is said to be relevant; and

(3) the nature of the *objections* to the admission of the evidence.

Option A: evidence of discreditable conduct by the defendant on another occasion

9.75 The most obvious approach is to confine the rule to evidence of certain kinds of *fact*. It might be provided, for example, that the rule should extend to any evidence that (or from which the fact-finders are likely to infer that) the defendant has committed a criminal offence, or done anything else that is likely to reflect adversely on the defendant in the minds of the fact-finders, other than the commission of the offence charged.

9.76 At first sight this approach seems attractively straightforward; but we think that it suffers from a serious drawback. If the crucial question is to be whether the evidence relates to discreditable conduct on the defendant's part, the rule must obviously be confined to evidence of conduct *other than the conduct alleged to constitute the offence charged*. But, as we have seen,[72] it is not always clear where the background to an offence ends and the offence itself begins. An incident which, on one view, is merely part of the background has sometimes been held admissible on the ground that it forms part of the offence.[73] A definition along the lines suggested would therefore need to make it clear whether such "background evidence" is or is not within the exclusionary rule; and we suspect that a provision which attempted to do this might prove difficult to apply, and give rise to great uncertainty. Different judges would reach different conclusions on indistinguishable facts. We invite views as to whether such a formulation would be workable, but our provisional view is that it would not. **We provisionally reject this option.**

[72] See paras 2.70 – 2.84 above.

[73] Eg *Ellis* (1826) 6 B & C 145, 108 ER 406; *Rearden* (1864) 4 F & F 76, 176 ER 473; *Bond* [1906] 2 KB 389.

Option B: evidence from which the fact-finders are invited to draw certain kinds of inference

9.77 An alternative approach would involve asking what kinds of *inference* the fact-finders would be invited to draw from the evidence if it were admitted. In most cases of the kind with which we are concerned, the fact-finders are asked to infer that the defendant is likely to have committed the offence charged *either*

(1) because the evidence shows that the defendant has a propensity to commit offences of the kind with which he or she is charged, *or*

(2) because the evidence reveals a combination of circumstances that is highly unlikely to be attributable to coincidence alone.

The exclusionary rule might be formulated so as to extend to any evidence which is adduced as the basis for an inference of either of these kinds.

9.78 This approach resembles the "tendency" and "coincidence" rules contained in the Australian Evidence Act 1995.[74] That Act provides that all relevant evidence is admissible unless excluded by the Act, but that evidence may not be adduced to show

(1) that a person has a tendency to act in a particular way, or

(2) that a person did a particular act (or had a particular state of mind) because two or more events have occurred which are unlikely to have occurred by coincidence,

unless the evidence has *significant probative value*.[75] In addition, tendency evidence and coincidence evidence adduced *by the prosecution about a defendant* may not be used against the defendant unless its probative value *substantially outweighs any prejudicial effect* that it may have on the defendant.[76]

9.79 The main drawback of this approach, in our view, is that categories of this kind cannot be exhaustive of the kinds of evidence that ought to be subject to the exclusionary rule. In *Straffen*,[77] for example, evidence was adduced that the defendant had escaped from Broadmoor shortly before the commission of the murder. The purpose of this evidence was not to show that he had a propensity to commit that kind of crime, nor to suggest a combination of circumstances unlikely to be attributable to coincidence, but to show that he had only briefly been at liberty, in the vicinity in question, at the crucial time. Such evidence is clearly prejudicial, and we do not think that it should be admissible without having to satisfy the conditions that we propose in Part X below.

9.80 Similarly, in Part II we referred to a category of evidence which, though incidentally showing discreditable conduct on the part of the defendant,

[74] See Appendix B, paras B.16 – B.18 below.

[75] Evidence Act 1995, ss 97(1), 98(1).

[76] *Ibid*, s 101(2).

[77] *Straffen* [1952] 2 QB 911.

nevertheless appears to be admissible without having to satisfy the rules on similar fact evidence. This appears to be so where the evidence can be regarded as forming part of the "background" to the offence charged, and can therefore be admitted as res gestae, or as going to the defendant's motive (for example by showing antipathy between the defendant and the alleged victim). However, the boundaries of the principle are unclear, and it has on occasion been regarded as justifying the admission of evidence which appears to go to propensity alone[78] – although even such "background" evidence can be excluded if it is unduly prejudicial, either at common law or under s 78 of PACE.

9.81 We think that evidence of this kind ought to be prima facie inadmissible, even if it is adduced to show neither propensity nor the improbability of coincidence, because it may be just as prejudicial as evidence that *is* adduced for one of those purposes. Where evidence carries a risk of prejudice, it seems right that it should not be admitted without first considering whether its admission can be justified in spite of that risk; and this is so, in our view, even if it belongs to a category which might at present be regarded as automatically admissible.

9.82 We therefore think that the exclusionary rule should extend to *all* evidence which is potentially prejudicial, and not merely to evidence which is adduced to show propensity or the improbability of coincidence. However, we doubt that it would be possible to do this simply by adding *further* rules, by analogy with the "tendency" and "coincidence" rules. This is because those rules seek to exclude evidence which is adduced as a basis for certain kinds of *rational inference*. They do not seek to exclude evidence which is likely to provoke a certain kind of *irrational reaction*. It would be impossible to spell out every kind of inference which the fact-finders might conceivably be invited to draw from evidence which is potentially prejudicial.

9.83 This approach would therefore make the exclusionary rule too narrow, and permit the admission, without the necessary safeguards, of evidence that ought to be prima facie inadmissible. Indeed, this is implicitly recognised by the Australian legislation itself: prejudicial evidence is not necessarily admissible merely because (like the Broadmoor evidence in *Straffen*, or "background evidence") it falls outside the tendency and coincidence rules. The Act provides that *any* evidence adduced by the prosecution must be excluded if its probative value is outweighed by the danger of unfair prejudice to the defendant.[79] Clearly the tendency and coincidence rules are not in themselves sufficient to exclude evidence that is too prejudicial to be admitted. **We provisionally reject this option.**

9.84 However, this leaves open the possibility of adopting the same *scheme* as the Australian legislation. That scheme involves *two* exclusionary rules – one applying to evidence adduced as a basis for a particular kind of inference (such as tendency or coincidence), and the other to potentially prejudicial evidence falling outside the first rule. The question is whether such a scheme would be any better, or worse, than a rule of the second kind alone. The answer must depend whether, in order to justify its admission, tendency and coincidence evidence ought to be *more*

[78] *Fulcher* [1995] 2 Cr App R 251.

[79] Evidence Act 1995, s 137.

probative than prejudicial evidence of other kinds – for example, whether its probative value should need to be *significant*, or *substantially* to outweigh its likely prejudicial effect.

9.85 Our discussion of this point is best postponed to our consideration of the *exceptions* to our proposed exclusionary rule – that is, the circumstances in which evidence prima facie caught by the rule may nevertheless be admissible;[80] but the conclusion we there draw is that these requirements of *additional* probative value are unnecessary and indeed undesirable. It follows that there is no place in our proposals for an exclusionary rule comparable to the Australian tendency and coincidence rules – either instead of *or as well as* a wider rule extending to prejudicial evidence of other kinds.

Option C: evidence carrying a risk of prejudice

9.86 Our reasons for rejecting the previous option suggest a third approach, namely to focus on what is said to be *wrong* with the evidence in question – on the *reason why* certain kinds of evidence should, in our view, be prima facie inadmissible. That reason is, of course, that certain kinds of evidence carry a risk of prejudice – either "reasoning prejudice" or "moral prejudice",[81] or both. It is only where there is a risk of prejudice that the evidence needs to be subject to an exclusionary rule; and conversely, if there *is* such a risk, the evidence *ought* to be subject to such a rule.

9.87 This approach has its dangers. If the exclusionary rule were confined to evidence whose admission would create a risk of prejudice, it is possible that evidence of bad character might be admitted on the fallacious ground that it is *directly* relevant to the defendant's guilt of the offence charged – that is, relevant otherwise than solely as showing propensity – and is *therefore not prejudicial*. But this risk could be minimised by the inclusion of a suitable definition of the circumstances in which evidence is to be regarded as potentially prejudicial. Those circumstances should in our view include the existence of a risk of either "reasoning prejudice" or "moral prejudice".

9.88 It is also arguable that not all evidence of previous misconduct is necessarily prejudicial. The findings in the Oxford Report suggest that, where the defendant has a conviction for an offence which is of a kind dissimilar to the offence charged (and which is not of a character which the jury is likely to find repugnant, such as sexual assault), the defendant is *less* likely to be convicted if the conviction is revealed than if it is not. If this were generally true, it would follow that the admission of evidence of such a conviction, far from being prejudicial, is actually in the interests of the defence. Indeed, if this were *recognised* to be generally true, it would be the defence who would seek to adduce the evidence and the prosecution who might prefer to keep it out. But if the prosecution did wish to rely on it, a judge who accepted the implications of the research might rule that the conviction

[80] See paras 10.60 – 10.70 below.

[81] See paras 7.7 – 7.15 above.

carries no risk of prejudice and is therefore admissible if relevant; and it might well have *some* probative value, if only on the question of the defendant's credibility.[82]

9.89 We doubt that such an outcome would be considered satisfactory, but we also doubt that the research findings justify the conclusion. The Oxford study has a number of limitations,[83] and it cannot be assumed that the same effect would be observed across a range of cases in real trials, involving a variety of different kinds of criminal record – particularly since it is far from clear *why* the effect should occur at all. The research does suggest that there are certain categories of previous conviction which, if disclosed to the jury, are likely to increase the chances of a conviction, even if they are dissimilar to the offence charged. It is not yet known whether this category extends beyond convictions for sexual assault, or if so how far. Even if the *type* of conviction is one which would not be prejudicial in itself, the fact that the defendant has a *number* of such convictions may be prejudicial. In the present state of the research, and given the overriding importance of avoiding wrongful convictions, we think it can safely be assumed that courts would err on the side of caution by treating evidence of *any* previous conviction as carrying *some* risk of prejudice.

9.90 On one view, the rule may be inappropriate for summary trials. This is because magistrates are unlikely to concede that they might adopt an irrational mode of reasoning. However, this difficulty can be exaggerated. In practice, prosecutors are unlikely to adduce clearly prejudicial evidence in summary proceedings with the risk that the magistrates may be improperly influenced by it. To do so would invite an appeal that would be likely to succeed. We think that it would soon become clear what kinds of evidence were to be regarded as prejudicial.

9.91 In any event it seems comparatively uncommon for these issues to arise in summary trials at all. Prosecutors tend to be wary of antagonising the bench by appearing to be bent on securing a conviction at all costs. Magistrates tend to be keen to ensure that justice is not only done but seen by the defendant to have been done. Moreover, our proposals would ensure that, when these issues do arise, the relevant principles are more readily accessible than they are now, and are set out in terms that lay magistrates can easily understand.

9.92 We think that this approach goes to the heart of the problem, and we provisionally adopt it. **We propose**

(1) that, subject to the exceptions we propose in Parts X–XIII below, evidence should be inadmissible if, in the opinion of the court, its admission would be prejudicial; and

[82] Cf paras 6.55 – 6.58 above, where we suggest that convictions for dishonesty are more likely to undermine a person's credibility than are convictions for other offences; but the Oxford study also found the disclosure of a conviction for dishonesty to have no effect on a jury's assessment of the defendant's credibility (para 6.61 above and Appendix D, paras D.37 – D.41 below). A judge who accepted *all* the conclusions of the Oxford Report might therefore rule that a previous conviction for dishonesty, though not prejudicial on a charge of a dissimilar offence, had no probative value either, even on the issue of the defendant's credibility – in which case it would be inadmissible, because irrelevant.

[83] See Appendix D, paras D.51 – D.62 below.

(2) that, for the purpose of this rule, the admission of evidence should be regarded as prejudicial if there is a risk that

(a) the fact-finders might treat the evidence as being more probative of guilt than it really is, or

(b) it might lead them to convict the defendant without being satisfied that he or she is guilty as charged.

SECTION 1(f)(i) OF THE 1898 ACT

9.93 As we have explained, we propose an exclusionary rule subject to several exceptions, the majority of which would apply only where the relevant factors have altered since the start of the trial. These latter exceptions would for the most part correspond to the provisions of section 1(f) of the 1898 Act.[84] However, we do not propose to retain section 1(f)(i) of that Act, which provides, by way of exception to the general rule that a defendant may not be cross-examined about other offences, that such cross-examination is permissible if the defendant's commission or conviction of the other offence is admissible to show his or her guilt of the offence charged.

9.94 The reason for this is simple. Unlike the 1898 Act, our proposed legislation would not include any rule against cross-examination of a defendant, because we see no need for such a rule. General principles dictate that no witness may be asked, whether in chief, in cross-examination or in re-examination, to state facts that are inadmissible. If the defendant's previous misconduct is inadmissible in chief, under the principles that we propose in Part X, he or she clearly cannot be cross-examined about it – *unless* one of the exceptions that we propose in Parts XI–XIII applies. There is no need for a special rule that the evidence is inadmissible *in cross-examination*. And therefore there is no need for an *exception* to such a rule, *permitting* cross-examination where the evidence is admissible in chief. Therefore, **we do not propose that the new legislation should include a provision corresponding to section 1(f)(i) of the 1898 Act**.

[84] See Parts XI–XIII below.

Options involving no judicial discretion 140
Option 1: adduce the accused's criminal record at the start of every trial 140
Arguments in favour of this option 140
Irrationality 140
Minimising prejudicial effect.....140
The jury or magistrates know anyway 141
Simplification 141
The examples of other criminal justice systems.....141
Arguments against this option 143
The irrelevance of the criminal history.....143
The risk of prejudice 143
The concept of rehabilitation.....144
Option 2: adduce the defendant's criminal record in sex cases 144
"Sexual offences should be treated differently because of the particular psychology of the perpetrators".....144
"Sexual offenders should be treated differently because of the particular danger they pose to society".....145
"Sexual offences should be treated differently because of the particular problems they pose in gathering evidence".....146
Further arguments against the new Rules.....147
Conclusions 147
Option 3: allow evidence of the defendant's previous misconduct to be adduced *only* where it is an ingredient of the offence charged.....148
Advantages.....148
Disadvantages 148
Options involving judicial discretion 149
Judicial discretion 149
The merits of judicial discretion 149

The disadvantages of judicial discretion....149

Structured discretion....151

Option 4: a single inclusionary rule with an exception for evidence whose likely prejudicial effect outweighs its probative value....152

Uncertainty....152

Over-simplification....153

A presumption of admissibility....153

Practical drawbacks....153

Option 5: an exclusionary rule with a single exception for evidence whose probative value outweighs its likely prejudicial effect....154

Option 6: an exclusionary rule with separate exceptions for evidence admissible in chief and for evidence subsequently becoming admissible....154

The scope of the exclusionary rule....155

Option A: evidence of discreditable conduct by the defendant on another occasion....155

Option B: evidence from which the fact-finders are invited to draw certain kinds of inference....156

Option C: evidence carrying a risk of prejudice....158

Section 1(f)(i) of the 1898 Act....160

PART X
ADDUCING BAD CHARACTER EVIDENCE IN CHIEF: THE PROBLEMS AND SOME POSSIBLE SOLUTIONS

10.1 In this Part we are concerned with the circumstances in which evidence of a defendant's bad character should be admissible *in chief*, as part of the prosecution's case. This is commonly known as the problem of "similar fact evidence". We are not here concerned with the circumstances in which such evidence should *subsequently* become admissible, for example in cross-examination of the defendant. As we have explained,[1] our preferred approach recognises that these latter circumstances raise issues too complex to be strait-jacketed into the same rule as governs the admissibility of bad character evidence in chief. We therefore deal with these issues separately, in Parts XI–XIII below.

10.2 Mustill LJ gave a concise summary of the problems of similar fact evidence when he said in *Brooks*:

> The problems [of similar fact evidence] and the reasons for them, … arise because the rules – so far as one can state any rules – are based on an uneasy mixture of logic, common sense and expediency. Common sense suggests that if it is known that a man has committed 49 burglaries in the past this fact tells one something about the probability of his having committed yet another. Logic at once intervenes to point out that the fact will not in itself prove that the habitual burglar has actually committed a further offence, still less the particular offence charged against him in the indictment, although it may shed light on an admitted or proved connection between the defendant and the acts which are alleged to have constituted the offence. Expediency emphasises the need to keep careful watch on the use of similar fact evidence because of the risk that the jury will proceed directly from evidence suggesting predisposition to an inference of guilt … . Finally, expediency and common sense join forces to insist that there may nevertheless be cases where the prospect that the fact of the previous offence will tell the jury something sufficiently solid and legitimate about the instant offence is sufficient to justify the taking of that risk.[2]

10.3 The Royal Commission described this area of the law as "difficult to comprehend, embodied as it is in a series of judgments that are not always easily reconcilable".[3] In this Part we review the principles that in our view ought to govern the law on this topic, and conclude that the existing law is in need of reform. We then consider various forms that such reform might take, and explain the approach that

[1] Paras 9.61 – 9.65 and 9.72 – 9.73 above.

[2] *Brooks* (1991) 92 Cr App R 36, 39–40.

[3] Report of the Royal Commission, para 30.

we provisionally favour. We believe that this approach would go some way towards meeting the Royal Commission's concern.

PRINCIPLES

10.4 As Lord Wilberforce has said, "a basic principle must be that the admission of similar fact evidence … is exceptional and requires a strong degree of probative force".[4] In *DPP v P* [5] Lord Mackay LC, giving a speech with which the remainder of their Lordships agreed, stated:

> I would deduce the essential feature of evidence which is to be admitted is that its probative force in support of the allegation that an accused person committed a crime is sufficiently great to make it just to admit the evidence, notwithstanding that it is prejudicial to the accused in tending to show that he was guilty of another crime.

We take these dicta as our starting point: to be admissible, similar fact evidence must be *more* probative than other evidence needs to be, because of the risk of prejudice that attaches to it.

10.5 Here we review briefly what is meant by "prejudice", examine what is meant by the "strong degree of probative force" that may justify the admission of evidence although it is potentially prejudicial, and mention some further factors that may militate against its admission.

Prejudice

10.6 As we have said above,[6] there are two kinds of prejudice: the first is what has been called "reasoning prejudice", the second, "moral prejudice". In brief, reasoning prejudice is the danger that the fact-finders will give more weight to the previous misconduct evidence than they ought. Moral prejudice is the danger that the fact-finders will be inclined to convict for reasons which do not relate to the evidence on the charge: for example, they may be repulsed by the nature of the previous misconduct, or they may think that the accused deserves to be punished whether or not the charge is proved.

10.7 Since it is primarily the risk of prejudice (of either kind) that may make it undesirable to admit bad character evidence, we have proposed above that it should be the presence or absence of such a risk that determines whether any given item of evidence falls within the scope of the exclusionary rule.[7] If there is no such risk, the evidence will (unless excluded by some other rule) be admissible; if there is such a risk, other factors will also need to be considered. The most important of these other factors is the *relevance* of the evidence.

[4] *Boardman* [1975] AC 421, 444D.

[5] *DPP v P* [1991] 2 AC 447.

[6] See paras 7.7 – 7.15 below.

[7] See para 9.92 above.

Relevance

10.8 There are two conflicting approaches to the question of the relevance of similar fact evidence: the "purpose" approach and the "degree of relevance" (or probative value) approach.

The "purpose" approach

10.9 The "purpose" approach originated with Lord Herschell's famous dictum in *Makin*.[8] It appeared that a particular *form of reasoning* was forbidden, namely the inferring of guilt from the past behaviour of the accused. Lord Cross in *Boardman* disagreed with the argument that such reasoning is forbidden, and that similar fact evidence may not be used "for the purpose of leading to the conclusion that the accused is a person likely from his conduct and character to commit the offence for which he is being tried". He demonstrated this point by referring to *Straffen*,[9] in which the defendant had been charged with strangling a young girl. The circumstances were unusual because there had been no sexual assault nor any attempt to conceal the body. The prosecution was permitted to adduce evidence that the defendant, who had been in the area at the time of the crime, had previously strangled two girls in identical circumstances. The evidence was relevant precisely because, in the words of Lord Cross, it "was simply evidence to show that Straffen was a man likely to commit a murder of that particular kind".[10] Our provisional view is that *Straffen* was rightly decided.

10.10 As Hoffmann points out,[11] it is impossible to reconcile decided cases with any rule that similar fact evidence may not be admitted for the purpose of proving disposition. He cites the well-known decisions of the House of Lords in *Ball* [12] and *Thompson*.[13] In *Ball* [14] the similar fact evidence was relevant solely to show that the accused were the kind of people likely to commit incest, while in *Thompson*[15] it was relevant that the accused was a homosexual and a pederast. In each of these cases the issues raised at the trial made the defendants' disposition highly relevant; the admission of the similar fact evidence had only one purpose, namely to prove that disposition. Our provisional view is that these cases too were correctly decided.

[8] *Makin v A-G for New South Wales* [1894] AC 57; see para 2.15 above.

[9] *Straffen* [1952] QB 911.

[10] *Boardman* [1975] AC 421, 457B.

[11] L H Hoffmann, "Similar Facts after Boardman" (1975) 91 LQR 193, 198.

[12] *Ball* [1911] AC 47.

[13] *Thompson* [1918] AC 221.

[14] In that case, a brother and sister had been charged with incest and the evidence showed that they had been living together and sharing the same bed. The prosecution was allowed to adduce evidence to show they had committed incest together in a period prior to that charge when it was not an offence. The House of Lords held that this evidence had been rightly admitted.

[15] In that case a homosexual pederast had assaulted two young boys and had arranged to meet them again. The defendant kept the appointment, but denied being the man who had assaulted the boys. The disputed evidence was the defendant's possession of powder puffs and indecent photographs, which were not alleged to have been used in the offence. The evidence was held to be admissible.

10.11 On a practical note, it is a far from straightforward matter to identify those cases where the previous misconduct evidence is relevant by some mode of reasoning other than in terms of the accused's propensities alone. For example, there is not even unanimity about whether *Makin* was a "propensity reasoning" case.[16] In *Thompson*, as Adrian Zuckerman observes,[17] the issue was identified in the judgments as credibility, identity, intention, and the accused's "identifying mark"; but the process of reasoning in fact relied on the accused's propensity.

10.12 For these reasons, our provisional view is that the admissibility of similar fact evidence should not depend upon the purpose for which it is adduced, and we reject the notion that the "forbidden reasoning" should be forbidden.

Probative value

10.13 The alternative approach to the admissibility of similar fact evidence is the view of Hoffmann[18] that everything depends on the *degree* of relevance of the evidence – or, to put it another way, on the *probative value* that the evidence has (or would have if it were accepted to be true). This approach is a consequence of Lord Wilberforce's reasoning in *Boardman*[19] that the admissibility of similar fact evidence depends on "whether, *and if so how strongly*, the evidence as to other facts tends to support, ie, to make more credible, the evidence given as to the fact in question".[20] We believe this to be correct.

10.14 **Our provisional view is that the admissibility of bad character evidence in chief should depend upon the probative value of the evidence, and not on the purpose for which it is proposed to adduce it; and that the evidence should not, therefore, be inadmissible merely because it is relevant only to propensity, provided that it is sufficiently probative.**

[16] In *Makin* [1894] AC 57, the disputed evidence concerned the discovery of the bodies of children buried at properties to which the defendants could be connected. The charge was murder of a child. The defendants denied the whole case against them. Some commentators have said that the disputed evidence was relevant because it boosted the credibility of the mother who said she had handed the child to the Makins; others have said that it was relevant primarily because of what it revealed about the defendants' propensity to take in children on the basis that they would care for them, take very little money for them and then (by inference from the subsequent deaths of those children) to cause their deaths. T R S Allan sets out the contrasting interpretations of *Makin* in "Some Favourite Fallacies about Similar Facts" (1988) 8 LS 35, 39. See also L H Hoffmann, "Similar Facts after *Boardman*" (1975) 91 LQR 193, 198–200, and Colin Tapper's comments in E Campbell and L Waller (eds) *Well and Truly Tried* (1982) p 198; A Palmer, "Digging up the Dirt on *Makin*" (1993) 67 Law Inst J 1171; A E Acorn, "Similar Fact Evidence and the Principle of Inductive Reasoning: Makin Sense" (1991) 11 OJLS 63, 80–82; T R S Allan, "Similar Fact Evidence and Disposition: Law, Discretion and Admissibility" (1985) 48 MLR 253, 258, where he argues that *Makin* was not a disposition case.

[17] A Zuckerman, *The Principles of Criminal Evidence* (1989) pp 224–225.

[18] L H Hoffmann, "Similar Facts after *Boardman*" (1975) 91 LQR 193, 200.

[19] *Boardman* [1975] AC 421, 442F.

[20] Italics supplied. He also added an additional factor which was "whether such evidence, if given, is likely to be prejudicial to the accused. Both these elements involve questions of degree".

Other factors

10.15 The risk of prejudice and the relevance of the evidence are not the only factors that should in our view be considered in determining whether the evidence ought to be admitted. Other such factors are "the time to be occupied in examinations of [the evidence] and the time which it is practicable to bestow upon them",[21] and "preventing the minds of the jury from being drawn away from the real point they have to decide".[22] These latter factors are too often overlooked.

DEFECTS IN THE PRESENT LAW

Uncertainty

10.16 A criticism which can be made of the present law is that it is uncertain. As we have said above,[23] laws of evidence must be clear, comprehensible and easy to apply. The tests that have been put forward, whether of "striking similarity" (as in *Boardman*)[24] or of "sufficient probative force to overcome prejudice" (as in *DPP v P*),[25] are open to the criticism that they are "amorphous, indefinite, subjective and discretionary".[26] These formulations have

> the merit of being absolutely all embracing, but [they are] so vague as to require explanation, which in turn needs examples, which are found in cases. Before we know where we are the cleared ground will be once more covered with structures.[27]

10.17 The House of Lords has emphasised the importance of the relationship between "probative value" and "prejudice".[28] However, Lord Mackay's formulation could be said, with respect, not to address the real issue, because the circumstances in which it is "just to admit the evidence, notwithstanding that it is prejudicial to the accused" are precisely what is at issue. There is no indication of the factors that are relevant in assessing the probative value of similar fact evidence (such as *dissimilarities* in the evidence),[29] or in assessing its likely prejudicial effect. Nor is

[21] *Per* Rolfe B in *A-G v Hitchcock* (1847) 1 Ex 91, 105; 154 ER 38, 44.

[22] *Per* Willis J in *Hollingham v Head* (1858) 4 CB (NS) 388, 391; 140 ER 1135.

[23] See paras 1.6 – 1.9 above.

[24] See paras 2.19 – 2.29 above.

[25] *DPP v P* [1991] 2 AC 447; paras 2.35 – 2.43 above.

[26] ALRC, Report No 26, Evidence, Vol 1.

[27] D Elliott, "The Young Person's Guide to Similar Fact Evidence – I" [1983] Crim LR 284, 286.

[28] *DPP v P* [1991] 2 AC 447; paras 2.35 – 2.43 above.

[29] In *Johnson* [1995] Crim LR 53 the Court of Appeal allowed an appeal because the similarities between the present charge and the previous misconduct were taken into account but the clear dissimilarities were ignored. Cf *West (Rosemary)* 2 April 1996, CA No 95/7813/S2, where the appellant had been convicted of murdering seven females. She argued that evidence should not have been admitted of assaults by her on four other females, because these assaults were insufficiently similar to the murders charged: in particular, the victims had survived. The Court of Appeal rejected the argument, holding that dissimilarities alone cannot determine the question of admissibility: this is simply one feature of the proposed evidence to which the judge must have regard when assessing its probative force in the light of the purpose for which the prosecution seeks to adduce it.

there any express requirement that the evidence should be relevant to a specific issue in the case.

The requirement of a "signature" in identity cases

10.18 Another matter of some concern is the statement in *DPP v P*[30] by the Lord Chancellor that

> where the identity of the perpetrator is an issue and evidence of this kind is important in that connection, obviously something in the nature of what has been called in the course of the argument "a signature" or other special feature would be necessary.

As we have said above,[31] this is not true of cases such as *Thompson*,[32] in which the issue was the identity of a man who had committed indecent assaults, and the identification was confirmed by evidence of the accused's possession of powder puffs and indecent photographs. These items were not alleged to have been used in the offence and, in any case, could not amount to a "signature". Nevertheless, the evidence was (rightly, in our view) accepted.

The absence of any reference to the distracting or time-wasting features of previous misconduct

10.19 As we have said in our discussion of the relevant principles,[33] we think it is important that the court should consider the potentially distracting or time-wasting nature of the similar fact evidence. At present, the law does not explicitly require these factors to be taken into account.

Option 1: no change

10.20 The first option open to us is that there should be no change to the existing law. In view of the defects of the present law that we have just examined, and despite the developments in the case law since 1972, we agree with the view of the Royal Commission[34] that the CLRC was correct when it remarked[35] that this branch of the law is "difficult to summarize because it is exceptionally complicated and because opinions differ greatly as to the effect of some of the decisions and as to whether the law is entirely consistent in itself". This complexity leads to confusion, anomalies and wasted time, both for the court and for the parties. It is difficult for prosecutors to predict whether similar fact evidence can be adduced in a particular case; the defence does not know whether the prosecution's similar fact evidence will be admitted, and therefore finds it difficult to advise on the plea to be entered. In many cases the question whether similar fact evidence is admitted will depend

[30] *DPP v P* [1991] 2 AC 447.

[31] See para 2.47 above.

[32] *Thompson* [1918] AC 221.

[33] See paras 7.25 – 7.27 and 10.15 above.

[34] Report of the Royal Commission, para 30.

[35] Evidence Report, para 78.

on the exercise of an unstructured judicial discretion, which leads to inconsistency of decisions from one court to another.

10.21 Although, as we have seen, the House of Lords' decisions in *Boardman* and in *DPP v P* have advanced the common law considerably, if one tried to formulate a test for the admissibility of all evidence of bad character on the basis of those two decisions, there would still be gaps. The extent of the rule, the degree to which there is any room left for a discretion to exclude prejudicial evidence after the rule has been applied, how the rule is to be applied where identity is in issue: these are all currently unclear. Moreover, it is arguable that the case law is not clear on the essential point: when is it just to admit evidence of bad character?

10.22 For all these reasons **we believe that change is necessary**, and that option 1 should be rejected.

OPTIONS FOR REFORM

Option 2: allowing evidence of an accused's previous convictions to be adduced where the conduct is admitted but there is an issue as to whether it was performed with any criminal knowledge or intent

10.23 This option is not a comprehensive option, in that it would be applicable in only a limited range of cases. It was most recently proposed by the Royal Commission, taking up a recommendation made by the CLRC. The Royal Commission wrote:

> The CLRC recommended a specific additional exception to the similar fact rule in their [Evidence] Report,[36] namely that it should be open to the prosecution to bring in evidence of an accused's previous convictions where he or she admits the conduct of which he or she is accused but denies that it was performed with any criminal knowledge or intent. In such circumstances the CLRC believed that it should be permissible simply to adduce evidence of previous misconduct of the kind alleged *without having to prove similarity of circumstances or facts surrounding the conviction*. They recommended therefore that when a defendant admits the basic facts alleged by the prosecution and the

[36] Evidence Report, paras 92–96. Clause 3(4) of the draft Bill appended to the Report reads:

> In any proceedings where the conduct in respect of which the accused is charged is admitted in the course of those proceedings by or on behalf of the accused, evidence of other conduct of the accused tending to show in him a disposition to commit the kind of offence with which he is charged shall be admissible for any of the following purposes, namely –
>
> (a) to establish the existence in the accused of any state of mind (including recklessness) proof of which lies on the prosecution; or
>
> (b) to prove that the conduct in respect of which the accused is charged was not accidental or involuntary; or
>
> (c) to prove that there was no lawful justification or excuse for the conduct in respect of which the accused is charged,
>
> notwithstanding that the other conduct is relevant for that purpose by reason only that it tends to show in the accused a disposition to commit the kind of offence with which he is charged.

(Footnote added)

> question is only one of knowledge or intent, the fact that he or she has previous similar convictions should be made known to the jury. We recommend that the CLRC's proposals in this regard be implemented.[37]

10.24 In practice, the court would have also to consider the prejudicial effect of the previous misconduct evidence which this recommendation made admissible. We have seen from the psychological research that predictions about a person's behaviour cannot be made with confidence if there are insufficient similarities between the past conduct and the charge, or on the strength of a single past instance.[38] Thus, if it is enough simply to cite the bare fact of a previous conviction, the probative value of this information will not be strong. Its prejudicial effect, however, could easily be more than trivial.[39] In that event, the defence would no doubt apply for the evidence to be excluded by the judge or magistrates, pursuant to the common law rule[40] or section 78(1) of PACE. The net result would be that probative value would need to outweigh prejudicial effect, and the admissibility of a person's criminal record would depend on the exercise of judicial discretion.

Advantages

10.25 One of the CLRC's concerns was that evidence of a disposition to behave in a particular criminal way, broadly speaking, could give the lie to a defence that conduct was innocent even without particular similarities between the past conduct and the charge, but such evidence would be inadmissible. The type of case which the CLRC had in mind was where a person with convictions for burglary is again charged with trespass with intent to steal[41] and his defence is that he entered the building only to sleep.[42]

10.26 The Police Service of England and Wales, in its submission to the Royal Commission, supported the CLRC's idea, noting that there are established modi operandi which, taken alone, appear or can appear to be innocent, but where the criminal mens rea is clear when the conduct is set in the context of the individual's criminal history. The examples given include the passenger in a vehicle which has been taken without the owner's consent, who argues that he or she did not know the vehicle had been unlawfully taken;[43] the driver of the get-away vehicle from an armed robbery, who pleads that he or she was duped into driving the vehicle for some other purpose; distributors of illegal drugs, who claim to be the innocent agent of some other (untraceable) person; and sex offenders who claim that the touching was not indecent, or was accidental.

[37] Report of the Royal Commission, para 31 (emphasis supplied).

[38] See paras 6.11 – 6.17 above.

[39] This danger may arise especially in the case of sexual offences, particularly those against children, because of the enormous prejudicial effect which such convictions can have: see Appendix D, para D.26 below.

[40] *Sang* [1980] AC 402.

[41] Contrary to the Theft Act 1968, s 9(1)(a).

[42] See *Harrison-Owen* [1951] 2 All ER 726; para 2.59 above.

[43] Charged with an offence contrary to the Theft Act 1968, s 12(1).

10.27 The CLRC's proposal would no doubt make it easier for defendants in such cases to be convicted, and some may see this as an advantage.

Disadvantages

10.28 The disadvantages of this option are both principled and practical. We take the principled difficulties first.

THE DANGER OF WRONGFUL CONVICTIONS

10.29 The dangers of evidence of bad character have already been mentioned.[44] It is arguable that this option does not give due weight to these dangers, and would permit the admission of evidence lacking the high degree of probative value that bad character evidence ought to have.

10.30 Colin Tapper illustrates the risk of a wrongful conviction when he makes the powerful point[45] that

> the accused with a long and prejudicial record, even of dissimilar offences, who happens to be innocent, will be faced with a choice between running his real defence of innocent involvement in the hope that the jury will not be influenced against him on account of his record, and fabricating a false defence denying involvement in order to avoid any possible prejudice on account of the revelation of his record.[46]

10.31 The proposal could lead to unjust results. A person with convictions for shoplifting might find a wallet on a train and genuinely intend to hand it in to a guard. He might then go looking for the guard with the wallet in his hand. If he were stopped by the police, arrested and charged, his previous convictions would go in; and he would stand little chance of being acquitted.[47]

PAST MISCARRIAGES OF JUSTICE WOULD BE COMPOUNDED

10.32 The CLRC proposal relies on the assumption that the convictions on the record are not wrongful convictions. There is therefore the danger of a past miscarriage of justice being compounded.

10.33 We now turn to the practical difficulties of this option.

[44] At paras 7.2 – 7.28 and 10.6 – 10.7 above.

[45] C Tapper, "Criminal Law Revision Committee 11th Report: Character Evidence" (1973) 36 MLR 56, 61.

[46] *Ibid.* Tapper points out forcefully that the CLRC considered it wrong to confront the accused with precisely this dilemma in relation to his or her tactics in cross-examination of a prosecution witness, in circumstances where the defendant has previous convictions. The Committee concluded on this point, at para 123(v), that "Whether the accused is convicted or not may depend on the way in which this choice is made, but it is not one that legal advisers should be called on to make. A rule that operates in this way turns the criminal trial into a kind of game."

[47] The old convictions for shoplifting would probably fall within cl 3(4) of the CLRC proposal.

THE DEFENDANT MAY NOT MAKE ANY ADMISSION

10.34 The obvious reaction to such a provision is that the accused with a record would be well advised not to make any admission of his or her conduct. Not surprisingly, the CLRC anticipated the objection; but it was rejected by a majority because they believed that where the accused's actual defence is that the conduct took place but was innocent, he or she will not, for tactical reasons, be in a position to deny the conduct.[48] The defendant might, however, put the prosecution to proof of its case but add that, in any event, his or her conduct was accidental, or carried out with an innocent intent, or that he or she was entitled to do it. Defendants frequently do this in serious fraud cases, for example.

IT MAY NOT ALWAYS BE CLEAR WHETHER THE CONDUCT IS DENIED

10.35 Tapper also raises a more technical objection about the form of words in the condition that triggers admissibility: that the defendant "admits the conduct of which he or she is accused",[49] while the provision in the Draft Criminal Evidence Bill attached to the Evidence Report requires "the conduct in respect of which the accused is charged" to be admitted.[50] This might be a difficult clause to construe, because it requires an admission of the actus reus,[51] whereas a defence that an act was accidental or involuntary, or done with at least some lawful justification or excuse, is sometimes regarded as a *denial* of the actus reus.[52] Suppose a defendant admits wounding the alleged victim, but claims that it was in self-defence: does the defendant admit the conduct alleged (because the conduct alleged is wounding) or deny it (because the conduct alleged is *unlawful* wounding)? We agree with Tapper that "It is vital to grasp just what it is that the accused must admit before his record can be used against him".[53] He also points out that "in many cases where the defence is that the act was involuntary the accused will not be in a position to admit the conduct since his claim is that he did not know what he was doing".

10.36 For all these reasons, **we provisionally reject this option**.

[48] Evidence Report, para 94.

[49] Report of the Royal Commission, para 31.

[50] See cl 3(4) at n 36 above.

[51] See paras 92–94 and 95 of the Evidence Report, and p 215 of the Notes.

[52] Eg, in the case of dangerous driving, does the actus reus consist simply of driving, or of driving *dangerously* within the meaning of the Road Traffic Act 1988 (as substituted by the Road Traffic Act 1991)? Or take the example of the offence of rape. If the defendant says that non-consensual intercourse did not take place, that is a denial of the actus reus; but if he claims that he believed the complainant was consenting, that is a denial of the mens rea. It is not uncommon for both denials to form part of a defence which runs, "The complainant was consenting, or at least that is what I believed". (These examples are adapted from ones given by Stephen Parish in his submission to the Royal Commission.)

[53] C Tapper, "Criminal Law Revision Committee 11th Report: Character Evidence" (1973) 36 MLR 56, 62.

Option 3: allowing bad character evidence to be adduced in chief if it tends to show a disposition to commit the kind of offence charged or a general disposition to commit offences

10.37 In its Evidence Report, the CLRC recommended not only the reform set out in Option 2 above but also an option which was "intended to state existing law".[54] Clause 3 of the bill accompanying the report provides:

> (1) Subject to the provisions of this section, in any [criminal] proceedings evidence of other conduct of the accused shall not be admissible for the purpose of proving the commission by him of the offence charged by reason only that the conduct in question tends to show in him a disposition to commit the kind of offence with which he is charged or a general disposition to commit crimes.
>
> In this section "other conduct of the accused" means conduct of the accused other than conduct in respect of which he is charged.
>
> (2) In any [criminal] proceedings evidence of other conduct of the accused tending to show in him a disposition to commit the kind of offence with which he is charged shall be admissible for the said purpose if the disposition which the conduct tends to show is, in the circumstances of the case, of particular relevance to a matter in issue in the proceedings, as in appropriate circumstances would be, for example:
>
> (a) a disposition to commit that kind of offence in a particular manner or according to a particular mode of operation alleged as regards the offence charged; or
>
> (b) a disposition to commit that kind of offence in respect of the person in respect of whom he is alleged to have committed the offence charged; or
>
> (c) a disposition to commit that kind of offence (even though not falling within paragraph (a) or (b) above) which tends to confirm the correctness of an identification of the accused by a witness for the prosecution.

10.38 Although expressed to be a statement of the current law, this proposal was widely seen as an attempt "to enlarge the occasions on which [similar fact] evidence can be given".[55] Lord Salmon said of subsection 2 that it is "said to be a codification, but it is in truth, in my judgment at any rate, a considerable extension of the law if it means what it says".[56] Lord Widgery, then Lord Chief Justice, said that "the Committee seems to have come to the conclusion that they ought to let [similar

[54] R Cross, "Clause 3 of the Draft Criminal Evidence Bill, Research and Codification" [1973] Crim LR 400, 405.

[55] Viscount Dilhorne, *Hansard* (HL) 14 February 1973, vol 338, col 1553.

[56] *Ibid*, at col 1609.

fact evidence] well alone, but they failed to resist the temptation to put in some little change – and that little change seems to me undesirable, unnecessary".[57]

10.39 The proposal was strongly criticised. Lord Salmon was particularly concerned about paragraph (a) of subsection (2). He gives the example of a person who is alleged to have committed burglary by entering a house through a window on the ground floor, and who has previous convictions for burglary, always entering houses through a window on the ground floor.[58] The CLRC proposal would make the previous convictions admissible, although they are not especially probative. We agree that the admission of previous convictions in such a case, where the issue is that of identity, would be a totally unacceptable extension of similar fact evidence: it would mean that the defendant would be in danger of being convicted because of the highly prejudicial nature of the evidence, although there was nothing unusual or striking about it.

10.40 We believe that, although propensity evidence can be relevant, it should not be admissible if "its only relevance is to show that the accused is a person of bad disposition, and his disposition is not *highly relevant* to an issue raised at the trial".[59]

10.41 We are also unhappy about subsection (2)(b). This would have the effect that if a person has, say, two previous convictions of shoplifting from a particular shop, a store detective would know that if that individual was charged with shoplifting on a subsequent occasion, those previous convictions, even if not unusual in any way, would be put before the fact-finders. The consequences of this are obvious and inevitable: the defendant would have no real chance of a fair trial, even though there might be a marked dissimilarity between the way in which the different offences were committed; and investigators might pick on people with previous convictions, knowing that they could obtain a conviction by relying on the person's criminal record.

10.42 Our strongest criticism, however, must be reserved for paragraph (c), which permits similar fact evidence to be adduced to cover "a disposition to commit that kind of offence … which tends to confirm the correctness of an identification of the accused by a witness for the prosecution". As we understand it, this means that where there is a disputed identification of the accused, the prosecution could adduce details of previous misconduct for "that kind of offence".

10.43 The CLRC stated that

> we regard mistaken identification as by far the greatest cause of actual or possible wrong convictions. Several cases have occurred in recent years when a person has been charged or convicted on what has later been shown beyond doubt to have been mistaken identification.[60]

[57] *Ibid*, at col 1623.

[58] *Ibid*, at col 1609, cited with approval by Lord Morris of Borth-y-Gest, at col 1632.

[59] L H Hoffmann, *South African Law of Evidence* (2nd ed 1970) p 34.

[60] Evidence Report, para 196.

10.44 Subsequently, concern over two miscarriages of justice on the basis of mis-identification caused the Government to set up a Departmental Committee under the chairmanship of Lord Devlin to review all aspects of the law and procedure relating to identification in criminal cases.[61] The Court of Appeal in *Turnbull*[62] laid down important guidelines for trials involving disputed identification. We are troubled by the suggestion that identification evidence could be bolstered by disclosure of the defendant's previous convictions.[63]

10.45 A further problem that the CLRC proposal presents is the definition of "kind of offence".[64] The following questions may illustrate the kinds of issue that would arise.

- If the offence charged is burglary contrary to section 9(1)(b) of the Theft Act 1968, are all previous convictions of *that form* of burglary to be admissible, or all previous convictions of burglary, or all previous offences of dishonesty?

- What is to count as an offence of dishonesty? Would blackmail count, for example, although proof of dishonesty is not required?

- Would there be only one category for all sexual offences, or would it be subdivided into offences against children and offences against adults? Would there be different categories depending on whether consent is a defence?

10.46 All these proposals were heavily criticised by professional bodies[65] and in the House of Lords.[66] We are not surprised by this lack of enthusiasm for this CLRC proposal and **we provisionally reject it.**

Option 4: the Australian common law test

10.47 The test adopted under the Australian common law was recently stated in *Pfennig*:[67] the evidence is inadmissible unless there is no rational view of the

[61] HC Paper 338 (1976).

[62] *Turnbull* [1977] QB 224.

[63] These are that whenever the case against an accused depends wholly or substantially on disputed identification evidence, the judge should warn the jury of the special need for caution before convicting the accused in reliance on the identification; and that the jury should be directed to examine closely the circumstances in which the identification by each witness could be made, and warned of any specific weaknesses in the identification evidence. These guidelines were endorsed by the Privy Council in *Reid* [1990] 1 AC 363.

[64] See the wording of the CLRC proposal, cited at n 36 above.

[65] Eg the Bar Association, the Society of Labour Lawyers, the Criminal Courts Solicitors Association, the Bar Council.

[66] Eg Viscount Dilhorne, *Hansard* (HL) 14 February 1973, vol 338, col 1553; Lord Gardiner, at cols 1577–1579; Lord Salmon, at cols 1609–1610; Lord Widgery, at col 1623; Lord Morris of Borth-y-Gest, at col 1632; and Lord Diplock, at col 1648, where he expresses "some reservations about clause 3 on previous conviction".

[67] *Pfennig* (1995) 127 ALR 99.

evidence that is consistent with the innocence of the accused. The majority in *Pfennig* said that

> for propensity or similar fact evidence to be admissible the objective improbability of its having some innocent explanation [must be] such that there is no reasonable[68] view of it other than as supporting an inference that the accused is guilty of the offence charged.[69]

10.48 This approach derives support from Lord Cross' dictum in *Boardman* that

> The question must always be whether similar fact evidence taken together with other evidence would do no more than raise or strengthen a suspicion that the accused committed the offence with which he is charged or would point so strongly to his guilt that only an ultra-cautious jury, if they accepted it as true, would acquit in the face of it.[70]

Advantages

10.49 The main advantage of this comparatively strict test is that it minimises the risk of wrongful convictions. Munday points out that "Practically speaking to admit similar fact evidence at all is to determine that, barring a miracle, the defendant will be convicted".[71] This test attempts to minimise the risk of a conviction resulting where there is in fact an innocent explanation. Even if the fact-finders do in fact convict through prejudice, had they acted rationally they could not have reached a different conclusion; so there is no danger of unfairness to the defendant.

10.50 A second advantage is that the test is a simple one. If the evidence passes the "no rational explanation" test, it is admissible; otherwise, it is not. The court is not involved in any weighing process: there is nothing for it to weigh.[72]

10.51 Thirdly, there is no danger of the court's time being wasted, or of the fact-finders' attention being distracted from the charge to the accused's character in general: if the evidence is sufficiently probative to be admissible under this test then it will inevitably be crucial and worth hearing. Only highly probative evidence can pass the test.

[68] The majority regarded "reasonable" and "rational" as synonymous in this context: *ibid,* at p 114.

[69] *Pfennig* (1995) 127 ALR 99, 113, *per* Mason CJ, Deane and Dawson JJ, summarising the effect of *Hoch* (1988) 165 CLR 292, 294.

[70] *Boardman* [1975] AC 421, 457C, *per* Lord Cross.

[71] R Munday, "Similar Fact Evidence and the Risk of Contaminated Testimony" [1995] CLJ 522, 524.

[72] As McHugh J put it in *Pfennig* (1995) 127 ALR 99, 138:

> If evidence revealing criminal propensity is not admissible unless the evidence is consistent only with the guilt of the accused, the requirement that the probative value "outweigh" or "transcend" the prejudicial effect is superfluous. The evidence either meets the no rational explanation test or it does not. There is nothing to be weighed – at any or all events by the trial judge. The law has already done the weighing.

Disadvantages

10.52 The principal drawback of this test was identified by McHugh J in *Pfennig*:

> [It] means that, even in cases where the risk of prejudice is very small, the prosecution cannot use the evidence unless it satisfies the stringent no rational explanation test. It cannot use the evidence even though in a practical sense its probative value outweighs its prejudicial effect.[73]

10.53 In other words, even if the risk of prejudice is very low the prosecution cannot use similar fact evidence unless it satisfies the "no rational explanation" test.[74] It seems strange that the threshold of probative value should be so high where the risk of prejudice is so low.[75] For example, the jury might be told about many of the defendant's previous convictions under section 27(3) of the Theft Act 1968,[76] but not (because it is outside the statutory period) about one which tends to disprove the defence set up in the present case. Yet the additional prejudicial effect of its disclosure would be small, in the light of the jury's knowledge of the defendant's criminal past, and its probative value might be very substantial.[77]

10.54 Thus the test may be stricter than is necessary, and may lead to wrongful acquittals. We suspect that there are many instances in which similar fact evidence has been admitted, rightly according to the principles laid down in the English cases, but would have been inadmissible under the Australian common law test. We doubt, for example, that the evidence admitted in *Ball*[78] or *Thompson*[79] would have been admissible under this test, and we would regard this as regrettable. Indeed, if the "no rational explanation" test represents the common law, practitioners and trial judges have long been engaged in a futile exercise. They have wasted much time and effort in attempting to identify the prejudice to the accused that might arise if the evidence is admitted, the weight to be given to the evidence, and whether that weight outweighs the likely prejudice.

10.55 This test also requires the trial judge (and, on appeal, the Court of Appeal) to carry out the task of the jury and decide on the *strength* of the evidence. The judge

[73] *Ibid*. Later in the same judgment, at p 150, he gave instances where he thought this might occur:

> in the relationship cases, for example, where evidence of propensity is relied on as confirmatory or explanatory of evidence implicating the accused, I do not think that such a high standard is either required or appropriate. Similarly, in cases where the accused's propensity is disclosed, but is not the basis of any reasoning process, a standard of proof lower than the no reasonable explanation standard may suffice for admission.

[74] *Ibid*.

[75] Cross and Tapper, at p 376, rightly, in our provisional view, criticised this test as being "both too restrictive, in eliminating less strong evidence; and too flexible, in supposing that such evidence has no disposition element requiring consideration of factors normally taken into account in this area".

[76] See paras 3.8 – 3.22 above.

[77] See the comments of McHugh J in *Pfennig* (1995) 127 ALR 99, 138.

[78] See para 10.10, n 14 above.

[79] See para 2.47, n 124 above.

applies to the admissibility of the evidence precisely the same test that the jury has to apply to the question of guilt if the evidence is admitted. To give judges this role is, at least, unusual.[80]

10.56 A further feature of this option, at any rate as it is currently applied in Australia, is that the trial judge often finds it necessary to hold a voir dire in order to determine not just the *cogency* of the evidence of bad character (that is, whether it appears likely to be true) but also its *probative value* (that is, how much further it would take the prosecution's case if it *were* true).

10.57 In *Pfennig*, for example, the defendant was charged with the murder of a boy who had disappeared from a place at which the defendant had been present at around the same time. The prosecution sought to adduce evidence that he had subsequently abducted and raped another boy. The judge heard the evidence relating to the disappearance of the first boy on a voir dire: the object was not to assess the cogency of the evidence relating to the second boy – that was mostly undisputed – but to determine whether there was any rational explanation for this combination of circumstances other than that the defendant had murdered the first boy. The judge took the view that there would be no such rational explanation if it were clear that the first boy had been abducted for sexual purposes and murdered, but not if it appeared that he might have drowned while swimming. The voir dire was therefore employed to determine whether it was reasonably possible that he might have drowned.

10.58 For reasons that we discuss further in the context of collusion and contamination, we would wish to keep the need for voir dires to a minimum. It is perhaps debatable whether the use of voir dires is in fact an *essential* corollary of the Australian common law test: it might be possible to adopt that test but to require the court to apply it on the basis of the papers rather than a voir dire. However, we think that it is probably no coincidence that greater use appears to have been made of voir dires in Australia (under the common law rule) than in England and Wales. It may be easier for a judge to decide, on the basis of the papers alone, whether the evidence's probative value outweighs its likely prejudicial effect, than to decide, on the papers alone, whether its probative value is so great as to allow no rational explanation other than that the defendant is guilty. If so, we would regard this as an additional reason for rejecting the Australian common law test.

10.59 For these reasons **we provisionally reject this option.**

Option 5: the scheme of the Australian Evidence Act 1995

10.60 We have sought to draw a distinction between the scope of an exclusionary rule itself (that is, the kind of evidence that such a rule may render inadmissible) and the scope of the *exceptions* to such a rule (that is, the circumstances in which such evidence may nevertheless be admitted).[81] The Australian Evidence Act 1995[82]

[80] In *Pfennig*, McHugh J said, at pp 138–139: "I do not recollect any other area of the Australian law of evidence where the test that the judge applies to the admissibility of a class of evidence is the same test that the jury must apply to the question of guilt if the evidence is admitted".

[81] See para 9.72 above.

provides that all relevant evidence is admissible unless excluded by the Act, but has two exclusionary rules that are relevant for present purposes: one is confined to "tendency" and "coincidence" evidence, and the other extends to any evidence adduced by the prosecution. In either case, evidence of the kind caught by the exclusionary rule is admissible on certain conditions; and we are here concerned with the appropriateness for our purposes of *those conditions*.[83]

10.61 Under the "tendency" and "coincidence" rules, evidence may not be adduced to show

(1) that a person has a tendency to act in a particular way, or

(2) that a person did a particular act (or had a particular state of mind) because two or more events have occurred which are unlikely to have occurred by coincidence,

unless the evidence has *significant probative value*.[84] In addition, tendency evidence and coincidence evidence adduced *by the prosecution about a defendant* may not be used against the defendant unless its probative value *substantially outweighs any prejudicial effect* that it may have on the defendant.[85]

10.62 Finally, *any* evidence adduced by the prosecution (not just tendency and coincidence evidence) must have probative value which outweighs the danger of prejudice.[86]

10.63 The effect is that prejudicial evidence adduced by the prosecution is admissible only if the following conditions are met:

(1) the evidence's probative value must outweigh the danger of prejudice;[87] *and*

(2) *if* the evidence is tendency or coincidence evidence, its probative value

[82] See Appendix B, paras B.12 – B.28 below.

[83] For the appropriateness of the Australian exclusionary rules themselves, see paras 9.78 – 9.85 above.

[84] Evidence Act 1995, ss 97, 98(1).

[85] *Ibid*, s 101(2).

[86] *Ibid*, s 137.

[87] *Ibid*.

must in addition

(a) *substantially* outweigh the danger of prejudice,[88] *and*

(b) be *significant*.[89]

10.64 We think that these rules have a number of drawbacks. In the first place it is far from clear what it means to say that the probative value of an item of evidence *substantially* outweighs the risk of prejudice (as distinct from merely outweighing it to some extent), or that the evidence has *significant* probative value (as distinct from *some* probative value): although these requirements have the laudable objective of discouraging courts from being too ready to admit highly prejudicial evidence, we believe that they are too vague to be effective.

10.65 Secondly, whatever the expressions "substantially outweigh" and "significant probative value" do mean, the effect of either requirement must be that tendency and coincidence evidence adduced by the prosecution is sometimes inadmissible *even if its probative value outweighs the risk of prejudice*. We see no reason why such a rule should be necessary. It is possible to imagine cases where the probative value of the evidence is very small – perhaps less than "significant" – but the risk of prejudice resulting from the admission of the evidence is even smaller. For example, the fact-finders might already know (perhaps because the fact has been admitted as "background" evidence, or because the defendant is notorious) that the defendant has a long history of serious crime. The additional prejudice likely to result from the revelation of one more minor offence is very small, and would be outweighed by a comparatively small degree of probative value. In such a case we think that the evidence ought to be admissible, even if the probative value of the evidence is not "significant". Similarly, if the evidence's probative value outweighs the risk of prejudice, we see no reason why it should be excluded merely because it does not *substantially* outweigh that risk.

10.66 Finally, we think it important that the law should be as simple as is reasonably practicable and consistent with the interests of justice. The Australian scheme of overlapping exclusionary rules, each with its own exceptions, is extremely complicated – in our view, unnecessarily so – and we regard this as a serious drawback.

10.67 We have already provisionally rejected the possibility of formulating our *exclusionary* rule along similar lines to the Australian tendency and coincidence rules (either instead of, or as well as, a rule extending to prejudicial evidence of other kinds),[90] preferring a simple rule applying to *any* evidence that is potentially prejudicial. It would, however, be possible to copy the Australian legislation's *exceptions* to the exclusionary rule applicable to tendency and coincidence evidence, while rejecting the Australian formulation of that rule itself. In other words, this option would be a hybrid between our approach and the Australian approach. This might consist of

[88] *Ibid*, s 101(2).

[89] *Ibid*, ss 97(1)(b), 98(1)(b).

[90] See para 9.77 – 9.85 above.

(1) an exclusionary rule, that evidence is prima facie inadmissible if it is prejudicial, subject to

(2) an *exception* to the exclusionary rule, which might take one of the following forms:

(a) a rule that prejudicial evidence is admissible if it has *significant* probative value; or

(b) a rule that prejudicial evidence is admissible if its probative value *substantially* outweighs the risk of prejudice; or

(c) a rule that prejudicial evidence is admissible if its probative value is significant *and* substantially outweighs the risk of prejudice; or

(d) a rule that prejudicial evidence is admissible if its probative value is significant *or* substantially outweighs the risk of prejudice.

10.68 We are not attracted by this option. As we have already explained, a requirement of "significant" probative value would in our view be an unnecessary and undesirable complication if (as in the Australian legislation) there were *also* a requirement that the evidence's probative value should outweigh the risk of prejudice;[91] and conversely, a requirement of "significant" probative value would be no *substitute* for such a requirement. Evidence which is highly prejudicial ought not to be admitted merely because it has significant probative value.

10.69 Similarly, we have explained that we do not think it should be necessary for the probative value of the evidence *substantially* to outweigh the risk of prejudice – even (as in the Australian legislation) in the case of tendency and coincidence evidence alone.[92] A fortiori we do not think this should be necessary in the case of *every* kind of evidence falling within our exclusionary rule, namely all evidence that is potentially prejudicial.

10.70 For these reasons **we provisionally reject this option**. In our view the Australian requirements that the evidence should have "significant" probative value, and that its probative value should "substantially" outweigh its likely prejudicial effect, are workable *only* in conjunction with option B in Part IX above – namely the formulation of an *exclusionary* rule along the same lines as the Australian tendency and coincidence rules, either instead of or as well as a wider rule extending to other kinds of prejudicial evidence – which we have also provisionally rejected. In conjunction with that option, of course, it would not be a hybrid: it would simply follow the scheme of the Australian legislation.

10.71 However, although we regard the Australian scheme as unduly complex, and in some respects unduly restrictive, it has certain aspects that we find attractive. The rule applicable to *all* prosecution evidence, namely that its probative value must outweigh the risk of prejudice, seems to us to be the best rule available.

[91] See paras 10.64 – 10.66 above.

[92] *Ibid.*

10.72 In addition, under the Australian legislation the court has a discretion to exclude evidence whose probative value is "substantially outweighed" by the danger that the evidence might *either* be unfairly prejudicial to any party in the proceedings *or* be misleading or confusing, or result in undue waste of time.[93] The court is also given a discretion to limit the *use* to be made of the evidence if there is any danger that a particular use of the evidence might be unfairly prejudicial, misleading or confusing.[94] We think it important that such discretions should be available; indeed, we are also keen that, in deciding whether to admit similar fact evidence, the court should be entitled to consider the potentially *distracting* nature of the evidence. The Australian rules include no express provision to this effect – though it may arguably be implicitly covered by the discretion to exclude evidence that may be "misleading or confusing".

Option 6: prejudicial evidence to be admissible if it is relevant to a specific issue *and* its probative value outweighs its likely prejudicial effect (and any other factors militating against its admission)

10.73 This, our preferred option, is close to the test in *DPP v P.* Our main criticism of the test set out in *DPP v P* was that it does not give sufficient guidance to courts on how to carry out the balancing test that it prescribes. We therefore suggest that the legislation should expressly set out

(a) the conditions that must be satisfied before the evidence can be admitted, and

(b) the factors that the court should consider in determining whether those conditions *are* satisfied.

10.74 Under this option, potentially prejudicial evidence would be admissible if

(1) it is relevant to a specific fact in issue; and

(2) on the assumption that the evidence is true, the *degree* to which it is relevant to that fact (in other words, its probative value) outweighs the risk that, if admitted, it might

(a) result in prejudice;

(b) mislead, confuse or distract the fact-finders; or

(c) cause undue waste of time.

Relevance to a specific fact in issue

10.75 The first of these tests is one of relevance alone: we think it desirable to emphasise that the court should begin by considering exactly what issue the evidence is relevant to. If no reasonable fact-finders could be any more confident of the existence of any fact in issue as a result of hearing the evidence in question, it has

[93] Evidence Act 1995, s 135.

[94] *Ibid*, at s 136.

no relevance and therefore no probative value. This requirement is of course implicit in the notion of probative value, but it is sometimes overlooked. In *Rodley*,[95] for example, the defendant was charged with housebreaking with intent to rape: the defence was consent. Evidence was admitted that shortly after this incident he had entered another house by climbing down the chimney, and had *consensual* intercourse with the occupant; on appeal, this evidence was held to be irrelevant to any issue in the case.

10.76 The evidence may be relevant to any of a number of issues, in various different ways. For example, it may go to the issue of identity, by suggesting a propensity in the defendant to act in the manner alleged; or it may go to mens rea, by revealing a combination of circumstances which is unlikely to have arisen through innocent coincidence. In some cases it will be clear which kind of relevance it has; but the court would not be required to assign it to any particular *category* of relevance,[96] only to identify the issue to which it relates.

10.77 The issue in question must, however, be a *live* issue in the case. In other words, the evidence should not be admitted if it bears on an issue which is "only formally in contest".[97] The probative value of the evidence in such a case will be very limited, and "being a sledgehammer, it should not be used to crack peanuts".[98]

Balancing probative value against the reasons for exclusion

10.78 Having satisfied itself that the evidence is relevant to a fact in issue, the court would then consider whether it is *so* relevant that it ought nevertheless to be admitted – in other words, whether its probative value outweighs its likely prejudicial effect, together with any other reasons militating against its admission.

10.79 We prefer "structured" to "ordinary" discretion,[99] and therefore think it desirable to set out the factors that the court ought to take into account on each side of the comparison between probative value and prejudicial effect. On the "probative value" side would be included, for example,

(1) the extent (if any) to which the evidence tends to suggest that the defendant has a *propensity* to act in the manner alleged;

(2) any *similarities* between the facts revealed by the evidence and those now alleged;

(3) the extent to which any such similarities may reasonably be attributed to coincidence; and

[95] *Rodley* [1913] 3 KB 468.

[96] Cf paras 9.77 – 9.85 above.

[97] *Yuille* [1948] VLR 41, 46 *per* Gavin Duffy J.

[98] D Elliott, "The Young Person's Guide to Similar Fact Evidence – 1" [1983] Crim LR 284, 292.

[99] See paras 9.51 – 9.57 above.

(4) any *dis*similarities between the facts revealed by the evidence and those now alleged.

10.80 The main factors to be taken into account on the "prejudice" side would be the risk of either or both of the two distinct types of prejudice that we have identified, namely

(1) "reasoning prejudice" (that is, the risk of the fact-finders attaching undue significance to the evidence in question in determining whether the defendant is guilty as charged) and

(2) "moral prejudice" (that is, the risk of their convicting the defendant on the basis of his or her conduct on some other occasion or occasions, rather than because they are satisfied that he or she is guilty as charged).

10.81 If our preferred option for the scope of the exclusionary rule were accepted – namely that evidence should be prima facie inadmissible if its admission would create a risk of prejudice[100] – the legislation would in any event define "prejudice" so as to include both reasoning prejudice and moral prejudice. However, it would probably be desirable to direct the court's attention to this distinction not only at the stage of determining whether the exclusionary rule applies at all (which under our proposal would rarely be in dispute), but also at the stage of deciding whether the evidence should nevertheless be admitted because its probative value outweighs its likely prejudicial effect.

10.82 As we have said,[101] we think it important that the court should have a discretion to exclude evidence, even where its probative value outweighs the risk of prejudice, if it is likely to mislead, confuse or distract the fact-finders, or to result in the court's time being wasted. For example, where the evidence relates to two occasions on which the accused is alleged to have acted in a particular way, and he or she denies having so acted, the court could end up spending a disproportionate amount of time hearing evidence about those two occasions. It would be possible to regard the consideration of these factors as an exercise entirely separate from that of weighing probative value against prejudicial effect; but we think it would be simpler to treat them as additional reasons for excluding relevant evidence, to be weighed (alongside the risk of prejudice) against the evidence's probative value.

Advantages

10.83 The degree of probative value required for the evidence to be admissible will be related to the risk of prejudice that attaches to the evidence in the individual case. We criticised the "no rational explanation test" because, even if the risk of prejudice were very low, the level of probative value required would still be extremely high.[102] This option is more flexible. Unlike the "no rational explanation" test, it also ensures that the role of the jury is not usurped.

[100] See paras 9.86 – 9.92 above.

[101] See para 10.15 above.

[102] See para 10.53 above.

Disadvantages

10.84 This option does permit the possibility of wrongful convictions: since it would allow the admission of bad character evidence for which there might be a rational and innocent explanation, it would be possible for the fact-finders to convict on the basis of that evidence where the accused is not in fact guilty. That is always a risk with this kind of evidence; but we believe that this option would reduce it as far as is reasonably practicable.

10.85 **We provisionally propose that this option be adopted.**

THE COGENCY OF THE EVIDENCE: COLLUSION AND CONTAMINATION

10.86 Doubts about the cogency of previous misconduct evidence arise in a particularly acute form where there may have been collusion[103] between the witnesses, or where one witness's evidence may have been unconsciously contaminated[104] by contact with another.[105] We now consider whether, in such cases, the judge should make an estimate of the danger by assessing the potential credibility of the witnesses, and, if so, what level of risk is acceptable; or whether this assessment should be left to the jury. These questions may arise whichever of the options considered in the previous section is eventually preferred. That they are difficult questions may be gleaned from the fact that, before the House of Lords gave their answer in *H*, there were five conflicting Court of Appeal decisions;[106] and in *H* itself, although their Lordships agreed on a conclusion, their routes to that conclusion were far from uniform,[107] or showed, as Lord Nicholls said,[108] "a limited measure of difference in emphasis".

[103] Meaning "secret agreement or understanding for the purposes of trickery or fraud; understanding, scheming or working with another; deceit, fraud, trickery": *Oxford English Dictionary*.

[104] Lord Wilberforce referred in *Boardman* to "a cause common to the witnesses"; [1975] AC 421, 444E. Lord Mustill in *H* refers to "innocent infection": [1995] 2 AC 596, 616D; Laws J describes the process in *Ananthanarayanan* [1994] 1 WLR 789, 793C: "a witness's account may be infected by what another complainant has said without there being even a suspicion of a deliberate intention to tell a false story."

[105] This may happen without the witnesses even communicating directly with each other, eg where the witnesses are inexpertly questioned by the same investigative team: A Bisset-Johnson, "Family Violence – Investigating Child Abuse and Learning from British Mistakes" (1993) 16 Dalhousie LJ 1.

[106] *Ananthanarayanan* [1994] 1 WLR 789, in which it was held that if the judge was of the view that there was a real risk of contamination the evidence should not be admitted, followed in *Ryder* (1993) 98 Cr App R 242; see also *W* [1994] 1 WLR 800. Cf *H* [1995] 2 AC 596 and *Hunt* [1995] Crim LR 42, in which it was held that such a possibility did not preclude the admission of the evidence, but required the jury to be directed that they should be sure that contamination had not occurred before using one witness's evidence to corroborate another's.

[107] Dissections of the different arguments relied upon by their Lordships can be found in P Mirfield, "Proof and Prejudice in the House of Lords" (1996) 112 LQR 1.

[108] *H* [1995] 2 AC 596, 626E.

A matter for the judge or the jury?

10.87 Credibility is traditionally a matter for the jury, not for the judge, as it relates to the weight of the evidence. However, judges regularly make decisions about facts for the purpose of deciding on the admissibility of evidence,[109] so it is not obvious that there is any objection of principle to their doing so in the case of evidence which is potentially prejudicial: the critical question is whether they can do it fairly.

10.88 As Lord Devlin has pointed out, generally speaking credibility is a matter which lay people are not only well placed to assess, but better placed than a judge:

> I am myself convinced that the jury is the best instrument for deciding upon the credibility or reliability of a witness and so for determining the primary facts. Whether a person is telling the truth, when it has to be to be judged, as so often it has, simply from the demeanour of the witness and his manner of telling it, is a matter about which it is easy for a single mind to be fallible. The impression that a witness makes depends upon reception as well as transmission and may be affected by the idiosyncrasies of the receiving mind; *the impression made upon a mind of twelve is more reliable*. Moreover, the judge, who naturally by his training regards so much as simple that to the ordinary man may be difficult, may fail to make enough allowance for the behaviour of the stupid.[110]

Yet a "mind of twelve" is susceptible to prejudice, perhaps more so than a single judicially trained mind; and it is for this reason, it may be argued, that, if the evidence may unfairly sway a jury although it is unreliable, it should not reach the jury at all.

10.89 It is sometimes argued that the test of admissibility for confessions under section 76(2) of PACE[111] serves as a useful analogy. There is, however, a distinction between the scheme under section 76(2) and what is needed to identify cases where witnesses are not truly independent. In the former, once the court has decided that a confession was not *obtained in circumstances which were likely to make it unreliable*, its *actual* truthfulness is a matter for the fact-finders; and they might well decide that it is untrue for reasons which have nothing to do with the way it was obtained. In the case of allegedly contaminated or collusive evidence, however,

[109] As Laws J notes in *Ananthanarayanan* [1994] 1 WLR 788, 795B.

[110] P Devlin, *Trial by Jury* (1956) p 140 (emphasis added).

[111] Section 76(2) of PACE provides:

> If, in any proceedings where the prosecution proposes to give in evidence a confession made by an accused person, it is represented to the court that the confession was or may have been obtained –
>
> (a) by oppression of the person who made it; or
>
> (b) in consequence of anything said or done which was likely, in the circumstances existing at the time, to render unreliable any confession which might be made by him in consequence thereof,
>
> the court shall not allow the confession to be given in evidence against him except in so far as the prosecution proves to the court beyond reasonable doubt that the confession (notwithstanding that it may be true) was not obtained as aforesaid.

once the court has decided beyond reasonable doubt that there has been *no* collusion or infection, the fact-finders will be deciding exactly the same question.

10.90 In *H*[112] the House of Lords held that the assessment of credibility should be left to the jury: for the purpose of deciding whether the evidence is admissible, the trial judge should assume that it is true. Thus the issues of collusion and contamination will not be relevant on the question of admissibility. This amounts to an artificial assumption of a certain probative value. In either case, Professor Tapper argues that assuming the evidence to be true distorts the test of admissibility to the extent that it may *predetermine* that question.[113] In effect, any threshold of admissibility set by an exclusionary rule is so lowered as to negate the purpose of the rule, which is to protect a defendant from the risk of being convicted unfairly.

10.91 The policy considerations behind the decision in *H* can be most clearly discerned in Lord Mustill's judgment. First, he did not believe that collusion could be discovered or explored in oral argument based on depositions. Second, if the prosecution is required to show that there has been no collusion or contamination before similar fact evidence can be admitted, it is highly likely that in many cases the evidence will be excluded; it would "load the scales unfairly [against] the interests of those who cannot protect themselves". Finally, if there has to be a voir dire to enable the judge to rule on admissibility, the witnesses will have to go through the ordeal of giving their evidence twice. There is force in these concerns: it will often be in cases involving sexual abuse that collusion or contamination is feared, because of the way in which such offences are commonly committed. As Lord Mustill said, "such an opportunity [for contamination] is commonplace".[114]

10.92 He believed that

> In practice, the only reliable way of finding out whether the complainants have unintentionally embroidered their stories is by asking them, and seeing how they respond. … It follows … that the judge will be required in almost every case to hold a preliminary trial at which the complainants will be subjected to the ordeal of a first inquisition about whether their stories have been compromised by borrowing (an inquisition which they will have to undergo again in the presence of they jury if their evidence is, against all the odds, admitted) solely in order to see whether the prosecution have proved a negative which will often be unprovable. This is more than I am willing to accept. The possibility of innocent infection is one amongst many factors which the jury will have to take into account; but to treat it as a unique "threshold issue" loads the scales unfairly against the prosecution, and hence against the interests of those who cannot protect themselves.[115]

[112] *H* [1995] 2 AC 596, 604H, *per* Lord Mackay of Clashfern LC; 614E, *per* Lord Griffiths; 622C, *per* Lord Mustill.

[113] C Tapper, "The Erosion of *Boardman v DPP* " (1995) 145 NLJ 1223.

[114] *H* [1995] 2 AC 596, 616E.

[115] *Ibid.*

Initial admissibility

10.93 Contamination and collusion need consideration at two stages in the trial; first, on initial admissibility, and later, after the evidence has been given. We consider first the options available on initial admissibility. The first question is how a court should deal with the questions of collusion or contamination. We repeat that the choice from among the various options is not necessarily determined by the option eventually adopted from among those discussed above under the heading "Options for reform": most of those options could be combined with any of the options that we consider below.

Option A: the test in H

10.94 In conjunction with our proposal of option 6 above, the retention of the rule in *H* would mean that the court would have to consider whether the probative value of the similar fact evidence outweighs its likely prejudicial effect (together with any other factors militating against its admission), on the assumption that the evidence in question is true. Depending on the nature of the evidence, this might or might not involve assuming that the defendant was in fact *guilty* of misconduct on the other occasion or occasions: if the evidence were purely circumstantial, it would be assumed that the evidence was true *as far as it went* (for example, in *Makin*,[116] that the babies' bodies had been found in the Makins' yard), but not that any particular inferences should be drawn from it (for example, that the Makins had killed them).

10.95 To decide whether this is the right solution, our readers will have to come to their own conclusions as to whether juries are able to deal with allegations of collusion or contamination, bearing in mind Lord Griffiths' statement that to remove this kind of issue from the exclusive consideration of the jury would be "to strike root and branch at the very reason we have jury trial".[117] Another point to be considered is whether, in Lord Mustill's words, any other course "loads the scales unfairly against the prosecution and hence against the interests of those who cannot protect themselves".[118]

Option B: the judge determines the cogency of the evidence on the basis of the documents

10.96 Our provisional view is to reject this option because of the impossibility of exploring these matters in oral argument on depositions. As Lord Mustill put it, "how can a risk whose potential is ever-present be negatived upon scrutiny of papers which, exhypothesi, say nothing about it?".[119] We find this argument convincing.

Option C: the judge holds a voir dire

10.97 The voir dire has many limitations. First, it assumes that the evidence given at that hearing would be the same as is given at the subsequent hearing in front of the

[116] *Makin v A-G for New South Wales* [1894] AC 57.

[117] *H* [1995] 2 AC 596, 613G.

[118] *H* [1995] 2 AC 596, 617C.

[119] *H* [1995] 2 AC 596, 616H–617A.

jury. In practice, advocates and witnesses learn from the voir dire, and ask questions or give answers differently or more fully. So it is quite conceivable that the facts decided by the judge on a voir dire would be very different. Lord Griffiths in *H*[120] stressed the fact-finding powers of jurors: we agree, and would be very unhappy about adopting a procedure by which the role of the fact-finders moved from jury to judge. Indeed, this is very much the approach that was adopted by the House of Lords in *H,* although they accepted that in some, exceptional, cases it might be appropriate to hold a voir dire.

10.98 We do not find it easy to come to a provisional conclusion. **We ask our readers for their views on this issue**, and in particular whether "juries can now be entrusted with the task of evaluating for themselves evidence which exhibits appreciable risks of contamination and collusion".[121]

Evidence of collusion or contamination emerging after the admission of similar fact evidence

10.99 In *H,*[122] the House of Lords considered that if the question of collusion had been raised during the proceedings, the judge was obliged to draw the jury's attention to its importance, with a warning that, if they were not satisfied that the evidence could be relied on as free of collusion, they could not properly rely upon it for any purpose adverse to the defendant. Their Lordships went on to consider the case where similar fact evidence is admitted but is later shown to be such that "no reasonable jury could accept the evidence as free from collusion". In that case, they believed that the jury should be given a direction that the evidence could no longer be relied on for any purpose adverse to the defence.

10.100 This raises a stark issue: whether jurors are likely to be able to put out of their minds evidence which has already been admitted and may be highly prejudicial. It is worth recollecting that collusion and contamination are particular problems in cases of the sexual abuse of children, and, as the Oxford Report[123] confirms, evidence of a previous conviction for such an offence is very prejudicial in the eyes of a jury. We are concerned that when such evidence has been admitted after a correct application of the test in *P*,[124] but it later transpires that the evidence has been seriously affected by contamination or collusion, the warnings referred to in *H* may not be effectively followed. The jury will have been seriously prejudiced.

10.101 We wonder whether a better course might be to require the judge, if so requested, to withdraw the matter from the jury if satisfied, after hearing all the evidence, that the prejudicial effect of the bad character evidence (and the risk that it may mislead, distract or confuse the jury) outweighs its probative value.

[120] *H* [1995] 2 AC 596.

[121] *Ibid.*

[122] *Ibid.*

[123] See Appendix D, para D.26 below.

[124] *DPP v P* [1991] 2 AC 447.

10.102 In making this tentative suggestion, we recall that a very similar safeguard against unreliable evidence has been introduced in the case of identification evidence.[125] A judge is obliged to withhold a case from the jury if the prosecution is based largely or entirely on identification evidence and the judge concludes that there is insufficient evidence on which a jury could properly convict.[126] The reason is that the jury will not adequately appreciate the weaknesses of the identification evidence, even if properly warned about it. The same argument could be said to apply to certain types of similar fact evidence.

10.103 Since our concern is to avoid miscarriages of justice, it may also be helpful to bear in mind the circumstances in which the Court of Appeal is now required to allow an appeal against conviction – namely where "they think that the conviction is unsafe".[127] The trial judge might similarly be required to abort the trial if it appears that, because of the admission of evidence whose probative value now appears to be outweighed by its prejudicial effect, a conviction would be unsafe.

10.104 An additional question is whether, in cases where the judge *is* satisfied at the conclusion of the evidence that the prejudicial effect of the evidence outweighs its probative value, the judge should order a new trial or direct a verdict of not guilty. In the case of identification evidence, the latter course is adopted because there is insufficient evidence for the defendant to be convicted. That is not necessarily so in the case of similar fact evidence, because it may sometimes be possible that the defendant could have been convicted *without* the similar fact evidence.

10.105 **We provisionally propose that where a judge is satisfied, after hearing *all* the evidence, that a conviction would be unsafe because, in the light of the risk of contamination or collusion, the probative value of any evidence admitted is outweighed by its likely prejudicial effect and the risk that the jury may be misled, confused or distracted, the judge should discharge the jury and consider whether to order a retrial or to enter a verdict of not guilty.**

JOINDER AND SEVERANCE

10.106 As we have seen,[128] the House of Lords recently confirmed in *Christou*[129] that, once counts have been properly joined, it is a matter for the discretion of the judge whether they should be severed. This may result in inconsistency, as exemplified by the contrast between *Christou* itself and *Brooks*.[130] In *Christou*, even though evidence from two different witnesses about different counts was not inter-admissible, and the trial judge told the jury "What we have here is two separate trials, one in relation to each of the two girls", the Court of Appeal was content

[125] *Turnbull* [1977] QB 224.

[126] *Daley* [1994] 1 AC 117.

[127] Criminal Appeal Act 1968, s 2(1)(a), as substituted by Criminal Appeal Act 1995, s 2(1).

[128] See para 2.99 above.

[129] *Christou* [1996] 2 WLR 620.

[130] *Brooks* (1991) 92 Cr App R 36.

that the judge had correctly exercised her discretion not to order severance.[131] In *Brooks*, on the other hand, the court concluded from the fact that the evidence was not inter-admissible that there should have been separate trials, and quashed the convictions. *Brooks* was not expressly disapproved when *Christou* reached the House of Lords.

Efficiency considerations

10.107 We are not aware of an English authority where the efficiency advantages of joinder have been explicitly set out, but they can probably be identified as follows:[132] joint trials minimise the burden on witnesses, avoid delays in bringing people to trial, and are cheaper. It is obviously desirable from the witness's point of view if multiple appearances can be avoided, more so where the experience of testifying is likely to be particularly unpleasant because of the nature of the evidence or the health of the individual.

10.108 However, the alternative to a joint trial is not necessarily multiple trials. If severance is ordered, the Crown will usually seek to have the most serious charges tried first. Depending on the outcome of that trial, the others may collapse into guilty pleas or be dropped by the Crown. Thus joint trials may not always be the most efficient outcome. Even if it is clear that a joint trial will be more beneficial to the witnesses and be a cheaper and speedier option, other factors are of far greater importance and should not be overborne by considerations of "efficiency".

Prejudice

10.109 As a matter of theory, there is much to be said in the approach advocated by Lord Cross in *Boardman*.[133] He and Lord Wilberforce were very conscious of the task facing a jury which had been directed by a judge that when considering each count they should put out of their minds the fact that other people were making similar allegations against the defendant. Lord Cross believed that

> it is asking too much of any jury to tell them to perform mental gymnastics of this sort. If the charges are tried together it is inevitable that juries will be influenced, consciously or unconsciously, by the fact that the accused is being charged not with a single offence against one person but with three separate offences against three persons: [I am very anxious] not in effect [to] let in the inadmissible evidence [of the other complaints] by trying all the charges together.[134]

[131] Sub nom *C* [1994] Crim LR 590. The House of Lords confirmed the existence of the discretion but was not invited to consider whether it had been properly exercised on the facts.

[132] The following list is taken from R Dawson, "Joint Trials of Defendants in Criminal Cases: An Analysis of Efficiencies and Prejudices" (1979) 77 Mich LR 1379, 1382–1389; this is about the United States jurisdiction, but much of what the author writes translates to this jurisdiction.

[133] *Boardman* [1975] AC 421, quoted at para 2.96 above.

[134] *Ibid*, at p 459E–G.

10.110 It also appears that Lord Lloyd acknowledged the inevitability of prejudice in the inadmissible evidence in *H*.[135] That indicates that where allegations of misconduct against the defendant are not admissible as similar fact evidence or under any statutory provision,[136] the court should refuse to permit similar counts to be heard together because of their prejudicial effect: in other words, severance issues should be governed by exactly the same principles as issues of admissibility.[137]

Conclusions

10.111 The logic of this approach is very powerful but, as we have seen,[138] it is inconsistent with general practice. We do not feel that we can make any provisional recommendations on this point, though the present practice does appear to be open to criticism on grounds of logic. **We ask whether the present rules in respect of joinder of charges are adequate, or whether the courts should sever charges where prejudicial evidence is not inter-admissible between different charges, especially in sex cases.**

SHOULD THE SAME RULE APPLY IF IT IS THE DEFENDANT WHO SEEKS TO ADDUCE THE EVIDENCE?

10.112 The rationale for the rule is to protect the defendant from undue prejudice. Therefore it can cogently be argued that if the defendant chooses to run the risk, he or she should be allowed to do so. This situation arose in the Australian case of *B*,[139] where the accused was charged with committing indecent acts and with having sexual intercourse with his daughter. He had pleaded guilty to acts of indecency with her some years before. He sought to have the evidence of the earlier convictions admitted to support his defence that her allegations were false. He hoped to persuade the jury that she had found a successful way to have him removed from the family home. The defence was risky, and did not pay off in that case, but it would not seem just to deny the defendant the opportunity to run it.

10.113 Both the Oxford Report[140] and the LSE study[141] found that defendants who were known to have a *dissimilar* previous conviction (provided that it was not for an offence which the mock jurors found repugnant, such as indecent assault on a child) were less likely to be convicted than defendants about whose criminal history the mock jurors knew nothing. This suggests that it might actually be advantageous for the defence to reveal such a conviction. Views might differ about

[135] *H* [1995] 2 AC 596, 624E.

[136] Eg s 27(3) of the Theft Act 1988: see paras 3.8 – 3.22 above.

[137] See M Weinberg, "Multiple Counts and Similar Fact Evidence" in E Campbell and L Waller (eds) *Well and Truly Tried* (1982) p 250; see also *De Jesus* (1986) 68 ALR 1.

[138] See paras 2.92 – 2.103 above.

[139] *B* (1992) 175 CLR 599.

[140] See Appendix D, para D.22 below.

[141] See Appendix C, para C.16 below.

the wisdom of such a course,[142] but we see no reason why the defence should not be free to adopt it.

10.114 **Our provisional view is that a defendant should be free to adduce evidence of his or her own bad character.**

SHOULD THE SAME RULE APPLY IF IT IS A CO-ACCUSED WHO SEEKS TO ADDUCE THE EVIDENCE?

10.115 Although the point is perhaps not finally decided, the authorities tend to the view that if a defendant wishes to call or elicit evidence of his or her co-accused's previous misconduct, the only question is whether the evidence is relevant; there is no balancing of the probative value of the evidence against its likely prejudicial effect.[143]

10.116 In *Thompson, Sinclair and Maver*[144] the Court of Appeal held, per curiam, that it might be preferable to allow a discretion to exclude relevant evidence which one accused wishes to adduce where the advantage to that defendant would be limited, but the prejudice to the co-accused substantial.

10.117 Where one accused seeks to admit evidence of a co-accused's propensities, there is evidently a risk of both "reasoning prejudice" and "moral prejudice".[145] Yet there is the countervailing consideration that an accused person should not be inhibited in the presentation of his or her defence. Where one defendant's defence entails adducing prejudicial evidence against another, the familiar dilemma arises of whose interests are to prevail. If the dilemma is insoluble within a single trial, it will of course be open to a court to order separate trials. If that course is not taken, what test of admissibility should apply to evidence which one defendant wishes to adduce against another? Should it be the same standard as applies to prosecution evidence, or a lower standard? Should there be a requirement that the probative value of the evidence should be greater than the danger of prejudice?

10.118 Because of the dangers of prejudicial evidence, it is arguable that the court should make some relative assessment of the advantage to one defendant and the attendant risks for the other. Yet, as the evidence in question would be exculpatory of one defendant, and one of the purposes of the rules of evidence is to protect against wrongful convictions, it is also clear that a defendant should not have to show that the only explanation consistent with the prejudicial evidence is the other's guilt. To have such a high standard would frustrate this purpose of the exclusionary rule. **We ask for consultees' views on this issue.**

[142] This might depend, for example, whether the reduction in the likelihood of conviction is attributable to a tendency on the part of fact-finders to form a mental stereotype of the defendant as the sort of person who commts a particular kind of offence (sc other than the kind charged), or to the perceived unfairness of the conviction being relied on by the prosecution: see Appendix D, para D.22 below. If the true explanation is the latter, there would (at best) be no advantage to the defence in putting the conviction in.

[143] See paras 2.85 – 2.91 above.

[144] *Thompson, Sinclair and Maver* [1995] Crim LR 821.

[145] See paras 7.7 – 7.15 above.

Principles 161
Prejudice 161
Relevance 162
The "purpose" approach 164
Probative value 165
Other factors 166
Defects in the present law 166
Uncertainty 166
The requirement of a "signature" in identity cases 167
The absence of any reference to the distracting or time-wasting features of previous misconduct 167
Option 1: no change 167
Options for reform 168
Option 2: allowing evidence of an accused's previous convictions to be adduced where the conduct is admitted but there is an issue as to whether it was performed with any criminal knowledge or intent 168
Advantages 169
Disadvantages 170
The danger of wrongful convictions 170
Past miscarriages of justice would be compounded 170
The defendant may not make any admission 171
It may not always be clear whether the conduct is denied 171
Option 3: allowing bad character evidence to be adduced in chief if it tends to show a disposition to commit the kind of offence charged or a general disposition to commit offences 172
Option 4: the Australian common law test 174
Advantages 175
Disadvantages 176
Option 5: the scheme of the Australian Evidence Act 1995 177

Option 6: prejudicial evidence to be admissible if it is relevant to a specific issue *and* its probative value outweighs its likely prejudicial effect (and any other factors militating against its admission) 181

Relevance to a specific fact in issue 181

Balancing probative value against the reasons for exclusion 182

Advantages....183

Disadvantages 184

The cogency of the evidence: collusion and contamination....184

A matter for the judge or the jury?....185

Initial admissibility....187

Option A: the test in H....187

Option B: the judge determines the cogency of the evidence on the basis of the documents 187

Option C: the judge holds a voir dire....187

Evidence of collusion or contamination emerging after the admission of similar fact evidence 188

Joinder and severance....189

Efficiency considerations 190

Prejudice 190

Conclusions....191

Should the same rule apply if it is the defendant who seeks to adduce the evidence? 191

Should the same rule apply if it is a co-accused who seeks to adduce the evidence?....192

PART XI
THE 1898 ACT –THE PROBLEMS AND SOME SOLUTIONS (I): ASSERTIONS OF GOOD CHARACTER

11.1 As we have explained,[1] we think it necessary to differentiate between the admissibility of bad character evidence in chief and the circumstances in which such evidence may *subsequently* become admissible as a result of the course that the trial has taken. At present, section 1(f)(ii) and (iii) of the 1898 Act set out three ways in which a defendant can lose the "shield" against cross-examination as to his or her bad character, where that evidence could not have been adduced as part of the prosecution's case.[2] In Parts XI–XIII we consider whether, and if so how, each of these rules should be reformed. In this Part we examine the first limb of section 1(f)(ii), which provides that a defendant may lose the shield where

> he has personally or by his advocate asked questions of the witnesses for the prosecution with a view to establish his own good character, or has given evidence of his good character … .[3]

THE RATIONALE OF THE FIRST LIMB OF SECTION 1(f)(ii)

11.2 The standard justification for the right of the prosecution to adduce evidence of the accused's bad character, when the accused endeavours to show that he or she is of good character, is that

> he presents a false view of the case, and the prosecution are not only entitled but bound to do what they can to prove to the jury that he ought not to be placed upon the high pedestal which he desires to occupy.[4]

Relevance to credibility

11.3 Cross-examination on a claim to good character is not relevant *solely* to rebut the truth of the claim; it also has the wider purpose of discrediting the accused generally.[5] As the Court of Appeal has said, in response to a submission that the evidence of bad character adduced in rebuttal should not be taken to reflect on the truth of all the accused's testimony:

> We do not think that this is the general practice and we have the gravest doubts as to whether a jury could be expected to understand such a direction, which verges on the metaphysical. … In our view evidence of character, when properly admitted, goes to the credibility

1 Paras 9.61 – 9.65 and 9.72 – 9.73 above.

2 See Part IV above.

3 The present law on this provision is set out at paras 4.17 – 4.32 above.

4 *Wood* [1920] 2 KB 179, 182, *per* Lord Reading CJ.

5 *Cross and Tapper*, pp 434–435.

> of the witness concerned, whether the evidence discloses good character or bad character. If the accused calls evidence of good character and is shown by cross-examination to have a bad character, the jury may give this fact such weight as they think fit when assessing the *general* credibility of the accused. They cannot be expected to execute the metaphysical feat of treating the evidence as relevant to credibility on one issue but irrelevant on another, and they are not required to do so.[6]

11.4 Similarly, the accused cannot confine the cross-examination on his or her character to a particular period when his or her character was good.[7] As it is the credibility of the defendant at trial that is in issue, any evidence of character is relevant, whether it relates to a time before or after the alleged offence.[8]

The divisibility of character

11.5 It must not be forgotten that the courts look at character as being indivisible:[9] thus *any* conviction may be relevant to *general* credibility. Roderick Munday points out:

> The dialogue one finds in *Winfield*,[10] where the defendant affirms: "I am not the sort of man to commit indecent assault," and where the prosecution retorts: "Oh! yes you are – you have convictions for theft," makes little sense, whereas everyone knows that – ignoring English law's repugnance for such modes of proof – evidence that a defendant has previous convictions for sexual offences can be a useful gauge both of the defendant's truthfulness when he claims a reputation for gallantry and of his general sexual propensities.[11]

11.6 As we have seen,[12] the psychological research does not support the criminal law's assumption that different traits of a person's character cannot be taken individually. There is no necessary connection between different character traits: for example, a person with a propensity for tax evasion may or may not also tend to lie on oath. With some exceptions, mock juries have shown that they recognise this.[13]

[6] *Richardson and Longman* [1969] 1 QB 299, 310C and 311B–C, *per* Edmund Davies LJ (emphasis in original).

[7] *Shrimpton* (1851) 2 Den CC 319, 169 ER 521.

[8] In *Wood* [1920] 2 KB 179 the evidence was of a conviction for an offence subsequent to the offence before the court. It was regarded as admissible as showing the bad character of the accused, not at the time of the alleged commission of the offence with which he was charged, but at the time of the trial.

[9] *Winfield* (1939) 27 Cr App R 139; para 4.27 above.

[10] See n 9 above (footnote added).

[11] R Munday, "Reflections on the Criminal Evidence Act 1898" [1985] CLJ 62, 81.

[12] See paras 6.23 – 6.29 above.

[13] In the Oxford study participants were asked what views they had formed about various aspects of the defendant's personality. It was found that the defendant who was known to have a conviction for indecent assault on a child was evaluated negatively in all sorts of respects (eg he was seen as more likely to lie on oath, or to rape a woman who was unknown to him), whereas the participants did not evaluate defendants with other

11.7 The law of defamation does not assume that a person's character is indivisible. As Lord Devlin has said,

> bad reputation which is pleaded in mitigation of damages [in libel cases] must bear some relation to the libel that is complained of. One cannot, for example, mitigate the fact that one has falsely called a man a traitor by proving that he had a reputation for loose morals.[14]

11.8 Two Australian law reform bodies have recommended the abolition of the rule that character is indivisible,[15] and the Commonwealth Evidence Act 1995 has now implemented this recommendation.[16] The effect is that where evidence of character has been confined to a particular aspect of the accused's character, the evidence of bad character or prior conviction in rebuttal is confined to such evidence as tends to disprove his or her good character in *that respect*. We provisionally agree.

Relevance to propensity

11.9 The classic view is that cross-examination under this head cannot go directly to the issue of guilt. As Lord Sankey said in *Maxwell v DPP*,

> the question whether a man has been convicted, charged or acquitted ought not to be admitted, even if it goes to credibility, if there is any risk of the jury being misled into thinking that it goes not to credibility but to the probability of his having committed the offence of which he is charged.[17]

11.10 Yet, as we have observed above,[18] it may be very difficult to distinguish credibility from propensity. This view has been expressed by other commentators.[19] Further,

convictions negatively in such a general sense. Although they estimated that a person who had committed an offence of violence may be more likely than someone without such a conviction to commit another assault, they did not also consider that such a person was, for example, less to be trusted with money.

[14] *Plato Films v Speidel* [1961] AC 1090, 1102, *per* Lord Devlin.

[15] ALRC Report No 38, paras 177–178, and cl 95 of draft legislation, Appendix A. Similarly the New South Wales Law Reform Commission recommended that evidence in rebuttal be limited to "any aspect of the disposition of the accused" of which he had tendered evidence: *Working Paper on Evidence of Disposition* (1978) 122, para 111(5)(e).

[16] s 110(3). See Appendix B, para B.25.

[17] *Maxwell v DPP* [1935] AC 309, 321.

[18] See paras 6.74 – 6.84 above.

[19] For example, Sir Rupert Cross wrote:

> It is … very doubtful whether the distinction between cross-examination to credit and to the issue makes sense in this context, and even more unlikely that words can be found which will prevent the revelations elicited from the accused in cross-examination from being treated as something which enhances the probability of his guilt. The most that can be hoped for is that the jury may be restrained from jumping to the conclusion that someone is guilty because 'he is the kind of person who would do that kind of thing'.

Cross on Evidence (5th ed 1979) p 433. Munday has said that this mechanism proceeds "on a wing and prayer" [1985] CLJ 62, 65.

it is not certain either that this principle is followed in practice[20] or that it would be desirable if it were, because evidence pertinent to the defendant's credibility would be excluded.[21]

11.11 We question whether assertions of good character made by the accused go solely to establishing the accused's truthfulness. It is surely implicit in any assertion of good character that a defendant is not only a credible witness but did not have the propensity to commit a particular offence.[22] This point is recognised by the direction recommended by the JSB when a defendant is of good character. The jury are told that

> good character cannot by itself provide a defence to criminal charges: but you should take it into account in his favour in the following ways. In the first place in considering the evidence given by the defendant, and as with any man of good character it supports his credibility. Credibility simply relates the confidence which you have in the truthfulness of his evidence and that is whether you can believe him. In the second place, the fact he has not previously committed any offence [*or* reached the age of …. without committing any offence] may mean that he is less likely than otherwise might be the case to commit this crime now.

11.12 **We believe**

(1) **that it is unrealistic to distinguish between the use of previous convictions to rebut false claims of good character, and their use in assessing how truthful the rest of the defendant's testimony is likely to be; and**

(2) **that, in some cases, it may also be unrealistic to distinguish between using the evidence of bad character to assess the likelihood that the defendant is telling the truth, and the likelihood that he or she committed the offence.**

Judicial warnings

11.13 We are not aware of any English authority as to whether the judge has a *duty* to warn the jury that evidence given to refute false assertions of good character is

[20] Indeed the Oxford Report suggests that jurors generally use evidence of a defendant's previous conviction *only* to assess propensity, and *not* on the question of credibility. The participants in the study who were told that the defendant had a previous conviction, provided it was not for indecent assault on a child, were not significantly less likely to say that they found the defendant to be a credible witness. Evidence of a previous conviction was, however, clearly used by participants to assess the defendant's propensity to commit similar offences.

[21] For example, if a person were charged with perjury, and had previous convictions for perjury, and the principle were strictly followed, those convictions should not be admitted, because it would be impossible for the jury not to use them on the question of the defendant's guilt; yet they would be relevant to the truthfulness of the defendant's denials.

[22] A defendant of good character is entitled to both the "propensity limb" and, where applicable, the "credibility limb" of the good character direction following *Vye* [1993] 1 WLR 471. The standard direction is set out at Appendix D, para D.12 below.

relevant only to credibility and not to propensity. In Australia, Barwick CJ has stated that a judge does have this duty: he or she "must assist the jury by expressly and with emphasis telling them that they may not use the fact of prior conviction as tending to the guilt of the accused".[23] It seems very likely that the position in the case of such evidence is the same as where the defendant has lost the shield under the second part of section 1(f)(ii), when it is indeed the duty of the judge to warn the jury to use the evidence solely on questions of credibility.[24]

11.14 However, in giving such a warning the judge would be inviting the jury to do something "extremely difficult, if not practically impossible".[25] Indeed, Cross described judicial warnings of this kind as "gibberish".[26] **Our provisional view is that, since evidence of previous misconduct adduced to refute a false assertion of good character may in truth relate not only to credibility but also to propensity, such warnings are of little, if any, use.**

DEFECTS IN THE PRESENT LAW

11.15 As we have said above,[27] by asserting good character the accused is trying to induce the fact-finders to believe not only that he or she is worthy of belief, but also that he or she is "not the kind of person" who would commit the crime that is the subject of the charge; but the prosecution is technically restricted to cross-examining on matters which go to the defendant's credit. In other words, the accused is making a claim about propensity *and* about credibility, but the prosecution can try to correct only the credibility aspect of the claim. The direction given to the jury on the relevance of previous convictions will accordingly instruct them to use the convictions *only* on the issue of the defendant's truthfulness.[28]

11.16 A second problem with the present law is the notion that a person's character is indivisible, so that an accused cannot assert one part of his or her character which happens to be good without risking the exposure of another part which may be bad.[29] It is true that in an appropriate case the defendant may be saved from this consequence by the exercise of judicial discretion; but, given the doubt that the psychological research casts on the traditional concept of a unitary character, it seems that there may be cause to question the whole doctrine of the indivisibility of character. The current law permits convictions of a different nature to be led where the defendant has asserted that he or she is of good character in another respect, yet the fact-finders may not have made an assumption about the accused's *general* character which needed to be corrected. Again, where the accused refers to one conviction in his or her past, is there an implied assertion that it is the only

[23] *Donnini* (1972) 128 CLR 114, 123.

[24] *McLeod* [1994] 1 WLR 1500; para 4.50 above.

[25] *Watts* [1983] 3 All ER 101, 104e, *per* Lord Lane CJ. See, eg, the case of *Helliwell*, described at n 93 to para 6.56 above.

[26] R Cross "The Problem of an Accused with a Record" (1969) 6 Syd L Rev 173, 183.

[27] Paras 11.11 – 11.12 above.

[28] Which, as we have pointed out at paras 11.13 – 11.14 above, may well be impossible.

[29] See paras 11.5 – 11.8 above.

one? If there is, then the jury may be misled; but it is not obvious that there is always such an implication, and it may not be fair that the defendant becomes vulnerable to cross-examination on all his or her convictions. The difficulty is that it may not be clear what inferences the fact-finders are likely to draw.

11.17 Thirdly, there is a lack of clarity in the present legislation because, as *Cross and Tapper* points out,[30] it is unclear what events will trigger the loss of the shield. For example, it is not clear from the case law whether the section encompasses "the mere repetition in court of words claiming a good character uttered upon arrest",[31] or a claim made in a letter "probably intended to be read only in mitigation of sentence".[32] Nor is it clear whether a defendant asserts good character for the purposes of the subsection by claiming (truthfully) to be, for example, a solicitor or a church warden.

11.18 Fourthly, as an assertion about a person's character may be inferred from what he or she wears, as, for example, where a defendant wears the uniform of a security firm, it is arguable that non-verbal assertions ought to be within the ambit of the section. The difficulty is that it is not clear what inferences different fact-finders might draw.[33]

11.19 Fifthly, it is not clear what counts as being of "good character". Will the accused be in peril of losing the shield if he or she claims to be of good character but in fact has *spent* convictions,[34] or has admitted to criminal conduct which is not that charged,[35] or to which he or she has pleaded guilty in the same proceedings?[36] The

[30] *Cross and Tapper*, p 431.

[31] *Solomon* (1909) 2 Cr App R 80.

[32] *Parker* (1924) 18 Cr App R 14.

[33] A stipendiary magistrate recounts the following:

> Recently, during a youth court trial, the defendant presented with a severe "bother boy" crew cut. During the luncheon adjournment one of the bench mentioned what a nasty looking piece of goods he was, a typical yob. His colleagues reminded him of the duty to suspend judgment until the case was heard and to rely on evidence rather than appearances. As it turned out the young man had a watertight argument. … He was acquitted. The crew cut? He was lovely lad [sic], pride of his school, and had been beavering away all through his summer holidays to raise money for a local children's cancer ward. This was his sponsored haircut: he had raised £500!!

T de Veil, "Reflections from the Retiring Room" (1995) 51(10) The Magistrate 248.

[34] If the accused has spent convictions, he or she is not entitled to a full good character direction: *Nye* (1982) 75 Cr App R 247; *O'Shea* [1993] Crim LR 951; see para 5.12 above.

[35] See, eg, *Zoppola-Barraza* [1994] Crim LR 833; *Aziz, Tosun and Yorganci* [1995] 3 WLR 53.

[36] See *Challenger* [1994] Crim LR 202. This case does not, however, sit easily with Lord Taylor CJ's dictum in *Vye* [1993] 1 WLR 471, which was confirmed in *Teasdale* [1993] 4 All ER 290. In *Teasdale* the appellant had pleaded guilty to another offence arising out of the same incident on the same occasion as the offence charged. However, she had no previous convictions and was therefore treated as being of good character. It was held that the trial judge ought to have directed the jury as to the relevance of the appellant's good character to the credibility of her evidence. Morland J went on, at pp 293j–294a, to approve of Lord Taylor CJ's dictum in *Vye,* at p 479F, where he said: "in our judgment the following principles are to be applied. (1) A direction as to the relevance of his good character to a

courts start from the position that anyone without criminal convictions (or cautions)[37] is of good character,[38] but have permitted the jury to be directed as if the accused were of good character even where he or she has previous convictions. In practice, in the Crown Court, it is a relatively simple matter for counsel to put before the judge the facts concerning the accused's character, and to seek a ruling before permitting his or her client to make a claim which will lead to the loss of the shield. This is obviously not so easy in the magistrates' court. As the accused ought to know in advance what kinds of claims about his or her character will lead to the loss of the shield, the meaning of "good character" needs clarification.

11.20 Sixthly, an anomaly may arise where the defendant gives evidence that other possible culprits have previous convictions for offences similar to that charged. Where those other people do not give evidence,[39] the shield remains intact. One view is that there is an implication that the others are more likely than the defendant to have committed the offence. If the defendant also has such convictions, this implication could be misleading, but it will remain uncorrected. Another view is that no such implication is entailed,[40] in which case the jury is not misled. The difficulty is that it cannot be known what inference the fact-finders will draw.

11.21 Finally, there is some uncertainty in the law, as, even in cases which would appear to be covered by the exception under the first limb of section 1(f)(ii), the courts have construed the exception in favour of the defence. For example, where a defence witness called by an unrepresented defendant to prove a document made an unsolicited and incorrect assertion as to the latter's good character, it was held to be improper for that witness to be cross-examined about the defendant's convictions.[41] It seems strange that such cross-examination was not allowed,

defendant's credibility is to be given where he has testified or made pre-trial answers or statements. (2) A direction as to the relevance of his good character to the likelihood of his having committed the offence charged is to be given, whether or not he has testified, or made pre-trial answers or statements." In both *Vye* and *Teasdale* the court assumed that the offender who had pleaded guilty to another count on the same indictment, and yet had no previous convictions, was to be treated as being of good character.

37 *Hellivell* (unreported) 24 October 1994, CA No 94/4660/Y3.

38 A distinction between those who have criminal records and those who do not does not, of course, reflect a division between those who have committed crimes and those who have not; but if there is to be a distinction between those of "good character" and those of "bad character" then referring to the existence or absence of a criminal record is doubtless the only pragmatic way to draw such a distinction.

39 If they give evidence for the prosecution, the shield will be lost under the second limb of s 1(f)(ii).

40 See, eg, *Lee* [1976] 1 WLR 71, 73F, *per* Orr LJ. The accused was alleged to have taken some money and a ring from a person living in the same house. He denied taking them, part of his case being that at least two persons with convictions for dishonesty had also had access to the house. The Court of Appeal held that cross-examination of a prosecution witness to the effect that the two persons had such convictions did not result in the loss of the shield, for "it was not implicit in an accusation of dishonesty that the accuser himself was honest". But it is difficult to see what purpose the accused might have in adducing evidence of the others' criminal records, if not to make it appear that they are more likely than the accused to have committed the crime.

41 *Redd* [1923] 1 KB 104.

because without it the jury would have been left with the false impression that the defendant was of good character; on the other hand, one can see why a defendant should not be penalised for a false assertion over which he had no control.

THE NEED FOR CHANGE

11.22 It can be seen from all the defects set out in the preceding paragraphs that the law is not satisfactory as it stands. We are also mindful of our duty to have a view to the simplification and modernisation of the law.[42] For these reasons **our provisional view is that change is needed.**[43]

11.23 It may be helpful to approach suggestions for change by asking the following four questions:

(1) What should count as an assertion of good character?

(2) Who must make the assertion?

(3) If the defence asserts good character in only one respect, what evidence can be adduced to refute that assertion?

(4) How should the bad character evidence that is admitted as a result be used?

We must also consider the position of the defendant who asserts good character but does not testify.

WHAT SHOULD COUNT AS AN ASSERTION OF GOOD CHARACTER?

11.24 This subdivides into the following questions: whether, to trigger the loss of the shield, an assertion of good character

(1) must be express, or may be implicit; and

(2) must be verbal, or may be non-verbal.

Implied assertions

11.25 Should the shield be lost only where an *express* assertion of good character is made, or should the rule extend to verbal assertions which *imply* that the accused is of good character?

11.26 It is often difficult to distinguish between express and implied assertions. As we have said,[44] an accused person may attempt to claim that he or she is of good character by giving evidence that has the effect of conveying this impression

[42] Law Commissions Act 1965, s 3(1).

[43] A radical solution would be to forbid the defendant to adduce evidence of his or her own good character. In this event, there would be no danger of the fact-finders being misled, and no question of evidence of bad character being adduced to correct a misleading impression. We consider this possibility, and reject it, at paras 8.6 – 8.13 and 8.20 above.

[44] See para 11.17 above.

indirectly.[45] The CLRC proposed to apply the rule to the introduction of evidence "with a view to establishing directly or by implication that the accused is generally or in a particular respect a person of good disposition or reputation."[46] The same approach has been adopted in the Evidence Act (Commonwealth) 1995.[47]

11.27 The underlying concern is that the fact-finders may be misled into thinking that the accused is of good character. It seems to us that there is no reason to distinguish between explicit statements and statements which imply the same thing. **Our provisional view, therefore, is that the statute should make it clear that an implied assertion of good character will result in the loss of the shield in circumstances where an express assertion would do so.**

Non-verbal assertions

11.28 Must an assertion of good character be verbal, or may it be non-verbal? The defendant may seek to hold himself or herself out as being of good character, for example, by appearing in court in clothing which implies that he or she holds a position of trust that would not normally be held by a person with a criminal record.[48]

11.29 Exactly *how* the misleading impression is conveyed is not the crucial fact: what is crucial is the effect on the fact-finders, and more particularly whether they are misled. We take the provisional view that if the fact-finder is misled, it is irrelevant how this is achieved.

11.30 It would clearly be impracticable to treat as an assertion of good character every act on a defendant's part that might tend to create a favourable impression on the fact-finders, such as wearing smart clothes or speaking in a more "cultured" accent than the defendant's own: the fact-finders may or may not be to some extent influenced by such conduct, consciously or unconsciously, but they are unlikely to assume from it that the defendant must be a person of good character. Our concern is with conduct clearly intended to instil in the fact-finders a belief that the defendant possesses some specific attribute which, had he or she expressly laid claim to it, would have amounted to an implied assertion of good character. This would probably include a defendant who appears in a police uniform or a clergyman's dog-collar, because an express assertion that the defendant is a police officer or a member of the clergy would probably amount to an implied assertion of good character. It would probably *not* include a defendant who merely wears the tie or badge of a particular regiment or school, because even an express claim to have attended a particular school, or to have served in a particular regiment, could

[45] The CLRC refer (at para 135) to an unnamed case at the Central Criminal Court, where a man accused of conspiracy to rob gave evidence that he had met his co-accused at their golf club, and that they had been introduced by the secretary of that club.

[46] Para 136 and cl 7(1)(a) of the draft Bill.

[47] Section 110(2) provides: "If evidence adduced to prove (directly or by implication) that a defendant is generally a person of good character has been admitted, the hearsay rule, the tendency rule and the credibility rule do not apply to evidence adduced to prove (directly or by implication) that the defendant is not generally a person of good character."

[48] Eg, a man who appears in court wearing a Securicor-style uniform. The implication could be that, as a security guard, he is a person of integrity.

scarcely be construed as an implied assertion of good character. Neither, a fortiori, could an *implied* claim to the same effect.

11.31 Clearly this distinction would sometimes involve the exercise of a degree of judgment by the court; but we believe that there are cases where the fact-finders will be seriously misled if no account is taken of the inferences that they are clearly intended to draw from the defendant's conduct in court. **Our provisional conclusion is that, where**

(1) **in the opinion of the court, a defendant's conduct in the proceedings is intended to give the impression that he or she possesses a specific attribute, and**

(2) **had the defendant expressly claimed to possess that attribute, he or she would have been regarded as implicitly asserting that he or she is of good character,**

the defendant should be regarded as so asserting, and should therefore lose the shield.

WHO MUST MAKE THE ASSERTION?

11.32 An assertion that a defendant is of good character may be made by any witness, for the prosecution or the defence (including the defendant in question, or a co-defendant), and may be made in the course of the witness's evidence in chief, in cross-examination by another party, or in re-examination. It may also be contained in an out-of-court statement which is admitted under an exception to the rule against hearsay. The question is: in which of these circumstances should the shield be lost by the defendant about whom the assertion is made?

11.33 Where the shield is lost because a defendant's good character is asserted, the probative value of the bad character evidence is likely to be greater than it was before the issue of character was raised, because there is now a risk of the fact-finders being misled. It does not follow that the probative value of the evidence is now *so much* greater as to outweigh its likely prejudicial effect. The result is that prejudicial evidence may be admitted although its probative value is still comparatively small. The justification for this is that the ensuing prejudice to the defendant is self-induced, so there is no unfairness. In our view, therefore, an assertion of a defendant's good character should result in the loss of the shield only where the defendant can reasonably be held responsible for the assertion.

11.34 This will almost inevitably be so where the assertion is made by the defendant in person, either in chief or in re-examination. It will also be so where the assertion is made by a witness called by the defendant, unless it is unsolicited.[49] We suggest that the test should be whether the assertion is made in answer to a question which was apparently *intended* by the defendant's advocate (or by the defendant, if he or she is unrepresented) to elicit such an assertion. It should not, in our view, be sufficient that it was *predictable* that the question might provoke such an assertion, because the defendant should not be held responsible for inept questioning (by

[49] As in *Redd* [1923] 1 KB 104; para 11.21 above.

either the defendant or an advocate). We believe that courts will normally be able to distinguish between the witness who has been coached to make an apparently unsolicited assertion and the one who has misunderstood a badly-phrased question.

11.35 Where the defendant makes the assertion in cross-examination, by the prosecution or on behalf of a co-defendant, it is less likely that it will be fair to hold the defendant responsible. The defendant may have been "cornered" into making an assertion that he or she would have preferred not to make. It would clearly be unfair to admit the defendant's convictions for theft, for example, merely because, on being asked in cross-examination whether he or she has convictions for deception, the defendant has truthfully answered in the negative. In this case we suggest that the crucial factor is not so much the intention with which the question is asked as whether the assertion was a reasonable response to that question. Thus the shield would *not* be lost if the assertion were provoked by a badly-phrased question which the defendant reasonably interpreted as an invitation to assert good character, even if this was not the advocate's intention in asking it.

11.36 We suggest that the same principle should apply where the assertion is made by the defendant's *witness* in the course of cross-examination.

11.37 Where a defendant's good character is asserted by a witness who is neither the defendant in question nor called by that defendant, we suggest that the defendant should not be held responsible for the assertion unless it is made in cross-examination by or on behalf of that defendant *and* in answer to a question which appears to have been intended to elicit it. As in the case of an assertion by the defendant's own witness in chief or in re-examination, we think that the test should be the intention behind the question rather than the reasonableness of the answer.

11.38 Finally, it would seem clear that the defendant should be held responsible for an assertion of good character if it is made in the course of an out-of-court statement which is adduced by the defendant under an exception to the rule against hearsay. In this case there is no question of the defendant being taken by surprise.

11.39 **We therefore propose that the shield should be lost if the assertion of the defendant's good character is made**

(1) by the defendant in the course of his or her evidence in chief, or in re-examination;

(2) by a witness for the defendant in the course of his or her evidence in chief, or in re-examination, unless it is made in response to a question which does not appear to the court to have been intended to elicit the assertion;

(3) by the defendant or a witness for the defendant in cross-examination, unless it is a reasonable response to the question asked;

(4) by a prosecution witness, a co-defendant or a witness for a co-defendant in cross-examination by or on behalf of the defendant, if it is made in response to a question which appears to the court to have been intended to elicit the assertion; or

(5) in a hearsay statement adduced by or on behalf of the defendant.

IF THE DEFENCE ASSERTS GOOD CHARACTER IN ONLY ONE RESPECT, WHAT EVIDENCE CAN BE ADDUCED TO REFUTE THAT ASSERTION?

11.40 We now consider the position if the claim to good character relates to only one aspect of the defendant's character. The ALRC proposed that the prosecution should be permitted to rebut the claim of good character, but only in relation to the particular aspect of character to which the claim relates. The common law rule of the indivisibility of character would thus be abolished, and the prosecution would no longer be allowed to adduce rebuttal evidence relating to *any* character trait.[50] As we have said,[51] our provisional view is that character should be divisible. This suggestion avoids the injustice that may arise where the defendant truthfully asserts that he or she has a good character in a certain respect, and may then be cross-examined on discreditable conduct which has no bearing on the assertion made.[52]

11.41 The question of the admissibility of the evidence of bad character then becomes one of relevance. For example, if the defendant is careful to limit the scope of the assertion to the period before the incident which led to the charge ("Until that day when they arrested me, I'd never been in trouble with the law"), there would be no grounds for adducing evidence of charges *subsequent* to that incident. Conversely, if the assertion is about the defendant's truthfulness, it has implications for the credibility of his or her evidence at the trial. A conviction which contradicts the claim to truthfulness would therefore be relevant, even if it relates to an occasion after the incident that gave rise to the charge.

11.42 **We propose that the defendant should be open to cross-examination only on *that part* of his or her character or truthfulness about which an assertion of good character has been made.**

11.43 The judge would still have to balance probative value against prejudicial effect, with the result that, if it were more conducive to a fair trial for the jury to be left with a misleading impression than for highly prejudicial convictions to be

[50] Interim Report No 26, vol 1 para 803; Report No 38, paras 177, 178. The Canadian Federal/Provincial Task Force on Uniform Rules of Evidence recommended an amendment to the Canadian Criminal Code along similar lines, changing s 593 so that the Crown could prove only those convictions which, in the opinion of the trial judge, bear on the accused's possession of the character trait in dispute: Report of the Federal/Provincial Task Force on Uniform Rules of Evidence (1982) para 7.5.

[51] See paras 6.23 – 6.28 above.

[52] We refer at paras 5.12 and 11.19 above to the lack of clarity in the law about whether someone who has stale convictions of scant relevance to the charge is entitled to a good character direction. If told that a defendant is "of good character" or "has no previous convictions" a court will assume exactly that, and it is important that the court is not misled. On the other hand, if the convictions are spent, minor, or wholly irrelevant, it seems harsh that a defendant should not be able to point this out without risking cross-examination on those spent convictions and any other discreditable conduct. Sir John Smith's proposal, to which we refer in note 28 to para 5.12 above, that in such circumstances the jury should be told that the defendant has no *relevant* convictions, seems an appropriate solution. We would add that a suitably modified good character direction should follow.

admitted, the leave of the court would not be given. The judge would also take into account the danger of the jury being distracted from the central issues. In the magistrates' court it would be more difficult to avoid prejudice, but in an extreme case the magistrates could discharge themselves.

HOW SHOULD THE BAD CHARACTER EVIDENCE ADMITTED AS A RESULT BE USED?

11.44 We have pointed out the illogicality of a direction that evidence of the defendant's bad character is relevant only to his or her credibility, where the assertion is of a lack of *propensity* to behave in a certain way, and the bad character evidence sheds more light on the defendant's propensities than on his or her truthfulness.[53] Under our provisional proposals in this Part, the prosecution would be allowed to adduce evidence that, in the respect in which the defendant asserts his or her character to be good, it is in fact bad.[54] If the assertion relates to the accused's propensities, the evidence rebutting the assertion will also bear on those propensities, and in our view the fact-finders should be so directed. Evidence should be used in relation to the issue to which it is relevant, not merely (and not necessarily at all) on the issue of credibility.

11.45 **We provisionally propose that, where the assertion of good character, and the evidence adduced to rebut that assertion, are directly relevant to the accused's propensities, the fact-finders should not be directed to treat the evidence as bearing solely on the accused's credibility.**

THE DEFENDANT WHO ASSERTS GOOD CHARACTER BUT DOES NOT TESTIFY

11.46 By asserting good character a defendant loses the shield against *cross-examination* on his or her bad character. However, it seems to be possible[55] – and under our proposals it would continue to be possible[56] – for a defendant to assert good character without personally giving evidence to that effect. For example, a defence witness might be invited to make the assertion. It is therefore possible that a defendant might lose the shield against cross-examination as to his or her bad character by asserting good character without testifying *at all* – in which case the question of cross-examination obviously does not arise.

11.47 This possibility causes far fewer problems in this context than in the situation where the defendant makes imputations against prosecution witnesses.[57] This is probably because, in the case of an assertion of good character by a witness other than the defendant, the prosecution can cross-examine the *witness* so as to show that the assertion is false or misleading;[58] and if the witness does not admit it, the

[53] See paras 6.76 – 6.77 above.

[54] R Munday describes this as "fighting fire with fire": "The Paradox of Cross-Examination to Credit – Simply Too Close for Comfort" [1994] CLJ 303, 324.

[55] See para 4.31 above.

[56] See paras 11.32 – 11.39 above.

[57] See paras 12.35 – 12.37 below.

[58] See para 4.31 above.

prosecution can call evidence in rebuttal.[59] There seems to be little need for a rule that the prosecution can adduce evidence of the defendant's bad character in any event.

11.48 However, consultees may think that some change should be made to the corresponding rule that a defendant of bad character can safely make imputations against prosecution witnesses as long as he or she does not testify; and in that case it might be desirable that the same principle should apply however the shield is lost. **We ask whether, if a defendant asserts good character but does not testify, the prosecution should nevertheless be able to adduce evidence of the defendant's bad character, otherwise than by cross-examining the witness who makes the assertion or adducing evidence in rebuttal of that witness's denial.**

[59] See para 4.32 above.

The rationale of the first limb of section 1(f)(ii) 191

Relevance to credibility 194

The divisibility of character 195

Relevance to propensity 196

Judicial warnings 197

Defects in the present law 198

The need for change 201

What should count as an assertion of good character? 201

Implied assertions 201

Non-verbal assertions 202

Who must make the assertion? 203

If the defence asserts good character in only one respect, what evidence can be adduced to refute that assertion? 205

How should the bad character evidence admitted as a result be used? 206

The defendant who asserts good character but does not testify 206

PART XII
THE 1898 ACT – THE PROBLEMS AND SOME SOLUTIONS (II): IMPUTATIONS AGAINST PROSECUTION WITNESSES

12.1 Under the second limb of section 1(f)(ii) of the 1898 Act, as amended by section 31 of the Criminal Justice and Public Order Act 1994, a defendant's character becomes admissible in cross-examination, even if it was not admissible in chief,[1] where

> the nature or conduct of the defence is such as to involve imputations on the character of the prosecutor or the witnesses for the prosecution; or the deceased victim of the alleged crime …[2]

12.2 The issue of imputations against prosecution witnesses is of special importance because, as was found in the Crown Court study conducted for the Royal Commission, a defendant's criminal record is more likely to emerge as a result of the second limb of section 1(f)(ii) than as a result of the first limb of the subsection or of section 1(f)(iii).[3] Frequently it is the defence that introduces previous convictions. That fact is relevant to this project since it tends to indicate that the defence anticipates, and pre-empts, an application by the Crown, because it will look better if the discreditable evidence comes from the accused in chief rather than being extracted in cross-examination. This limb is important for another reason: defence barristers were asked whether the danger of the client's record going in under the second limb of section 1(f)(ii) inhibited the defence. 72 per cent said it did not, either because it was not necessary to attack the prosecution evidence (20 per cent) or for other reasons (52 per cent), but 28 per cent of defence counsel believed that their clients' defences *were* inhibited by the provision.[4]

12.3 In this Part we examine the justifications for this provision. We then look at the problems that it causes, and finally at the options for reform that are open to us.

THE PURPOSE OF THE SECOND LIMB OF SECTION 1(f)(ii)

12.4 There are three possible justifications for the admission of prejudicial evidence under this statutory provision: credibility, fairness and deterrence.

[1] For the importance of distinguishing between the admissibility of bad character evidence in chief and the circumstances in which it may subsequently *become* admissible, see paras 9.61 – 9.65 and 9.72 – 9.73 above.

[2] The full text of the section is set out at Appendix A below.

[3] M Zander and P Henderson, Research Study No 19 (1993) for the Report of the Royal Commission at para 4.67 and table 4.14. The study found that, in the Crown Court trials studied, 77% of defendants had previous convictions (para 4.6.1); in more than half of the cases those convictions were similar to the present charge or charges (para 4.6.5); and the previous convictions emerged in a fifth of the trials (para 4.6.6).

[4] *Ibid*, para 4.6.8.

Credibility

12.5 The principal justification for allowing the defendant's criminal record to be revealed where a prosecution witness is attacked is that it helps the fact-finders to make a more informed assessment of the defendant's credibility.

12.6 It is arguable that "it is not implicit in an accusation of dishonesty that the accuser himself is an honest man".[5] The counter-argument is that this is simplistic and that the fact-finders are bound to assess one witness's credibility *in relation to that of the other witness* when choosing which version of events to believe.[6] As Devlin J said in *Cook*:[7] "the jury is entitled to know the credit of the man on whose word the witness's character is being impugned."

12.7 We doubt that this is a comprehensive justification, for two reasons. First, it is not only when a defendant casts imputations against a prosecution witness that his or her credibility will be significant. In fact, whether the defendant can be believed will certainly be in the forefront of the fact-finders' minds irrespective of whether imputations are cast in the course of his or her evidence.[8]

12.8 Secondly, the previous misconduct evidence that is admitted in consequence of the loss of the shield, ostensibly on the defendant's credibility, may not shed much light on the defendant's truthfulness on oath.[9] As we have seen,[10] the psychological research shows that bad character evidence generally may not be as relevant to a witness's truthfulness as has hitherto been assumed; and, where bad character evidence is admitted, it is probably impossible to restrict its use to an assessment only of the tendency of the accused to lie in court. These factors tend to undermine the argument that a criminal record is relevant to a person's truthfulness.

Fairness

12.9 The phrase "tit for tat" is often used as a shorthand for the principle that justifies the admission of previous convictions. As Lord Pearce explained:

> The prosecutor is cross-examined to show that he has fabricated the charge for improper reasons. That involves imputations on his

[5] See, eg, *Lee* [1976] 1 WLR 71, 73 (CA). See also *Butterwasser* [1948] KB 4, 7: "by attacking the witnesses for the prosecution and suggesting they are unreliable, [the defendant] is not putting his character in issue; he is putting their character in issue"; and paras 12.81 – 12.115 below.

[6] See A Zuckerman, *The Principles of Criminal Evidence* (1989) pp 272–273.

[7] *Cook* [1959] 2 QB 340, 348, *per* Devlin J.

[8] As noted at para 6.43 above, the defendant's truthfulness may be a factor even if he or she does not testify.

[9] This would seem to be the view taken by the participants in the Oxford study. Participants told that the defendant had a previous conviction for handling, or for an assault, did not say that they found him to be a less credible witness. Only if they were told that the defendant had a previous conviction for an indecent assault on a child were the participants likely to say that they found him to be a less credible witness: see Appendix D, paras D.37 – D.41 below.

[10] See paras 6.30 – 6.34 above.

> character. Therefore, it lets in the previous convictions of the accused. The practical justification, for this view is the "tit for tat" argument. If the accused is seeking to cast discredit on the prosecution, then the prosecution should be allowed to do likewise. If the accused is seeking to persuade the jury that the prosecutor behaved like a knave, then the jury should know the character of the man who makes these accusations, so that it may judge fairly between them instead of being in the dark as to one of them.[11]

12.10 The phrase seems to mean that if the defendant calls a prosecution witness's integrity into question, it is *fair* for the defendant to lose the shield from cross-examination; if the defendant casts aspersions and puts the integrity of a prosecution witness in issue from the shelter of the shield, he or she deserves to be deprived of that protection. As Stuart-Smith LJ commented in *McLeod*, "The judge should be careful to balance the gravity of the attack on the prosecution with the degree of prejudice to the defendant which will result from the disclosure of the facts in question".[12] In other words, the more serious the imputations cast against prosecution witnesses, the less protection from prejudice the defendant can expect to receive.

12.11 There are three problems with this justification. First, although prosecution witnesses (and victims who, for whatever reason, are not witnesses) do need to be protected against irrelevant or untrue imputations, and the law, rightly in our view, seeks to discourage such imputations,[13] the accused is also in need of protection against wrongful conviction.[14]

12.12 Secondly, this principle does not offer a full explanation because there are anomalies in the way the subsection works. If, for example, the defendant's *representative* makes the attack on the prosecution witness's character, and the defendant does not give evidence, then, although the shield will be lost, the Crown will be unable to take advantage of its having been lost.

12.13 Thirdly, it has been suggested that the rule might be oppressive to innocent defendants with criminal records whose allegations against prosecution witnesses are true and pertinent to the defence. For example, the investigating authority might not be reluctant to act in an oppressive way to obtain a confession if it knows that either the defendant will not tell the court how the confession was obtained or, if he or she does so, his or her criminal record will go in.[15] Some

[11] *Selvey v DPP* [1970] AC 304, 353.

[12] *McLeod* [1994] 1 WLR 1500, 1513.

[13] We discuss this at paras 12.18 – 12.19 below.

[14] See Part VIII above for a more detailed discussion of the special position of the defendant.

[15] The Royal Commission consulted on the question of whether an attack on the character of prosecution witnesses should have the effect of removing the accused's shield, where the attack is "central to the defence". All the legal associations that responded were in favour of reform. The Society of Conservative Lawyers felt that the rule encouraged miscarriages of justice, because of the possibility of unchallenged false confessions. The Birmingham Law Society suggested that police witnesses were not in need of the same protections as other witnesses for the prosecution. Interested pressure groups also supported reform of the rule: JUSTICE was in favour of a distinction between necessary and gratuitous attacks, while the Legal Action Group was primarily concerned with the rights of an accused person to

might respond to this third problem by saying that the judicial discretion available[16] will temper the worst imbalances, but, whether or not this happens in practice, our provisional view is that this problem is sufficiently important to be dealt with by a rule of admissibility and should not be dependent on judicial discretion.

Deterrence

12.14 The CLRC wrote in 1972 that

> it is contrary to the public interest that [witnesses for the prosecution] should be exposed to what may be wholly unjustifiable attacks without the prosecution's being able to show from the accused's record whether he is likely to be telling the truth in making the attacks.[17]

Part of the aim of the statute is clearly to deter a defendant from making such attacks by threatening the defendant with a penalty.[18] We understand from practitioners that the fear that the record will be revealed does indeed affect the conduct of the defence, and they suspect that if there were no such disincentive they would, in some cases, be instructed to attack prosecution witnesses with greater vigour than they do now.

12.15 The reasons for seeking to protect witnesses were summarised in *Bishop*[19] before the Court of Appeal. They are as follows:

(1) there is a disincentive for witnesses to come forward and give evidence if they are aware that they themselves will be attacked;

(2) the jury may be prejudiced against the witness by what they hear, and be tempted to reach a verdict on a non-rational basis; and

(3) the defendant will be tempted to make untrue allegations about the prosecution witnesses.

12.16 There is also a public interest in protecting those who cannot be present to defend themselves from gratuitous attacks on their character which they cannot answer. This concern led to the provision contained in section 31 of the Criminal Justice and Public Order Act 1994 (which added the "deceased victim" to those against whom imputations may not be cast without the shield being lost).[20] Lord Ackner, moving the amendment in the House of Lords, explained that it was necessary to prevent a defendant presenting a "false, unbalanced picture" to the jury, whether

complain about breaches of PACE Code C (the Code of Practice for the Detention, Treatment, and Questioning of Persons by Police Officers).

[16] See paras 4.37 – 4.38 and 4.48 – 4.56 above.

[17] Evidence Report, para 124(iii).

[18] See also *Phipson*, para 18-46.

[19] *Bishop* [1975] QB 274, 279. The court accepted the arguments of counsel for the Crown, Michael Worsley.

[20] See paras 4.34 – 4.35 above.

the victim of the alleged offence is dead or alive.[21] The concern here is obviously not that the victim would be discouraged from testifying, but a sense that the defendant should not be able to take unfair advantage of the person's death.

12.17 This justification draws attention to a problem with this limb of section 1(f)(ii): there are witnesses that it does not cover, such as any absent prosecution declarant who is not a deceased victim, and defence witnesses. This justification also highlights the fact that there is no deterrent effect where the imputation is made by counsel without the defendant giving evidence, or by a defendant of good character.[22]

12.18 Our view is that the aims set out in *Bishop* are worthy aims, but that the price paid may perhaps be too high. The public interest in deterring the defence from making imputations may conflict with the public interest in protecting a defendant from being wrongfully convicted. A minority of the CLRC believed that the sanction of losing the shield is too severe, especially considering that the defendant stands to lose more than does an ordinary witness: "the sanction should not be one which may well make it more likely that he will be convicted of the offence."[23] The reason for not depriving the accused of the shield in these circumstances is the same as the reason for providing the shield in the first place.

12.19 If the allegations made by or on behalf of the accused are true, and have direct relevance to any of the issues to be resolved in the case, there is much to be said for the view that the public interest in guarding against a wrongful conviction outweighs the importance of encouraging people to testify and the objective of preventing attacks on those who are not present in court. But if the allegations are untrue, or true but not probative, then the fact-finders will not be helped to a correct verdict by hearing them, and the policy considerations in favour of "punishing" the defendant for gratuitous attacks win out. We must strive for a system which does not unfairly inhibit defendants from making true imputations which are central to the defence.

12.20 We have considered what other methods might be available for deterring any party from making untrue, or only loosely relevant, imputations against a maker of a statement for the other side, whether that person is present or not. Adrian Zuckerman suggests that the problem could be ameliorated to some extent by permitting the party whose witness has been attacked to call rehabilitating evidence.[24] If the imputations are untrue or misleading, the picture of the witness's character put before the jury or magistrates might be corrected if the evidence

[21] *Hansard* (HL) 17 May 1994, vol 555, col 207. Earl Ferrers, for the government, acknowledged that the amendment would deter untrue attacks on the character of a deceased victim, sparing the deceased's relations suffering: *ibid*, col 208.

[22] For a fuller discussion of these limitations of this limb of section 1(f)(ii) see paras 12.43 – 12.46 below.

[23] Evidence Report, para 123(i).

[24] A Zuckerman, *The Principles of Criminal Evidence* (1989) p 270 and n 68.

could be found in time. However, this proposal would answer only the third, and to some extent the first, of the concerns expressed in *Bishop*.[25]

12.21 Zuckerman's idea has the attraction that, if the defence anticipates that such evidence will be called, the imputation will not be made in the first place. However, there are practical problems with this suggestion. If the matter cannot be dealt with in re-examination, as happens currently, and a witness needs to be called to give rehabilitative evidence, the attention of the jury would be distracted (even if the witness could be found), and the flow of the trial would be interrupted while evidence was sought and collateral matters explored.

12.22 Sir Rupert Cross suggested that where the accused was convicted but had, in the course of his or her defence, made imputations against prosecution witnesses, either the conduct of the defence could be taken into account in sentencing, or the jury could be reconvened to decide whether the accused had committed perjury.[26]

12.23 There are various difficulties with this suggestion. A prosecution for perjury requires the Crown to prove that the accused lied on oath, and that his or her statement was material to the proceedings, which are necessarily different elements from the original offence. It follows from the fact that the accused was convicted of the original offence that his or her defence was not believed by the jury or magistrates, but it does not necessarily follow that he or she lied. Specifically, it does not follow that any imputations which were cast in the course of the trial were untrue. The consequence is that it cannot be assumed that perjury will be proven.

12.24 In any event, this suggestion would be of no avail where the imputations were cast by counsel but the defendant did not testify.

DEFECTS IN THE PRESENT LAW

12.25 There are a number of difficulties with the present law.

Over-reliance on judicial discretion

12.26 The courts have seriously undermined the effect of the second limb of section 1(f)(ii). As we have pointed out,[27] the courts have exercised their discretion not to allow cross-examination where the suggestions made are essential to the defendant's plea of not guilty[28] or where there "is nothing more than a denial, however emphatic or offensively made, of an act or even a short series of acts amounting to one incident or what was said to have been a short interview"[29]. The

[25] See para 12.15 above. It would meet the first concern to the extent that witnesses would doubtless prefer not to be attacked at all; but the assurance that attacks on them could be rebutted by rehabilitating evidence might mean that they were not so discouraged from testifying.

[26] R Cross, "The Problem of an Accused with a Record" (1969) 6 Syd LR 173, 181.

[27] See para 4.54 – 4.55 above.

[28] *St Louis* (1984) 79 Cr App R 53.

[29] *Britzman* [1983] 1 WLR 350, 355, *per* Lawton LJ.

discretion therefore extends to a very large proportion of the cases in which imputations are made.

12.27 The width of this discretion has three main consequences. In the first place, it is unusual and unsatisfactory to have a statutory rule so comprehensively undermined by a discretion: this must lead to difficulties for lay magistrates and those part-time judges who are involved in the administration of the law.

12.28 Secondly, it is not easy for defence advocates to predict what may or may not be put to prosecution witnesses in cross-examination without running the risk that their clients' records would be revealed.[30] The usual practice[31] is for the judge or magistrate (or justices' clerk) to warn the advocate that he or she considers that the cross-examination is approaching the point where an application under section 1(f)(ii) would be entertained, but such a warning is not obligatory. An alternative practice is to ask the judge in advance for a ruling. This is obviously not a viable proposition in the magistrates' courts, where most trials are heard,[32] as the magistrates are responsible for the legal rulings and for the subsequent verdicts.

12.29 Thirdly, the type of illustration that we have given shows that the demarcation between cases where discretion will and will not be exercised is unclear: it might depend on an analysis of a question to see whether it is merely a "denial, … emphatic or offensively made"[33] – in which case the discretion is exercised – or "a deliberate attack being made on the conduct of the police officer calculated to discredit him wholly as a witness",[34] in which case the discretion will not be exercised. Again, a defendant may be protected from cross-examination on his or her character, even though allegations about the prosecution witnesses have been made, if the evidence is overwhelming.[35]

12.30 We conclude that the working of the second limb of section 1(f)(ii) has been seriously and substantially undermined by the exercise of the judicial discretion, with the result that there is uncertainty as to its true operation: in consequence, the task of defence lawyers is made unnecessarily complicated.

[30] It will be recalled that, in the Crown Court study conducted by the Royal Commission, 28% of defence counsel believed that their clients' defences were inhibited by this provision: para 12.2 above.

[31] See *Cook* [1959] 2 QB 340, 349; *Stanton* [1994] Crim L R 834; para 4.57 above. In practice, where the evidence against the accused is strong, the prosecution often does not take advantage of the opportunity to put the record in.

[32] In 1994 (the latest year for which figures are available) 85,900 people appeared for trial at the Crown Court, while 1,947,000 people were proceeded against in magistrates' courts, a ratio of approximately 1 to 23, a percentage of 4.4 per cent: Criminal Statistics (1994) Cm 3010, para 6.1, tables 6.1 and 6.6.

[33] See para 4.54 above.

[34] *Per* Devlin J in *Cook* [1959] 2 QB 340, 348, approved by the Court of Appeal in *Powell* [1985] 1 WLR 1364.

[35] *Britzman* [1983] 1 WLR 350, 355.

It is not clear what counts as an imputation

12.31 The current law leaves unclear exactly what kind of allegation counts as an imputation. In *Courtney,*[36] the allegation, made in the course of the cross-examination of the defendant, was that, after he had been arrested, a Customs officer (who had given evidence in the case) had asked the accused's mother to have a quiet word with him and persuade him to admit the offence. It was not suggested that the officer did not honestly believe the accused was guilty and there was no necessary inference that he had sought to extract an admission which he knew to be false. The trial judge nevertheless held that an imputation had been made and, in the exercise of his discretion, let in the accused's record. The Court of Appeal did not criticise the judge for this.

12.32 In *Bishop*[37] the Court of Appeal held that an allegation of conduct which is not illegal may nevertheless count as an imputation. In that case, decided in 1975, the allegation in question was that the witness had had consensual sex with another man. Not everyone would take this to be a slur on his character. It falls to the judge to decide what counts as an imputation.[38]

12.33 The Australian Evidence Act 1995 provides that a relevant imputation is a suggestion that the prosecution witness has a tendency to be untruthful.[39]

The overlap between the issue of guilt and credibility

12.34 As with the first limb of section 1(f)(ii), when the shield is lost, the jury will be directed that the evidence of previous misconduct goes only to the defendant's credibility and not directly to the issue of his or her guilt.[40] Such a direction may be impossible to follow, and there is a serious danger of prejudice to the accused.[41] Moreover, the cases suggest that the courts do not always adhere to the theory that

[36] *Courtney* [1995] Crim LR 63.

[37] *Bishop* [1975] QB 274.

[38] Little help is to be had from the civil law of defamation on this point. As a defamatory statement tends to lower the standing of the complainant in the eyes of "right-thinking" members of society, and the values and opinions of society alter over time, statements which are defamatory for one generation may not be defamatory for another. In particular, standards of sexual immorality change more quickly and more radically than do other standards of behaviour: see *Gatley on Libel and Slander* (8th ed 1981) para 51.

[39] "evidence … that tends to prove that a witness called by the prosecutor has a tendency to be untruthful …": section 104(4)(b). (This section does not apply where the evidence in question relates to the commission or investigation of the offence for which the defendant is being prosecuted.)

[40] See *McLeod* [1994] 1 WLR 1500, approved in *Fearon v DPP* 159 JP 649.

[41] The Oxford Report found that participants told that the defendant had a previous conviction were significantly more likely to believe that he was guilty of a similar offence: Appendix D, para D.21 below. The study also found that unless the previous conviction was for an indecent assault on a child, being told that the defendant had a previous conviction did not lead to the participants saying that they found him to be a less credible witness: see Appendix D, paras D.37 – D.41 below. This suggests that jurors may use evidence of previous convictions only on the question of propensity, for which the evidence will be highly prejudicial if the previous conviction is for a similar offence to the one charged.

bad character evidence admitted under this provision goes only to the defendant's credibility.[42]

Imputations by the non-testifying accused

12.35 Where the imputations are made by the defence advocate but the defendant does not testify, there will be no cross-examination which might elicit evidence of bad character, whatever the nature of the imputations.[43] When this occurs, it may be felt that the trial process benefits the accused at the expense of prosecution witnesses, and that section 1(f)(ii) fails to deter untrue allegations of misconduct on the part of prosecution witnesses.

12.36 Further, as the CLRC pointed out,

> The present rule also makes possible a particular abuse where there are two accused, A and B, and A has a bad record and B none. B makes the attack on the witnesses for the prosecution for the benefit of both A and himself, but A cannot be cross-examined on his record. We should have liked to find a way of preventing this abuse … .[44]

12.37 The justification for these anomalies is that a criminal record is admitted under section 1(f)(ii) on the question of the defendant's credibility, and if he or she has not given evidence, his or her credibility cannot be in issue.[45] We have queried above[46] whether the credibility of a defendant (or of a defence) can truly be said to be in issue only if the individual testifies. We consider at paragraphs 12.81 – 12.90 below whether the rule in *Butterwasser* should be reversed.

Evidence may be admitted which is more prejudicial than probative

12.38 The CLRC wrote in 1972 that

> if relevant evidence is excluded during the case for the prosecution because it may be too prejudicial to the accused, it does not become any less prejudicial because the accused attacks the witnesses for the prosecution.[47]

[42] The clearest example is *Selvey v DPP* [1970] AC 304 where, because the accused, who had denied a charge of buggery, had alleged that the complainant was a male prostitute, his previous convictions for indecency with males were admitted. As Heydon points out, "The indecency convictions could only support an inference that Selvey was a liar *after* the jury had inferred from them that Selvey was guilty because they revealed a disposition towards homosexual crime; they could thus be primarily relevant only to prove guilt." Yet the trial judge instructed the jury that the only relevance of these convictions was to show that the defendant was not credible. The defendant's previous convictions for dishonesty were not admitted. J D Heydon, "Can the Accused Attack the Prosecution?" (1974) 7 Syd LR 166, 167.

[43] *Butterwasser* [1948] 1 KB 4; see para 12.81 below.

[44] Evidence Report, para 131.

[45] See, eg, Report of the Royal Commission, ch 8, para 34.

[46] See para 6.43 above.

[47] Evidence Report, para 123(i). See also J D Heydon, "Can the Accused Attack the Prosecution?" (1974) 7 Syd LR 166, 167.

The dangers which a defendant faces when evidence of bad character is admitted do not, indeed, decrease simply because the defendant has cast imputations. Our provisional view is that although the probative value of the bad character evidence may in some cases be such that it is nevertheless fair to admit it, this criticism of the statutory provision has considerable force. The rules of evidence should themselves be geared towards making a trial fair.

Evidence of bad character which *is* of probative value may never be adduced

12.39 Because the focus of this limb of section 1(f)(ii) is on how the defence is presented, it is perfectly possible for significant bad character evidence never to be mentioned in court. One might ask why, if it really is of help to the court to hear that the prosecution witnesses have convictions, it should fall to the defendant to elicit this information, at risk to his or her own situation.

The defendant may be deterred from testifying

12.40 One consequence of this limb of section 1(f)(ii) is that the court may be deprived of relevant evidence because the defendant may fear that, if he or she gives evidence, his or her previous convictions will emerge. This danger was appreciated during the Second Reading of the 1898 Bill in the House of Commons.[48] As we have noted, in the research conducted for the Royal Commission, 28 per cent of defence counsel thought their clients' defences had been inhibited by the statutory provision.

12.41 Thus a defendant who denies a confession attributed to him by the police may

(1) deny the confession from the witness-box, be cross-examined on his convictions and run the gauntlet of prejudice;[49]

(2) testify but not contest the confession, and accept that a verdict of guilty will most probably follow; or

(3) get his or her counsel to deny the confession, refrain from testifying and thus rob the denial of any force.[50]

[48] Mr Atherley Jones MP said, "if it happened by chance that, although I was innocent of the particular offence which was the subject of the charge which was brought against me, I was a man of indifferent character and I had been in previous years convicted of a similar offence, then nothing in the world would induce me, short of compulsion, to go into the witness box and submit to cross-examination": *Hansard* (HC) 25 April 1898, vol 56, col 1035.

[49] Another anomaly arises in the context of confessions: where an accused person alleges that a confession was obtained by oppression or in consequence of something said or done which was likely to make the confession unreliable, this will be investigated within a voir dire. If the prosecution cannot satisfy the court that the confession was *not* so obtained, it will not be admitted (PACE, s 76) and the shield will not be lost. By contrast, if the accused alleges that the confession was never made at all, this will be investigated in the course of the trial as a fact in issue, and the defendant will lose his or her shield because of the inevitable imputation against the investigating officer.

[50] This quandary is set out by A Zuckerman in *The Principles of Criminal Evidence* (1989) at p 265. Consider also the position of Winston Silcott as described by his solicitor. When

12.42 Although a defendant may be deterred from giving evidence for fear that his or her record will emerge, section 35(3) of the Criminal Justice and Public Order Act 1994 now creates a countervailing pressure to give evidence by permitting the fact-finders to draw adverse inferences from a failure to do so. Anecdotal evidence from Crown Court judges suggests that, as a result, more defendants, including those with criminal records, are going into the witness box. The Court of Appeal has recently held that there would need to be some evidential basis or some exceptional factors in a case to justify *not* drawing an adverse inference. The court did not accept that the fact that the accused had attacked prosecution witnesses and had a criminal record could constitute such a factor: otherwise a defendant with a criminal record would be in a better position than one without, which would be "a bizarre result".[51]

The deterrent purpose of the provision is not served

12.43 As we state above, this limb of section 1(f)(ii) is sometimes justified on the grounds that it deters gratuitous attacks on witnesses;[52] but it fails to do so in four circumstances. First, as we have pointed out,[53] if the defendant's *representative* makes the imputations, and the defendant does not give evidence, there is no disincentive to the making of such attacks.

12.44 Second, this protection is not extended to witnesses called on behalf of the *defendant*, who may equally be deterred from giving evidence. This is important because in some cases the defendant is unable to give evidence about the facts in issue (for example, where the charge arises out of a fight in which the defendant was concussed), or his or her defence is severely weakened if it is unsupported by other evidence (such as a defence of alibi).

12.45 Thirdly, not all prosecution witnesses are protected against gratuitous attacks upon them.[54] The inclusion of "the deceased victim of the alleged crime"[55] may have brought one group within the scope of the provision, but others are still not covered. Deceased people other than victims are not protected against imputations if their written statements are admitted in evidence; nor are witnesses who do not give live evidence for any other reason. It is even arguable that the amendment does not cover a victim who has died but was not killed by the defendant.

asked why his client had not challenged the accuracy of the interview record at trial, the solicitor said that his client was already convicted of murder and if he had challenged the police's credibility his own record would have been revealed. It would have been a credibility contest between the head of the serious crime squad and a vilified black man with a previous conviction for murder. That was not a contest he was likely to win. *The Observer* 31 July 1994.

[51] *Per* Lord Taylor CJ in *Cowan; Gayle; Ricciardi* [1996] 1 Cr App R 1.

[52] See paras 12.14 – 12.17 above.

[53] See para 12.17 above.

[54] *Ibid.*

[55] Added by Criminal Justice and Public Order Act 1994, s 31.

12.46 Lastly, a defendant who has no criminal record, or only stale or obviously irrelevant convictions, will not be deterred from making imputations against prosecution witnesses.

No loss of shield where the defendant is shown in a good light

12.47 Because the defendant stands to lose the shield even where the imputations are essential to the defence, an anomaly is set up: the shield is not lost if the defendant is incidentally shown in a favourable light,[56] but it *is* lost if a prosecution witness is incidentally shown in a bad light.

A temptation to fabricate

12.48 As we have noted,[57] the current law presents a temptation to investigating officers to break the rules in the knowledge that if the accused alleges in court that this has happened, his or her previous convictions are likely to be admitted, thus making a conviction more likely.[58]

OPTIONS OPEN TO US

Option 1: no change

12.49 The second limb of section 1(f)(ii) does not represent the law as it is applied. Its stark and inflexible nature has led the courts to rely on a wide ranging discretion to mitigate its effects. There is much uncertainty, not only about what counts as an imputation but also on the extent of the discretion. The inevitable consequence is that lawyers spend unnecessary amounts of time deciding whether a certain line of questioning will amount to an imputation and so fall within the second limb; and if it does, the judge then has to spend more time deciding whether the discretion should be exercised. We believe that this is particularly unsatisfactory in an area where the law should be as clear as possible. We are also mindful of our duty to have a view to the simplification and modernisation of the law.[59] For these reasons **our provisional view is that this option should be rejected**.

Option 2: limiting cross-examination of the accused about previous misconduct to cases where *unnecessary* imputations have been made

12.50 In 1944 the House of Lords sought to provide guidance on this point, and interpreted the rule as meaning that "an accused is not to be regarded as depriving himself of the protection [of section 1(f)] because the proper conduct of his defence *necessitates* the making of injurious reflections on the prosecutor or his

[56] See para 4.22 above.

[57] See para 12.13 above.

[58] See generally J D Heydon, "Can the Accused Attack the Prosecution?" (1974) 7 Syd LR 166, 167. This point is also made by Latham CJ in *Curwood* (1944) 69 CLR 561, 577.

[59] Law Commissions Act 1965, s 3(1).

witnesses."[60] This dictum was subsequently explained away and not followed.[61]

The CLRC

12.51 The CLRC referred to difficulties encountered with the provisions of section 1(f)(ii). It argued that the present law deprives accused persons of their protection under section 1(f) where the defence case rests upon the making of imputations against witnesses for the prosecution. Three particular possibilities are referred to in the Report:[62]

> where … the accused was only defending himself against an assault by the prosecutor, as in *Brown*,[63] or where he alleges indecent approaches by the prosecutor, as in *Flynn*[64] and *Selvey v DPP*.[65] Another kind of case is where the accused alleges that the police obtained a confession from him by a threat, as in *Cook*.[66]

12.52 According to the CLRC,[67] before the decision in *Selvey* a provisional solution to this difficulty had been reached through the exercise of the discretion of the court to disallow cross-examination, the practice being that the prosecution would seek the court's permission before commencing cross-examination of the accused under section 1(f)(ii). The Court of Criminal Appeal held in *Flynn* that where the imputation was a necessary part of the defence, the court should usually exercise its discretion not to allow such cross-examination. However, in *Selvey* the House of Lords held that this doctrine was incompatible with the language of section 1(f)(ii).

12.53 The CLRC's proposed legislation was based on a distinction between cross-examination going to credibility and cross-examination going to disposition. A majority of the committee believed that it was acceptable to expect juries and magistrates to treat the previous misconduct of the accused as potentially affecting their assessment of the credibility of his or her testimony, but *not* to allow it to affect their view of the accused's disposition to crime:[68]

> the majority of the committee think that the distinction is a genuine one which can be applied in practice and … propose to make it the basis of the provision to replace this part of s 1(f) of the 1898 Act.

[60] *Stirland v DPP* [1944] AC 315, 327 (emphasis added).

[61] See, for example, *Jenkins* (1946) 31 Cr App R 1, 13–14; *Cook* (1959) 43 Cr App R 138; *Selvey v DPP* [1970] AC 304.

[62] Evidence Report, para 119.

[63] *Brown* (1960) 44 Cr App R 181.

[64] *Flynn* [1963] 1 QB 729.

[65] *Selvey v DPP* [1970] AC 304.

[66] *Cook* [1959] 2 QB 340.

[67] Evidence Report, para 119.

[68] *Ibid*, para 120.

12.54 The "essential question", according to the CLRC, is[69]

> whether it is right to keep in some form the provision in s 1(f)(ii) of the 1898 Act that the accused is liable to cross-examination about his other misconduct if he makes "imputations on the character of the prosecutor or the witnesses for the prosecution".

12.55 The CLRC was split on this issue. A minority of members of the committee wished to adopt the approach of the North American jurisdictions, where the accused is (broadly) treated as an ordinary witness. The most important argument for this approach is that the court or the jury would[70]

> no longer be in the dark on the important question of which witness is the more likely, from his past conduct, to be telling the truth.

12.56 The majority of the committee rejected this idea on two grounds: first, that the fact that the accused person gives evidence does not justify the admission of evidence as potentially prejudicial as that of his or her previous misconduct, and second that this approach would discourage accused persons from giving evidence.[71] The latter argument appears to have had particular force, as the CLRC also recommended legislation permitting the court or jury to draw adverse inferences from the refusal of the accused to give evidence in his or her own defence.

12.57 A second minority of the committee favoured granting the accused "full protection". This minority felt that it was wrong to subject the accused to a line of questioning which is considered prejudicial, and is therefore usually forbidden, merely because imputations have been made against the witnesses for the prosecution. They explained that any other rule

> can be justified only on the supposition that there is something wrong in the accused's behaving like this; but in fact the cross-examination may be perfectly proper, and of high importance.[72]

12.58 The minority in favour of full protection pointed out that evidence going to the credibility of the accused is not evidence of the same import as evidence going to the credibility of the witnesses for the prosecution, as the accused's truthfulness is suspect in any case. Therefore, the evidence of the accused and that of other witnesses ought not to be treated as equivalent.

12.59 A majority of the committee rejected both the "full protection" and "ordinary witness" approaches, coming down in favour of the compromise approach adopted in the 1898 Act, subject to a single notable amendment – namely, that the shield should be lifted under this limb only where the "main purpose" of the imputation is to damage the credibility of the witness for the prosecution. They also believed that any question asked by the prosecution of the accused concerning his or her

[69] *Ibid,* para 122.

[70] *Ibid*, para 126.

[71] *Ibid*, para 127.

[72] *Ibid*, para 130(i).

previous misconduct under the "losing-the-shield" provisions that were proposed to replace section 1(f)(ii) must be relevant to the accused's credibility as a witness.[73]

12.60 The CLRC proposed that the accused should lose the shield of protection from cross-examination on his or her character if

> (a) the accused has personally or by his advocate asked any witness for the prosecution or for a person jointly charged with him any question concerning the witness's conduct on any occasion or as to whether the witness has committed, or has been charged with or convicted or acquitted of, any offence; and
>
> (b) the court is of the opinion that the main purpose of that question was to raise an issue as to the witness's credibility … .[74]

12.61 The CLRC explained this clause as follows:

> if the attack is necessary in order to put forward the defence, it will not expose the accused to any cross-examination to which he would not otherwise be exposed.[75]

Therefore, the phrase "the witness's credibility" must mean the witness's "moral credibility" as we have used that term in Part VI.[76]

12.62 The Royal Commission supported the CLRC's proposal, preferring the word "central" where the CLRC used "necessary", and referring to "gratuitous disparagement" which it contrasted with "proper cross-examination".[77]

12.63 As we have said,[78] however necessary for the conduct of the defence it might be to make the imputations, under the present law that factor will not prevent the previous convictions becoming admissible. Whether or not the imputation was "necessary" can be taken into account in the exercise of the judicial discretion to prohibit cross-examination,[79] but, as we have said,[80] we are unhappy about leaving such an issue to judicial discretion. The CLRC proposal aims to address this potential unfairness.

[73] *Ibid*, paras 125 and 128.

[74] Clause 6(4) of the draft Bill appended to the CLRC's Report.

[75] Evidence Report, para 128.

[76] See para 6.47 above.

[77] Report of the Royal Commission, ch 8, para 33.

[78] See para 4.42 above.

[79] See *Flynn* [1963] 1 QB 729, 737, and paras 4.54 – 4.56 above. Nokes has said that "the assumption of a discretion not to enforce a statute is open to objection": (1959) 22 MLR 511, 514.

[80] See para 12.26 – 12.30 above.

Advantages

PREJUDICIAL EVIDENCE WOULD NOT BE ADMITTED UNLESS ITS PROBATIVE VALUE OUTWEIGHED THE POTENTIAL PREJUDICE

12.64 As we have said,[81] it is illogical that evidence of previous misconduct should be prohibited in chief on the grounds that its prejudicial effect outweighs its probative value, but then let in later in the trial. The probative value of the evidence cannot be altered by virtue of the reason for the attack on the prosecution witness, and therefore the admission of bad character evidence cannot be justified in terms of its probative value exceeding its prejudicial effect merely as a result of imputations being cast.

MORE RELEVANT INFORMATION WOULD BE MADE AVAILABLE TO THE COURT

12.65 We have referred above to the dilemma faced by a defendant with a criminal record, and the danger that such a defendant may be deterred from testifying.[82] Another advantage of this option is that it would make the dilemma less acute, because a defendant who sought simply to challenge the prosecution's version of events would not lose the shield. As a result, more relevant information would be available to the court, because a defendant would not be inhibited from putting it to a prosecution witness that, for example, evidence was deliberately fabricated.[83]

12.66 In addition, this option would remove the anomaly that the court is denied relevant information about the credibility of prosecution witnesses where the defendant refrains from challenging their credibility rather than run the risk of having his or her own criminal history exposed.

REMOVAL OF THE ANOMALY THAT EVIDENCE OF BAD CHARACTER CANNOT BE ADDUCED IF THE DEFENDANT LEAVES IT TO THE ADVOCATE TO MAKE THE IMPUTATIONS

12.67 This option would allow a solution of the *Butterwasser* problem,[84] namely that, if the defendant stays out of the witness box, evidence of his or her bad character cannot be adduced even if imputations are made by the defendant's advocate. If this proposal were adopted there would arguably be no need to distinguish between the case where imputations are cast by the accused from the witness box, and the case where they are cast on his or her behalf by an advocate.[85]

[81] See para 12.38 above.

[82] See paras 12.40 – 12.42 above.

[83] The anomaly referred to at n 49 to para 12.41 above would be resolved, in that there would be no difference between the case where a person with a criminal record alleges that a confession was obtained by oppression or inducement and the case where the claim is that the confession was never made at all: under this proposal, in neither case would the criminal record emerge, whereas under the present law it will emerge in the latter case but not the former.

[84] See 12.81 below.

[85] This argument would not address the contention that it is nonsensical to admit evidence on the basis that it is relevant to a defendant's truthfulness where that defendant does not testify. However, as we suggest at paras 6.43 – 6.44 above, it is not only when a defendant testifies that his or her truthfulness may be said to be in issue; and the fact-finders will

REMOVAL OF AN INCONSISTENCY IN THE PRESENT LAW

12.68 Lastly, this option would remove another inconsistency in the present law. As we have pointed out,[86] the present law is inconsistent in its approach to an assertion which is necessary for the defence, and incidentally shows the accused in a flattering light, where the loss of the shield will not result, as compared with an assertion which is necessary for the defence but shows a prosecution witness in a poor light, where the loss of the shield may result. The inconsistency would be removed because in the latter case the shield would not be lost, thus bringing it into line with the former case.

Disadvantages

12.69 A potential problem with this suggestion is that determining whether an imputation against a prosecution witness is "necessary" (the Royal Commission preferred the word "central") or "gratuitous" is very difficult. For example, some would say that it is always "necessary" to point out that an accuser has criminal convictions. In so far as a person's "general" or "moral credibility" is indicative of a general tendency to tell the truth, it is arguably always necessary to show that the witness is not the kind of person who should be believed. Even if "moral credibility" is only indirectly relevant to the issue of who is telling the truth, it is still relevant, and in that sense it is necessary for the defence to bring it out.[87]

12.70 The word "central" may serve the purpose better, but it is still questionable how easy it would be for the court to decide what are the main planks of a defence – even given an obligation to reveal the defence in advance.[88] This leads us on to option 3, which is essentially very similar but may remedy this defect. Meanwhile, **we provisionally reject this option**.

Option 3: the Australian solution: imputations should result in the loss of the shield only if they do not relate to the witness's conduct in the incident or investigation in question

12.71 The words used in the Evidence Act 1995 of the Commonwealth of Australia appear to provide a sounder way of drawing the distinction between imputations which should result in the loss of the shield and those that should not. The Act distinguishes between a challenge to a witness's credibility which is centred on his or her conduct in relation to the events that are the subject of the charge, or to the investigation of those events, and a challenge based on conduct of the witness which is unconnected with the present charge.[89] This seems to be a more practical

sometimes have to evaluate the plausibility of a *defence* even where the defendant does not testify.

[86] See para 12.47 above.

[87] If, however, this option were combined with a rule under which character evidence is admissible only where it is significantly probative (see option D, paras 12.91 – 12.100 below), the two suggestions could work together to protect all witnesses from imputations without unduly restricting the defence.

[88] See the current Criminal Procedure and Investigations Bill: n 48 to para 7.28 above.

[89] s 104(5)(b).

way of putting the matter, and also has a coherent theoretical basis. It was explained in an old case by Channell J:

> if the defence is so conducted, or the nature of the defence is such, as to involve the proposition that the jury ought not to believe … one of the witnesses for the prosecution upon the ground that his conduct – *not his evidence in the case, but his conduct outside the evidence given by him* – makes him an unreliable witness, then the jury ought also to know the character of the prisoner who either gives that evidence or makes that charge, and it then becomes admissible to cross-examine the prisoner as to his antecedents and character with the view of shewing that he has such a bad character that the jury ought not to rely upon his evidence.[90]

12.72 To take the facts of *Hudson*[91] as an illustration: the defence was that two of the defendant's friends (who were witnesses for the prosecution) had committed the theft with which the defendant was charged. This imputation in itself related only to the conduct of the witnesses in relation to the events in question. If, however, the defence had tried to lend support to this contention by putting it to the witnesses that they had *convictions* for this kind of theft, it would be appropriate that any equally probative convictions which the defendant might have should also emerge. In so far as the defendant chose to make an issue of the prosecution witnesses' *general* character, his own character would become an issue too.[92]

12.73 A person's conduct in the incident that gives rise to the criminal proceedings will bear directly on his or her "specific" or "probative" credibility, and it should be open to the defence to question that person about such conduct without being in peril of losing the shield.[93] Evidence about that person's conduct *in general* is effectively deemed not to be central to the defence.

12.74 Under this proposal, the appropriate direction might be along the lines that the evidence of bad character has been allowed because the defendant has, through his or her representative or when testifying, referred to extraneous matters which show one of the prosecution witnesses in a poor light, and it is thought fair that the jury should know more about the defendant's character so that they can judge for themselves who is more likely to be telling the truth about the facts in issue. It might be helpful for the jury to be reminded that a person with a criminal record

[90] *Preston* [1909] 1 KB 568, 575 (emphasis added).

[91] *Hudson* [1912] 2 KB 464.

[92] At para 4.46 above we noted that an allegation of consent in a rape case may or may not count as an imputation against the complainant, and the defendant may have to rely on the court's discretion to prevent cross-examination as to character. This option has the same effect, but with greater certainty: since to allege consent is to make allegations about the witness's conduct in the incident that gave rise to the charge, the shield would not be lost. If the defence extended the attack on the complainant to conduct outside the incident complained of, the shield *would* be lost. We note that the Heilbron Committee favoured the CLRC proposal which would have had this effect: see para 4.47 above.

[93] At para 6.47 above we referred to the distinction between "general" or "moral" credibility and "specific" or "probative" credibility. Both shed some light on the likelihood that a witness is telling the truth; but the latter is far more direct, and therefore of far more weight, than more general information about the kind of person a witness is.

may well tell the truth, and that someone of previously blameless character may sometimes lie.

Disadvantages

12.75 As we note above,[94] one of the justifications put forward for this limb of section 1(f)(ii) is that, where the accused attacks the truthfulness of a witness, the fact-finders need to know the character of the accused so that they can make an assessment of the comparative credibility of the two people, or of the two versions of events. This option discounts this justification in that it would permit the fact-finders to know about the character of the defendant only if he or she makes allegations about a prosecution witness's conduct outside the case itself. Those who hold that the assessment of comparative credibility is the primary justification for the provision will see the restriction on the circumstances in which the shield is lost as a disadvantage of this option.

12.76 The second disadvantage relates to the deterrence purpose of the provision.[95] Some might argue that if the shield is lost only where the imputations focus on a witness's conduct other than in connection with the events that led to the charge, there is no disincentive to the casting of false aspersions which do relate to those events.

12.77 This may arise where the evidence against the accused includes a confession, and the defence claims that the confession was fabricated: such a claim relates to the police officer's conduct in the investigation of the offence, and would not therefore result in the loss of the shield. There is a fear that if a defendant is free to make this claim without his or her criminal record being admitted, false claims of fabricated evidence will abound.

12.78 Two points may be made about this fear. First, if a defendant says in his or her evidence that the confession was invented, he or she will be cross-examined on the point, and if the defendant makes the allegation only through his or her advocate the fact-finders may draw an adverse inference. Secondly, if a jury or magistrates are not sure that a confession was *not* fabricated, and there is insufficient evidence to convict without it, it is right that they should acquit. In general terms, as we say above,[96] there is a conflict of interests to be balanced here, and there are coherent reasons why the conflict should in this instance be resolved in favour of the accused.

12.79 Our provisional view is that this option strikes the right balance between discouraging imputations which are not pertinent to the issues in the case, and not inhibiting defendants from making true imputations without which the defence can hardly be put forward. **We provisionally propose this option.**

[94] See para 12.6 above.

[95] See paras 12.14 – 12.24 above.

[96] See para 12.18 above.

IMPUTATIONS AGAINST THE MAKER OF A HEARSAY STATEMENT

12.80 At present the shield is lost only if the defendant makes imputations against prosecution *witnesses*, or the deceased victim of the alleged offence. However, the prosecution may be permitted to adduce evidence of statements made out of court by persons who do not testify, and to rely on such statements as evidence of the truth of the facts stated. In general such statements are inadmissible under the rule against hearsay, but there are a number of exceptions to that rule.[97] Where such a statement is admitted under such an exception, the defendant may seek to discredit the maker of the statement.[98] Where a defendant does this by making imputations which do not relate to the maker's conduct in the incident or investigation in question, we think that the shield should be lost as if that person had been a witness. **We provisionally propose that, where an imputation is made which would have resulted in the loss of the shield if it had been made against a prosecution witness, it should equally result in the loss of the shield if it is made against the maker of any statement adduced by the prosecution under an exception to the rule against hearsay.**

THE DEFENDANT WHO MAKES IMPUTATIONS AGAINST PROSECUTION WITNESSES BUT DOES NOT TESTIFY

12.81 If option 3 is adopted, the shield will be lost if imputations are made which do not relate to the incident in question or to the investigation of it. If, however, the defendant does not testify, under the rule in *Butterwasser*[99] the prosecution cannot take advantage of the loss of the shield and adduce evidence of the defendant's bad character.

> The reason is that by attacking the witnesses for the prosecution and suggesting they are unreliable, [the defendant] is not putting his character in issue; he is putting their character in issue.[100]

We now consider whether this rule should be changed.

12.82 The *Butterwasser* approach was rejected by the Royal Commission, who said a "better approach" was that

> since the defendant, through his or her advocate, is seeking to undermine the credibility of the prosecution evidence, it should be open to the prosecution to suggest, by bringing in the defendant's criminal record, that the person who has cast doubt on the credibility of the prosecution's evidence is a person of bad character. It does not seem to us to be reasonable that a defendant can avoid the

[97] Our consultation paper Evidence in Criminal Proceedings: Hearsay and Related Topics (1995) Consultation Paper No 138 made provisional proposals for reform of the rule and the exceptions to it.

[98] For example, where a statement in a document is admitted under ss 23–24 of the Criminal Justice Act 1988, any evidence which would have been admissible as relevant to the credibility of the maker of the statement if that person had been called as a witness is admissible for that purpose: Sch 2, para 1(a).

[99] *Butterwasser* [1948] 1 KB 4.

[100] *Ibid*, at p 7, *per* Lord Goddard CJ.

> consequences of the present rule by the simple expedient of staying out of the witness box.[101]

Although the Royal Commission did not say so explicitly, it must be that it was unhappy with the rule in *Butterwasser* because it thought it unfair that a defendant can "take advantage" of procedural rules to make imputations which are untrue but damaging.

12.83 Our provisional view is that this issue may now be of limited importance, for two reasons. In the first place it is likely that the apparent unfairness of *Butterwasser* will arise less often in the future than it has in the past, because, as a consequence of section 35 of the Criminal Justice and Public Order Act 1994, it will be less common for defendants to exercise their right not to testify.[102]

12.84 Secondly, our proposal of option 3 would mean that only imputations which are not directly connected to the circumstances of the charge could result in the loss of the shield, *whether the defendant testifies or not*. There is no question of bad character evidence being adduced against a defendant who does not testify where it could not have been adduced if he or she had. If our proposal were accepted, therefore, the *Butterwasser* issue could arise only where the defendant does not testify but makes imputations which are unrelated to the conduct of the witness in the incident or investigation in question. In view of the inferences that could now be drawn in such a situation, we doubt that it will often arise.

12.85 We put forward five options.

Option A: the *Butterwasser* approach

12.86 This, the approach adopted under the present law, means that even if the defendant, through his or her advocate, attacks the prosecution witnesses, evidence which reflects on the defendant's credibility (and which is not admissible in chief) can be adduced only if the defendant testifies. The justification of this approach is that a defendant who does not testify is not putting his or her own credibility in issue.[103] Our provisional view is that such a defendant *may or may not* be putting his or her credibility in issue: it depends whether a particular version of events is being put forward as the case for the defence.[104] Where this occurs, the fact-finders will

[101] Report of the Royal Commission, ch 8, para 34.

[102] The basis for s 35 was laid by the CLRC. The CLRC saw this "pressure … on accused persons to give evidence" as a way of overcoming what they saw as the undesirable rule in *Butterwasser*: "To many it is highly objectionable that the accused should be able [to make imputations against a witness for the prosecution but not give evidence] with impunity. The present rule also makes possible a particular abuse where there are two accused, A and B and A has a bad record and B none. B makes the attack on the witnesses for the prosecution for the benefit of both A and himself, but A cannot be cross-examined on his record. We should have liked to find a way of preventing this abuse, and that exemplified in *Butterwasser*, but it is impossible to do so consistently with the principle that the purpose of the cross-examination is to show whether the witness attacked or the attacker is more likely to be telling the truth": Evidence Report, para 131.

[103] See the dictum of Lord Goddard CJ quoted at para 12.81 above.

inevitably assess the credibility of the prosecution witness in relation to the credibility of the defendant in deciding whose version of events to believe.

12.87 We have proposed above that even a *testifying* defendant should not lose the shield by making imputations which relate to the conduct of the witness in the incident or investigation in question. If this proposal were accepted, the present issue would arise only where a non-testifying defendant makes imputations which are *not* so related. By taking the matter outside the witness's conduct in connection with the circumstances of the charge, such a defendant is attacking the witness's *general* or "moral" credibility and seeking to gain an advantage over the witness: the witness's generally bad character can be expected to undermine the credibility of the evidence he or she has given. If the defendant is also of bad character, so that, if the fact-finders knew about it, they would assess his or her credibility less favourably, the defendant gains an unfair advantage by being able to put the prosecution witness's character in issue while concealing his or her own. It can be argued that if the defendant seeks to put the prosecution witness's general character in issue, then his or her own character should go in too – provided that, with or without testifying, the defendant has put his or her credibility in issue.

Option B: evidence of the defendant's previous misconduct can be adduced whenever imputations are made against prosecution witnesses

12.88 This approach was advocated by the Royal Commission.[105] It might be said that in any case in which the defendant attacks the prosecution the fact-finders are entitled to know a little about the defendant so as to compare his or her credibility with that of the witness being attacked. However, the defendant's credibility is sometimes not in issue, for example where the defence simply put the prosecution to proof. In such a case, the direction that the bad character evidence is relevant only to the defendant's credibility can make no sense.

Option C: allowing evidence of the defendant's previous misconduct to be adduced if the nature of the defence is such as to put the defendant's credibility in issue

12.89 It is arguable that this option meets the justice of the situation fairly because, where the defendant's credibility is in issue, the fact-finders are entitled to know about matters which are relevant to his or her credibility.

12.90 There are two more options which, if adopted, would mean that the *Butterwasser* situation either would not arise at all or would arise only in very limited circumstances. We do not propose either of them, but put them forward and should be interested in consultees' views on them.

[104] See para 6.43 above. Occasionally a defendant will put forward a version of events to which defence witnesses testify, but of which the defendant does not claim any personal knowledge – eg because he or she claims to have been unconscious at the time. The defendant's own credibility might not then be in issue.

[105] Report of the Royal Commission, ch 8, para 34.

Option D: allowing imputations to be made against a witness only where, if true, they would *substantially* undermine the witness's credibility

12.91 It would be possible to adopt a rule that bad character evidence must be of more than trivial weight, or of significant or substantial weight,[106] before it can be admitted, whichever party seeks to adduce it. This would amount to requiring a higher standard of legal relevance for character evidence than for other evidence, on the grounds that without such a requirement there is a considerable risk of the fact-finders being misled.

12.92 Perhaps the time has indeed come to question how far it is appropriate to allow a party free rein in attacking witnesses' characters, on the basis that the focus of cross-examination should be the *probative* credibility of the witness (while conceding to defendants of good character that the vulnerable position of the accused justifies separate rules for the accused). For example, under the scheme introduced by the Australian Evidence Act 1995, where a prosecution witness has a conviction for theft from a shop, and does not claim to be of good character, this conviction cannot be mentioned unless it is either directly relevant to the live issues at the trial or *substantially* impairs the witness's credibility. The onus should be on the party seeking to introduce the incriminating evidence to show how it is directly relevant, or of significant weight.[107]

12.93 There is a precedent in section 2 of the Sexual Offences (Amendment) Act 1976 for restricting the power of the defence to cross-examine on irrelevant aspects of a witness's character, and a similar rule could be formulated for all offences. Such a rule might provide that evidence may be called, and questions asked, as to an aspect of a witness's character only where it would be unfair to the defendant for them *not* to be asked – in other words, where the evidence (or the question) might reasonably lead the fact-finders to take a different view of the witness's evidence.

Advantages

12.94 Under this proposal, all parties would be protected from gratuitous attacks on the character of their witnesses.

12.95 To follow this course would remove the anomaly that a defendant without a criminal record is free to make gratuitous imputations against prosecution witnesses, whereas a defendant with a criminal record is inhibited from so doing. If adopted in conjunction with option 3 above, it would also alleviate the worst effects of the *Butterwasser* rule, in that a defendant who does have a criminal record would no longer be free to make gratuitous imputations as long as he or she does not give evidence.

[106] Cf the Australian Evidence Act 1995, ss 102–103, which provide that evidence going only to credibility must have "substantial probative value".

[107] Professor R Eggleston wrote "For my own part, I would … limit severely the scope of cross-examination as to credit. As most witnesses will lie if the motive is strong enough, and many will lie merely to save lengthy explanations about matters that they think have nothing to do with the case, I do not regard the demonstration that a witness has lied about some irrelevant matter as affording much help in deciding whether he is telling the truth about the facts in issue": *Evidence, Proof and Probability* (2nd ed 1983) p 77.

12.96 It would not be essential for the same standard to apply to all parties,[108] but we believe that the standards applying to the defence and to the prosecution should not diverge too far. The defendant is, of course, additionally protected by the need to balance probative value against likely prejudicial effect.

Disadvantages

12.97 It is sometimes argued that the rules of evidence should become less restrictive, not more so, because greater confidence can be placed in juries and magistrates than has been the case in the past. All evidence of probative value should be placed before the court, it is said, because it will all help the fact-finders (even if only marginally) to reach the correct verdict.

12.98 The counter-argument is that, irrespective of views about the differences between modern juries and those of the nineteenth century, it appears that evidence of bad character is potentially prejudicial in the two ways identified in Part VII,[109] and that there are therefore special dangers attaching to it. These dangers justify special protection.

12.99 A more specific criticism is that this proposal entails limiting the way in which the defence may be conducted, to a greater extent than at present. Traditionally, there has been a reluctance to place any brake on a defendant's power to defend himself or herself. However, this view does not reflect the actual state of the law today. The court already has the power to exclude irrelevant evidence and vexatious or irrelevant questions. This proposal would merely extend the court's power in this regard, by placing the onus on the party seeking to put questions (or call evidence) as to credit to show why the answers (or the evidence) will be of more than trivial help to the fact-finders in deciding whose version of events to believe.

12.100 We see some merit in this option, but we do not feel able to put it forward as a proposal because it appears to raise issues going beyond the subject-matter of this paper. We are here concerned only with the admissibility of evidence of a defendant's bad character, not with cross-examination in general. Option D is relevant for present purposes only in the case where a *defendant* makes gratuitous imputations, and the question is whether this should result in the admission of the defendant's bad character; and this case requires *only* the choice of an option from among the three already discussed. The wider issue of whether such imputations should be permitted at all is not one on which we feel it necessary to express an opinion.

Option E: a rule that the party calling a witness (except the defendant) must reveal any convictions which, in the opinion of the court, bear on the witness's credibility

12.101 This option would involve a rule that, where a witness has a conviction which is held by the court to be relevant to his or her credibility, that conviction should be revealed in the course of the witness's evidence in chief by the party calling the

[108] See Part VIII above, where we discuss why it may be justifiable for the defendant to have additional protection.

[109] See paras 7.7 – 7.15 above.

witness. It would apply to witnesses called by the prosecution and to witnesses called by the defence, other than the defendant.

12.102 Some convictions will be obviously relevant to credibility (for example, a recent conviction for perjury, or a conviction which reveals a bias against the accused),[110] and others will be obviously irrelevant (for example, a very stale conviction). Sometimes the relevance of the conviction will be debatable; in that case, either party could ask the court to rule on the relevance of the conviction, the onus being on the opposing party.

12.103 For example, a witness (for the prosecution or the defence) has a recent conviction for perjury. The party calling the witness may decide that it should clearly be disclosed, and the witness would then be asked to confirm the existence of the conviction in the course of his or her evidence in chief. If that party were not minded to disclose the conviction, the opposing party could seek to persuade the court that it was indeed relevant to the credibility of the witness's testimony, and if the court agreed, the party calling the witness would have to mention the conviction.

12.104 The rationale behind this option is that the credibility of a testifying witness is always in issue, as the court is being asked to accept his or her testimony as true; and, where that witness has a conviction which genuinely reflects on the likely truth of that testimony, the fact-finders should be made aware of it. There is no reason why the revelation of such probative information should depend on another party's decision to elicit it: the other party may have tactical reasons for choosing not to do so.[111]

Advantages

12.105 First, misconduct which is truly probative of a witness's credibility will not be hidden from the fact-finders for reasons which have nothing to do with its probative value.

12.106 Secondly, defendants will not be deterred from drawing the court's attention to convictions which reflect badly on the credibility of a prosecution witness.

12.107 Thirdly, there would be greater equality between prosecution and defence witnesses (other than the defendant). At present, a prosecution witness is protected in some degree from imputations, however probative and however true, where the defendant has a criminal record, because the defendant will lose the shield if the imputations are made. There is no equivalent protection for defence witnesses.

[110] For example, the defence may be that the complainant is lying in order to take revenge against the defendant, who was responsible for the complainant being prosecuted in earlier proceedings.

[111] For example, under the second limb of section 1(f)(ii) the accused who has a criminal record risks the revelation of that record if he or she brings out the existence of a prosecution witness's conviction.

12.108 As regards the defendant who does not testify, there would be no question of his or her losing the shield by casting imputations on a prosecution witness, because it would not fall to the defence to put the witness's convictions before the court.

Disadvantages

12.109 As magistrates rule on points of law and decide on the verdict, this option would, in some cases, lead to their hearing about convictions which they rule to be irrelevant. There is therefore a danger that they might rule that a conviction was irrelevant to a witness's credibility, but nevertheless be influenced by it. Worse still, an unscrupulous party might make an application for a conviction to be revealed in chief, knowing that the application was likely to fail but that the conviction might nevertheless make a prejudicial impression on the court.

12.110 These dangers can be over-estimated. If the magistrates have been expressly asked to decide whether a conviction is relevant and they decide that it is not, it may not be unreasonable to assume that they will succeed in putting it from their minds.

12.111 A second possible difficulty is that this option would extend the court's existing powers to intervene in the conduct of the defence. Although no party may adduce irrelevant evidence, defence advocates in particular are not generally required to set out the relevance of evidence or of a line of questioning before being allowed to proceed with it. A judge or magistrate may intervene if apparently irrelevant questions are being asked, but the defence will be given the benefit of any doubt. This option, by contrast, requires *any* party seeking to have evidence admitted, of a kind which the party could currently adduce, to justify its admission.

12.112 We wonder how convincing this objection is. Courts are required under the current law to admit evidence if it is relevant and to exclude it if it is irrelevant, and this option does not seek to change that. What it does seek to change is the way in which a conviction emerges in court.

12.113 A more serious impediment is the difficulty of specifying exactly how relevant to credibility the conviction needs to be. Different courts may have different ideas about what kinds of offence reveal something about the likely truthfulness of the witness,[112] and there is therefore a danger that what would be ruled irrelevant in one court would be found to be relevant in another.

12.114 Although deciding whether evidence is sufficiently relevant to be admitted is truly part of the court's function, it is impossible to legislate about what is or is not relevant. We fear that in practice the result of this option would be that courts would be asked to rule on the relevance of a conviction to a witness's credibility whenever a witness had a conviction. Not only would a great deal of court time be consumed in hearing such arguments, but there would inevitably be variations between the rulings of different courts.

[112] Some may think that *any* criminal record reflects on a person's credibility; others that only offences of "dishonesty" can be relevant; and others that the only relevant offences are those disclosing a propensity to lie on oath.

12.115 Our provisional view is that this option, like the previous one, raises issues going beyond the scope of this paper; but we would welcome views on it**.**

THE DIRECTION THAT THE BAD CHARACTER EVIDENCE IS RELEVANT ONLY TO THE DEFENDANT'S CREDIBILITY

12.116 Where the defendant has lost the shield by casting imputations against prosecution witnesses, and he or she does testify, the justification for admitting evidence of his or her bad character is that his or her credibility is in issue. It follows that only evidence of bad character which is relevant to credibility should be admitted, and that the fact-finders should be directed to treat the evidence as directly relevant only to credibility. In some situations, it may be difficult or impossible for the fact-finders not to treat the evidence as directly relevant to the question of guilt. **We therefore ask consultees to consider a further question: in these situations, is it still desirable for the fact-finders to be directed to treat the evidence as bearing only on the defendant's credibility, or is such a direction pointless?**[113]

PROVISIONAL PROPOSALS AND CONSULTATION ISSUES

12.117 **We provisionally propose**

(1) **Option 3 – that imputations should result in the loss of the shield only if they do not relate to the witness's conduct in the incident or investigation in question; and**

(2) **that, subject to (1) above, the shield should be lost not only if imputations are made against a prosecution *witness* but also if they are made against any person whose out-of-court statement is adduced by the prosecution under an exception to the rule against hearsay.**

12.118 **On the question whether evidence of a defendant's bad character should be admissible where the defendant does not testify, but makes imputations which would have resulted in the loss of the shield if he or she had testified, we put forward the following options:**

(A) **The evidence should be inadmissible in all cases.**

(B) **The evidence should be admissible in all cases.**

(C) **The evidence should be admissible if the nature of the defence is such as to put the defendant's credibility in issue.**

[113] Adrian Zuckerman writes "we need to develop a vocabulary for discussing the problem [sc of the incongruity between the consideration expected from the jury of good and bad character evidence]. The judge should explain in plain language the importance of confining one's consideration to judging the probative force of testimony and resisting the prejudice that might be created by the moral standing of a witness or an accused": *The Principles of Criminal Evidence* (1989) p 260.

(D) **It should not be permissible to make imputations against a witness unless, if true, they would *substantially* undermine the witness's credibility.**

(E) **The party calling a witness (except the defendant) should be required to reveal to the fact-finders any convictions which bear on the witness's credibility.**

However, our provisional view is that options D and E raise issues beyond the scope of this paper.

12.119 **We ask: where bad character evidence is admitted because the defendant has cast imputations, should the fact-finders invariably be directed to treat the evidence as relevant only to the defendant's credibility?**

The purpose of the second limb of section 1(f)(ii) 206

Credibility 209

Fairness 209

Deterrence 211

Defects in the present law 213

Over-reliance on judicial discretion 213

It is not clear what counts as an imputation 215

The overlap between the issue of guilt and credibility 215

Imputations by the non-testifying accused 216

Evidence may be admitted which is more prejudicial than probative 216

Evidence of bad character which *is* of probative value may never be adduced 217

The defendant may be deterred from testifying 217

The deterrent purpose of the provision is not served 218

No loss of shield where the defendant is shown in a good light 219

A temptation to fabricate 219

Options open to us 219

Option 1: no change 219

Option 2: limiting cross-examination of the accused about previous misconduct to cases where *unnecessary* imputations have been made 219

The CLRC 220

Advantages 223

Prejudicial evidence would not be admitted unless its probative value outweighed the potential prejudice 223

More relevant information would be made available to the court 223

Removal of the anomaly that evidence of bad character cannot be adduced if the defendant leaves it to the advocate to make the imputations 223

Removal of an inconsistency in the present law 224

Disadvantages 224

Option 3: the Australian solution: imputations should result in the loss of the shield only if they do not relate to the witness's conduct in the incident or investigation in question 224

Disadvantages 226

Imputations against the maker of a hearsay statement 227

The defendant who makes imputations against prosecution witnesses but does not testify ...227

Option A: the *Butterwasser* approach 228

Option B: evidence of the defendant's previous misconduct can be adduced whenever imputations are made against prosecution witnesses 229

Option C: allowing evidence of the defendant's previous misconduct to be adduced if the nature of the defence is such as to put the defendant's credibility in issue 229

Option D: allowing imputations to be made against a witness only where, if true, they would *substantially* undermine the witness's credibility.....230

Advantages.....230

Disadvantages 231

Option E: a rule that the party calling a witness (except the defendant) must reveal any convictions which, in the opinion of the court, bear on the witness's credibility.....231

Advantages.....232

Disadvantages 233

The direction that the bad character evidence is relevant only to the defendant's credibility 234

Provisional proposals and consultation issues.....234

PART XIII
THE 1898 ACT – THE PROBLEMS AND SOME SOLUTIONS (III): CROSS-EXAMINATION OF A CO-ACCUSED

13.1 Under section 1(f)(iii) of the 1898 Act, a defendant's character becomes admissible in cross-examination, even if it was not admissible in chief,[1] where "he has given evidence against any other person charged in the same proceedings".[2] In this Part we look at the rationale of section 1(f)(iii)[3] and consider the defects of the subsection. We then consider whether there should be any change in the law, conclude that there should, and canvass a number of options for reform. In this part we use D1 to refer to the defendant whose evidence is considered to be an attack on a co-accused, and D2 to refer to the co-accused who is attacked or implicated by the evidence of D1. The numbers do *not* refer to the order in which the two defendants give evidence. For convenience, D1 is assumed to be male, and D2 female.

THE RATIONALE OF SECTION 1(f)(iii)

13.2 As we have said,[4] the justification for the loss of the shield under section 1(f)(iii) is that a defendant who is attacked or implicated by another ought to be free to show that the testimony of that other person is not to be given much weight – not just because he is trying to foist the guilt on to someone else, but also because he is of bad character.[5] The fact-finders are here inevitably involved in a *comparative* assessment of truthfulness; they have to decide whether to believe D1's account, D2's account, or neither. One might expect fact-finders to treat D1's evidence with considerable caution where he implicates D2, because the motive for doing so is obvious.

13.3 The extent to which the attacking evidence of D1 is further undermined by the knowledge that he already has a criminal record no doubt varies with the circumstances of each case.

13.4 The points we have made with reference to the other provisions of section 1(f) apply here too: bad character evidence generally may be of less use in assessing a witness's truthfulness than has hitherto been assumed;[6] and the bad character

[1] For the importance of distinguishing between the admissibility of bad character evidence in chief and the circumstances in which it may subsequently *become* admissible, see paras 9.61 – 9.65 and 9.72 – 9.73 above.

[2] The full text of the section is set out at Appendix A below.

[3] For an account of the present law see paras 4.59 – 4.79 above.

[4] See para 4.60 above.

[5] The purpose of cross-examination is to allow an accused person "to discredit someone who has given evidence against him": *Murdoch v Taylor* [1965] AC 574, 585D, *per* Lord Morris of Borth-y-Gest.

[6] See paras 6.30 – 6.34 above.

evidence that will be treated as most relevant to a defendant's truthfulness will be that which shows a *disposition* to behave in the manner now alleged.[7]

DEFECTS IN THE PRESENT LAW

Unfairness may result because there is no judicial discretion

13.5 The principal criticism of the present law is that unfairness may result because of the House of Lords' decision in *Murdoch v Taylor*[8] that the court has no discretion to prevent the loss of the shield where D1 gives evidence against D2. Lord Pearce, in his dissenting speech in *Murdoch v Taylor*,[9] gave two examples of situations calling for the exercise of a judicial discretion.

> The first is where [D2's] counsel has deliberately led [D1] into the trap, or has for the purpose of bringing in his bad record, put questions to him in cross-examination which will compel him for the sake of his own innocence, to give answers that will clash with the story of the other defendant, or compel him to bring to the forefront implications which would otherwise have been unnoticed or immaterial. The second type of situation is where the clash between the two stories is both inevitable and trivial, and yet the damage by the introduction of a bad record (perhaps many years previous) will in the circumstances be unfairly prejudicial.[10]

13.6 Ian Dennis suggests[11] that there is another situation which calls for a discretion to be available: an example occurred in *Varley*.[12] D2 is the first to testify, and inculpates D1. D1 faces a dilemma. If he remains silent, he may appear to have no answer to the allegation, and the jury may be invited to draw appropriate inferences from his silence.[13] If he testifies, he will have to contradict D2's evidence, thus giving evidence against her and losing the shield.[14]

13.7 "It is difficult to shake off the impression that the House of Lords, by opting for an inflexible rule under section 1(f)(iii), has promoted fairness to the co-accused at the expense of fairness for the accused quite unnecessarily."[15] The reason for this inflexibility appears to be the view that nothing should be done to impede a

[7] See paras 6.80 – 6.84 above.

[8] *Murdoch v Taylor* [1965] AC 574: see para 4.61 above.

[9] [1965] AC 574, 587E–F.

[10] Lord Pearce's dicta are endorsed by I H Dennis: this is "a situation requiring the exercise of the familiar discretion to exclude evidence the prejudicial effect of which outweighs its probative value": I H Dennis, "Evidence Against a Co-Accused" (1983) 36 CLP 177, 182.

[11] I H Dennis, "Evidence Against a Co-Accused" (1983) 36 CLP 177, 183.

[12] *Varley* [1982] 2 All ER 519.

[13] Criminal Justice and Public Order Act 1994, s 35(3), the full text of which is set out at Appendix A below.

[14] The problem becomes more acute when D2 has few or trivial convictions compared with D1. In such a case, D2 "has everything to gain and very little to lose by incriminating [D1] up to the hilt and making the trap as tight as possible": I H Dennis, "Evidence Against a Co-Accused" (1983) 36 CLP 177, 183.

[15] R Pattenden, *Judicial Discretion in Criminal Litigation* (1990) p 259.

defendant in the conduct of his or her defence.[16] Lord Donovan explained this in *Murdoch v Taylor*:

> [The accused] seeks to defend himself; to say to the jury that the man who is giving evidence against him is unworthy of belief; and to support that assertion by proof of bad character. The right to do this cannot, in my opinion, be fettered in any way.[17]

An alternative explanation could be that judges must not be seen to pick and choose between co-accused, since the "fairness" they show to one may produce an appearance of unfairness to another.[18]

13.8 The CLRC accepted that section 1(f)(iii) had not proved as difficult to apply as section 1(f)(ii).[19] The majority of the CLRC wished to see the rule in *Murdoch v Taylor* retained, because of the grievance that would be felt by D2 if prevented from adducing evidence of the previous misconduct of D1 who has given evidence against her. The potential prejudice to D1 was considered to be a lesser evil.

13.9 We disagree, because the undiscriminating nature of section 1(f)(iii) prevents any consideration by the court of whether the rationale of the provision *justifies* the admission of an accused's criminal record, in whole or in part. The rationale, according to Lord Donovan, relies on D2 showing, *by reference to D1's criminal record*, that D1 is not to be believed. Yet D1's record may shed little or no light on whether he is worthy of belief generally, or in relation to the particular evidence given against D2. In any event, it is inevitable that fact-finders will assess one defendant's credibility in the light of what is known about the other's. They will also be particularly likely to employ the "forbidden reasoning", and to confuse guilt with credibility; yet there is no scope for the court to protect a defendant where the probative value of the record is small, but its prejudicial effect is likely to be great.[20]

It is impossible to keep the evaluation of a defendant's guilt separate from the evaluation of his or her truthfulness

13.10 We have previously commented[21] on the difficulty of distinguishing credibility from propensity. This must be particularly acute where a comparative assessment is being made of the truthfulness of two accused people. Fact-finders will inevitably reach a view on who is more likely to have committed the offence when deciding

[16] Authority for this notion can be found in *Lavery and King (No 3)* [1992] VR 939, 947, *per* Winneke CJ: "it is fundamental to the administration of criminal justice that a person accused must be completely free to meet the charge against him by all legitimate and relevant means".

[17] *Murdoch v Taylor* [1965] AC 574, 593E.

[18] R Munday, "The Wilder Permutations of s 1(f) of the Criminal Evidence Act 1898" (1987) 7 LS 137, 144.

[19] Evidence Report, paras 121 and 132.

[20] The Oxford Report suggests that evidence of a defendant's previous conviction can be very prejudicial if it is either for an offence similar to the one charged, or for an offence that the jurors find repugnant, such as an indecent assault on a child.

[21] See paras 6.80 – 6.84 above.

which defendant's version of events to believe. Significantly, it is not necessarily fatal to a conviction that a trial judge fails to explain the limited purpose of the record to a jury, again no doubt because of the difficulty of distinguishing between the various purposes of cross-examination as to character in the case of a defendant.[22]

The court may be misled

13.11 A problem can arise where one defendant (D2) gives evidence, but this does not amount to "evidence against" D1, so D2's record does not go in. D1 then gives evidence against D2, and D1's record is admitted. Yet D2's record may be worse than D1's, and a jury or magistrates will be left with a misleading picture about the relative creditworthiness of the two accused, leading to unfairness to D1. This may happen irrespective of the order in which the two defendants give evidence.[23] For example, the second defendant to give evidence may do so without implicating the one who has already given evidence (and been cross-examined on his character), thus retaining the shield.[24] In both situations the result is that the jury or magistrates only hear about one defendant's character when the other's is as bad or worse. Option 4 below[25] is an attempt to address this problem.

Technical problems caused by the drafting of section 1(f)(iii)

13.12 A more technical criticism of section 1(f)(iii) is that it would seem to permit D3 to cross-examine D1 who has given evidence against D2. It is strongly arguable that this runs contrary to the intended purpose of this provision, namely to enable a co-accused "to discredit someone who has *given evidence against him*".[26]

13.13 By the same token, it is uncertain why the *prosecution* is apparently entitled (if discretion is exercised in its favour) to cross-examine D1 on his previous convictions where he has given evidence against a co-accused.[27] This appears to be an unjustified bonus for the prosecution, as the strength of its case is not brought into issue by the attack.

[22] *Hoggins* [1967] 1 WLR 1233.

[23] The order in which the two accused give evidence depends, in the Crown Court, on the order in which they are named in the indictment. *Stone's Justices' Manual* (1996) suggests that, in the absence of agreement, the defendants should proceed in the order in which they appear on the court register: para 2-61.

[24] Consider also the situation postulated by *Cross and Tapper*, p 447, in which two people charged in the same proceedings each give evidence against the other, but they both have criminal records and neither invokes s 1(f)(iii).

[25] Paras 13.25 – 13.27 below.

[26] *Murdoch v Taylor* [1965] AC 574, 585D, *per* Lord Morris of Borth-y-Gest (emphasis added).

[27] In *Seigley* (1911) 6 Cr App R 106 the Court of Appeal expressed the view that the prosecution may cross-examine under s 1(f)(iii), subject to the discretion of the judge to prohibit such a course. However, in *Matsuevich* (1977) 137 CLR 633 the High Court of Australia held that the prosecution had no power to cross-examine under an identically worded proviso.

13.14 The rule does not come into play if D1's *advocate* suggests to D2 (or to any witness) that D2 or D3 is guilty. Where this occurs, D1's credibility is traditionally said not to be in issue, because he has not testified. However, his *defence* may be such as to raise the issue of his truthfulness,[28] and if this is the case, it is difficult to see why this should be different from the case where he gives evidence.

13.15 In *Murdoch v Taylor* Lord Donovan defined evidence "against" a co-accused as "evidence which supports the prosecution's case in a material respect or which undermines the defence of the co-accused".[29] We noted above[30] that *Bruce* qualified this, holding that evidence is given "against" a co-accused "if and only if [it] makes his acquittal less likely",[31] and so, where D1's evidence provides D2 with a *better* defence, the shield is not lost. This interpretation is rather odd, as it might be thought that the mere fact of defendants giving mutually inconsistent evidence will inevitably tell against both of them.

Defendants may be inhibited from testifying

13.16 A more general objection might be along the lines of an argument which applies also to the second limb of section 1(f)(ii):[32] where D1's defence cannot be put forward *without* giving evidence "against" D2, it is at least arguable that it is inappropriate to penalise him for what is unavoidable, and it is unwise to deter him from testifying.

The rationale of section 1(f)(iii) is not coherent

13.17 As in the case of all evidence admitted under section 1(f)(ii) and (iii) of the 1898 Act, it is curious that evidence which is too prejudicial to be admissible in chief suddenly becomes admissible merely because one defendant has implicated another. One justification for this exception is the theory that, by giving evidence against D2, D1 puts himself in the position of a witness for the prosecution so far as D2 is concerned.[33] But this analogy has been said to be unconvincing, because a witness for the prosecution is not on trial and is therefore not in danger when his or her criminal record is brought up.[34]

OPTIONS OPEN TO US

Option 1: no change

13.18 It can be seen from all the defects set out in the preceding paragraphs that the law is not satisfactory as it stands. We are particularly concerned about the lack of any discretion to temper the effect of the rule where it might otherwise lead to

[28] See paras 6.43 – 6.44 above.

[29] *Murdoch v Taylor* [1965] AC 574, 592D.

[30] See para 4.69 above.

[31] *Bruce* [1975] 1 WLR 1252, 1259A, *per* Stephenson LJ.

[32] See paras 12.40 – 12.42 above.

[33] The CLRC adopted this view: Evidence Report, para 132.

[34] I H Dennis, "Evidence Against a Co-Accused" (1983) CLP 177, 184.

injustice.[35] We are also mindful of our duty to have a view to the simplification and modernisation of the law.[36] For these reasons **our provisional view is that this option should be rejected**.

Option 2: making the right to cross-examine a co-accused under section 1(f)(iii) wholly dependent on an unstructured judicial discretion

13.19 This would overcome the problems set out in paragraphs 13.5 – 13.9 above. However, this throws us back on the fundamental question of whether judicial discretion is desirable, which we discussed at paragraphs 9.46 – 9.50 above. In brief, the main advantage of judicial discretion is that it enables a judge or magistrate to produce a just result in the individual case.

13.20 The main disadvantages are that it would not be possible to know in advance whether D1's record is likely to go in if he implicates D2; it is inevitable that a discretion would be exercised differently by different judges and magistrates;[37] and there is very limited scope for a decision to be changed on appeal by the defence, and practically none for the prosecution. A particular problem arises in cases heard by magistrates, as they will normally have to hear of the defendant's convictions in order to decide whether to exercise their discretion to admit them. It would thus be much more difficult for a defendant to prepare his case, because there would be no way of knowing in advance whether the court would admit a particular conviction if he blamed a co-accused.[38] In sum, uncertainty as to the admissibility of previous convictions would mean that the prosecution could not confidently assess the prospects of conviction in deciding whether to prosecute, while those acting for defendants could not confidently advise on their plea or on the conduct of their defence.

13.21 A further difficulty with this option might be that, although it is uncertain how such a discretion would be exercised, it is possible that some judges steeped in the present law would in fact exercise it so that the same results are produced as under the present law. In that case, option 2 would have little advantage over option 1.

13.22 Our provisional view is that these are valid concerns, especially as our starting point is that the law should be as certain as possible. **We therefore provisionally conclude that leaving the whole issue to an unstructured discretion is to be avoided** because of the uncertainty it would inject into this area of the law.

[35] We do not agree with the CLRC that the potential prejudice caused to D1 by the examination of his record is a lesser evil than the grievance D2 would feel if D1 gave evidence against D2 and D1's character could not go in: see para 13.9 above.

[36] Law Commissions Act 1965, s 3(1).

[37] And this will be so whether the discretion is structured or unstructured, though less so in the former case. In Evidence in Criminal Proceedings: Hearsay and Related Topics (1995) Consultation Paper No 138, paras 4.44 – 4.62, we noted that the discretions available under ss 25–26 of the Criminal Justice Act 1988 were not exercised consistently across different cases. At paras 9.6 – 9.25 of that paper we discussed the general advantages and disadvantages of judicial discretion.

[38] A similar point was made in the CLRC's Evidence report, at para 246, in dealing with hearsay.

Option 3: repealing section 1(f)(iii), so that it would make no difference if one accused attacks another

13.23 Under this option, a defendant's character would not become admissible if he gave evidence against a co-accused. Both shields would remain intact.

13.24 The difficulty with this option is that it goes against the traditional approach that a defendant should be able to defend herself by pointing to the lack of creditworthiness of the individual who has incriminated her.[39] This option would mean that there could be no cases in which the fact-finders could be assisted on the credibility of D1 (who may have many convictions for perjury) where D1 has accused D2 of manufacturing evidence against him. We do not believe this to be desirable. Moreover, if this option were adopted, there would be nothing to restrain one defendant from launching into a vicious but unwarranted attack on another. **We provisionally reject this option.**

Option 4: where one defendant attacks another, *both* should lose their shields

13.25 As we have pointed out,[40] where one defendant's record emerges but the other's does not, the jury or magistrates may be left with a misleading picture of their relative credibility. This option would avoid this situation by providing that *both* defendants' records should be admitted once one has given evidence against the other.

13.26 This option would incorporate the proviso that if D3 or the prosecution sought to take advantage of the situation by adducing the records of D1 and D2, they would have to obtain the leave of the court, and there would be a presumption against the granting of leave. It would be granted only where the probative value of the existence and nature of the previous convictions exceeded their prejudicial effect.

13.27 The advantage of this option is that it would leave no room for the exercise of any judicial discretion. The disadvantage is that it would allow the accused with the better record to ensure that both defendants' records go in.[41] **We provisionally reject this option.**

Hybrid approaches

13.28 We have previously identified the unfairnesses that may currently result from the lack of any discretion to mitigate the fixed rule.[42] We would also be unhappy about giving the court an *unfettered* discretion. None of the options considered so far appears to us to be acceptable. We must therefore consider hybrid approaches,

[39] See the words of Lord Donovan cited at para 13.8 above.

[40] See para 13.11 above.

[41] This would arise as follows. D2, who has a minor record of stale convictions, gives evidence against D1. D1, who has a deplorable record, does not cross-examine D2 on her record because (under this option) to do so would mean that his own record would go in. However, as soon as he gives evidence (as long as it amounts to evidence "against" D2), D2 will be able to cross-examine D1 on his record, unworried by the fact that both records will be admitted.

[42] See paras 13.5 – 13.9 above.

involving a presumption with limited scope for the exercise of a structured discretion. We now put forward two options along these lines, the first involving an exclusionary discretion and the second an inclusionary discretion. The difference between them is the direction of the presumption.

Option 5: a presumption that, where D1 attacks D2, the fact-finders should be allowed to hear evidence of D1's character, coupled with a discretion to exclude it

13.29 This option starts by accepting that the general rule should be that a defendant should be entitled to discredit someone who has given evidence against her. Accordingly, this option starts with the presumption that if D2 is attacked by D1, who is charged in the same proceedings, D2 should be able to reveal D1's previous convictions: the fact-finders would thus be able to consider D1's character in deciding which of the two to believe.

13.30 We are, however, concerned that, where the conflict between the two stories is both inevitable and trivial, the damage caused by the introduction of a bad record might be unfairly prejudicial and totally disproportionate. In those circumstances we believe that the basic rule should be subject to the exception, familiar in criminal proceedings, that a judge or magistrate should have the discretion to exclude evidence of previous convictions whose likely prejudicial effect outweighs its probative value.

13.31 We readily accept that there are other cases in which it would not be appropriate for D1's record to be brought out. For example, at present, evidence "against" a co-accused means evidence which supports the prosecution case in a material respect or which undermines the defence of a co-accused.[43] The latter alternative might catch a case where D1 gives evidence of a peripheral matter which nevertheless reflects on D2's credibility. We would therefore suggest that in exercising the discretion the court should take into account the nature, relevance and impact of the particular attack made.

13.32 As we have pointed out,[44] it may be that D1's defence could hardly be put forward without undermining that of D2. We therefore suggest that the court should also take into account the degree to which it is unavoidable for D1 to undermine D2's defence.

13.33 As the character evidence goes to D1's credibility as a witness, an additional factor should be the *nature* of the misconduct it reveals. It is possible to imagine circumstances where that misconduct, whether or not resulting in a conviction, would be simply irrelevant to credibility.

13.34 To summarise, in deciding whether to grant leave a court would have regard, among any other relevant considerations, to the degree to which the co-accused's defence has been undermined; how unavoidable it is for the defendant to undermine the co-accused's defence; the nature, number and age of the matters of bad character which it is sought to adduce; and the relative characters of all the

[43] *Murdoch v Taylor* [1965] AC 574, 592D, *per* Lord Donovan.

[44] See para 13.16 above.

accused as they would appear to the fact-finders if the evidence of bad character were allowed.

13.35 A difficulty with this option is that it would require magistrates to look at the character evidence in order to assess whether it was fair to admit it. They would not only make the ruling about the admissibility of the character evidence, but also give the verdict. Even if their verdict was not improperly influenced by the character evidence disclosed to them, the defendant might think that it had been, and so feel that the trial had not been fair.

13.36 Under this option there would be a significant difference between the position of the defendant attacked and any other party to the proceedings, whether the prosecutor or another defendant. The defendant attacked has a much stronger claim to be able to cross-examine the person who has given evidence against her than a party who has not been attacked, because her credibility has been undermined. We therefore believe that any presumption of admissibility should be reversed where the party seeking to adduce the defendant's record is not the party who has been attacked. We do not favour an absolute prohibition against the record going in on application by the prosecution, or by a defendant whose defence has not been undermined, because there might well be some circumstances in which this is justified. For example, although D1 overtly attacks D2, an obvious inference might be that D3 was guilty, in which case there is an implied attack on D3.

13.37 **We provisionally reject this option.**

Option 6: a presumption *against* the loss of the shield, coupled with a discretion to *admit* evidence of D1's character

13.38 Under this option, there would be a presumption *against* the admission of D1's character where he gave evidence against D2, but the court could grant leave for the character evidence to be admitted if its probative value, in relation to the actual issues in the trial, outweighed its likely prejudicial effect. A presumption against the admission of D1's record in these circumstances could be justified on the basis that where one accused implicates another, it will usually be a necessary part of his own defence.[45] However, there could be cases where D1's convictions genuinely and directly shed light on the evidence he gives undermining D2's defence,[46] and where this is so, the discretion could be exercised in D2's favour.

[45] At paras 12.50 – 12.70 above, with reference to the second limb of s 1(f)(ii), we considered the option of providing that where the imputations are "necessary" the defendant should not lose the shield. If this option were adopted then a similar limitation on s 1(f)(iii) might be appropriate. Otherwise the situation could result in which D1, whose defence entails asserting both that a prosecution witness is lying and that the real culprit is D2, could be cross-examined as to his record by D2 but not by the prosecution. This could arise where one of the prosecution witnesses (W) is an alleged accomplice to the crime allegedly committed by D1 and D2, and W has pleaded guilty and "turned Queen's evidence". It would be just as much part of D1's defence that D2 is responsible as that W is giving false evidence, and it would therefore be illogical if D1 were protected from cross-examination on his record in the case of one assertion and not the other.

[46] For example, D1 and D2 are charged with causing grievous bodily harm to V in a revenge attack in the course of a feud between neighbours. D1 alone has previously been convicted

13.39 Our provisional view is that this option is the most attractive so far, because it puts the onus on the party seeking to adduce evidence of bad character to demonstrate its probative value in the particular circumstances of the case.

13.40 However, **we provisionally reject it in favour of the next option**, which is prompted by the same considerations as apply where the attack by a defendant is on a prosecution witness.

Option 7: evidence given by D1 of D2's conduct in the incident or investigation in question should not result in the loss of the shield; and where the shield *is* lost, the court should nevertheless have a discretion to prevent D1's bad character being revealed

13.41 Under this option, where D1 gives evidence against D2 and that evidence concerns the facts of the charge, D1's shield remains intact; where D1 gives evidence against D2 and that evidence does *not* concern the facts of the charge, D1's shield is lost, but there would be a structured judicial discretion to prevent D1 being cross-examined on his character.

13.42 The rationale of our preferred option in Part XII[47] is that, where the defence cross-examines a prosecution witness about his or her conduct in the incident that gave rise to the charge, the accused is doing no more than putting the defence and should not lose the shield. If, on the other hand, the defence chooses to take matters wider than that and puts the witness's character *generally* in issue, the accused's character should also go in.

13.43 If the equivalent rationale is applied to section 1(f)(iii) it follows that, where D1 gives evidence against D2, *and that evidence concerns only the incident that gave rise to the charge*, D1 should be permitted to give that evidence (or ask those questions in cross-examination) without penalty. If, on the other hand, D1 seeks to take matters outside the facts of the incident, and allude to *other* discreditable behaviour by D2, he is putting in D2's character in general, and D1's own character ought also to go in.

13.44 The additional discretion would be guided along the lines envisaged for the discretions in options 5 and 6. This additional discretion appears to be us to be needed to prevent injustice – for example, where D1 has raised the issue of D2's character only in a trivial way, and D1's record includes prejudicial convictions of little probative value.

13.45 On the one hand we are concerned that an accused person should be able to challenge the facts alleged against him or her without fear of penalty; on the other

of a similar assault on V. In her evidence, D2 asserts that the primary feud was between D1 and V and that she, D2, had only ever supported D1 in this feud, and relates how D1 had himself been a victim of an assault by V. D2's defence might be that it was more likely that D1 had been the prime mover, or that he had acted alone in the charged assault. In such a case, if the shield against D1's previous convictions being put in were absolute, with the effect that D2 was not allowed to introduce the fact that D1 had been convicted of a previous assault on V, the picture given to the court would be distorted to the detriment of D2.

[47] See paras 12.71 – 12.79 above.

hand, we understand the feeling that a defendant should not be prevented from pointing out the general character of the person giving evidence against him or her (whether a witness for the Crown or a co-accused). These two concerns may conflict where the person pointing the finger at the accused is a co-accused.

13.46 Our provisional view is that option 7 is right in giving priority to the former concern because we take the view that a person's "specific" credibility is more pertinent than his general or "moral" credibility.[48] It is therefore more important for one person to be able to challenge the facts alleged than for the other to be entitled to point to the accuser's general bad character. For these reasons, **we provisionally propose that, where a defendant, in the course of his or her evidence, or through his or her witness or representative, undermines the defence of a co-accused charged in the same proceedings,**

(1) **if the challenge to the co-accused's account concerns the co-accused's conduct in the incident in question or the investigation of it, the shield should not be lost; but**

(2) **if this is not the case, any party to the proceedings should be entitled to apply to the court for leave to adduce evidence of the defendant's character.**

13.47 There are two further issues to be decided: first, if the attack on D2 is made not in the course of D1's evidence, but by D1's advocate in cross-examination of D2, or by a witness called by D1, should that result in D2 being permitted to adduce evidence of D1's character? Secondly, where evidence of either defendant's character is admitted, is it to go merely to credibility, or may the fact-finders also consider it as directly relevant to the question of guilt?

ATTACKS ON A CO-ACCUSED BY A DEFENDANT WHO DOES NOT TESTIFY

13.48 Where one accused's defence is undermined by a co-accused, our provisional view is that the attack has a similar impact on the fact-finders whether it comes from the lips of the accused, or a witness called by the accused, or the accused's advocate, either in cross-examination or in the course of a speech. This consideration could be addressed by a further amendment to section 1(f)(iii) making D1's character admissible where D2's defence is undermined by the evidence of a witness called by D1, or by D1's representative, even if D1 does not testify.

13.49 The difficulty with this proposal is that, on the traditional understanding of "credibility", there would be no justification for bringing in D1's character in such circumstances. The rationale given for section 1(f)(iii) is, as we have seen,[49] that the attacked defendant is entitled to cast doubt on the truthfulness of the person attacking her; but if the attacking defendant does not testify, his truthfulness is said not to be in issue.

[48] See paras 6.47 – 6.49 above.

[49] See para 4.60 above.

13.50 As we suggest above,[50] it is arguable that a defendant's credibility may be put in issue by the nature of the defence, even though the defendant does not testify. Our provisional view is that the significant factor is the *effect* on the attacked defendant, and that D2's defence is no less undermined where D1's defence is apparent from what D1's witness or representative says than where D1 states it in evidence. **We provisionally propose that, where an application could have been made for leave to cross-examine a defendant about his or her previous misconduct on the ground that he or she has undermined the defence of a co-accused, but the defendant does not testify, any other party should be able to apply for leave to adduce evidence of the defendant's previous misconduct if the nature of the defence is such as to put the defendant's credibility in issue.**

RELEVANCE OF BAD CHARACTER TO GUILT AS WELL AS CREDIBILITY

13.51 We have referred many times to the difficulty a jury or magistrates face in keeping the questions of guilt and of credibility separate in their minds when the person whose credibility is in question is the accused. One of the reasons put forward for giving a defendant protection when he or she makes imputations against a prosecution witness is the difference in the relative situations of the witness and of the defendant: the witness's guilt is not in issue. This is evidently not the case where the person against whom imputations are being made is also on trial. In this situation both the credibility *and* the guilt of both accuser and accused are in issue. It must be particularly difficult to distinguish the question "Is D1 telling the truth when he says D2 did it?" from the question "Is D1 guilty?"

13.52 This points us tentatively towards a further possibility: when bad character evidence of D1 is admitted because he has given evidence against D2, the fact-finders could be permitted to use that character evidence on the issue of guilt as well as on the issue of credibility, and would be guided by the judge in assessing its probative value, as well as being warned about its potential for prejudice. For example, the judge could emphasise the importance of the other, non-character evidence in relation to the character evidence. In our view this would be more realistic than allowing D1's record to be admitted and then telling the jury that they are only to use it to decide how truthful D1 is, and not whether he is likely to have committed the offence.

13.53 **We therefore provisionally propose the abolition of the common law rule that, where evidence of an accused's bad character is admitted under section 1(f)(iii), it is directly relevant only to the accused's credibility.**

PROVISIONAL PROPOSALS

13.54 **We propose that, where a defendant, in the course of his or her evidence, or through his or her witness or representative, undermines the defence of a co-accused charged in the same proceedings,**

(1) if the challenge to the co-accused's account concerns the co-accused's conduct in the incident in question or the investigation of it, the shield should not be lost; but

[50] See paras 6.43 – 6.44 above.

(2) **if this is not the case, any party to the proceedings should be entitled to apply to the court for leave to adduce evidence of the defendant's character.**

13.55 **We propose that**

(1) where the party making the application for leave is the co-accused whose defence has been undermined, leave should be granted unless the court considers that it would be contrary to the interests of justice to grant leave;

(2) where the party making the application for leave is not the co-accused whose defence has been undermined, leave should not be granted unless the court considers that it would be in the interests of justice for leave to be granted; and

(3) in deciding whether to grant leave a court should have regard, amongst any other relevant considerations, to

(a) the degree to which the co-accused's defence has been undermined;

(b) how unavoidable it is for the defendant to undermine the co-accused's defence;

(c) the nature, number and age of the matters of bad character which it is sought to adduce; and

(d) the relative characters of all the accused as they would appear to the fact-finders if the evidence of bad character were allowed.

13.56 **We propose that, where an application could have been made for leave to cross-examine a defendant about his or her previous misconduct on the ground that he or she has undermined the defence of a co-accused, but the defendant does not testify, any other party should be able to apply for leave to adduce evidence of the defendant's previous misconduct if the nature of the defence is such as to put the defendant's own credibility in issue; and the criteria for determining the application should be the same as where the defendant does testify.**

13.57 **We propose the abolition of the common law rule that, where evidence of an accused's bad character is admitted under section 1(f)(iii), it is directly relevant only to the accused's credibility.**

The rationale of section 1(f)(iii) 236

Defects in the present law 237

Unfairness may result because there is no judicial discretion 237

It is impossible to keep the evaluation of a defendant's guilt separate from the evaluation of his or her truthfulness 238

The court may be misled 239

Technical problems caused by the drafting of section 1(f)(iii) 239

Defendants may be inhibited from testifying 240

The rationale of section 1(f)(iii) is not coherent 240

Options open to us 240

Option 1: no change 240

Option 2: making the right to cross-examine a co-accused under section 1(f)(iii) wholly dependent on an unstructured judicial discretion 241

Option 3: repealing section 1(f)(iii), so that it would make no difference if one accused attacks another 242

Option 4: where one defendant attacks another, *both* should lose their shields 242

Hybrid approaches 242

Option 5: a presumption that, where D1 attacks D2, the fact-finders should be allowed to hear evidence of D1's character, coupled with a discretion to exclude it 243

Option 6: a presumption *against* the loss of the shield, coupled with a discretion to *admit* evidence of D1's character 244

Option 7: evidence given by D1 of D2's conduct in the incident or investigation in question should not result in the loss of the shield; and where the shield *is* lost, the court should nevertheless have a discretion to prevent D1's bad character being revealed 245

Attacks on a co-accused by a defendant who does not testify 246

Relevance of bad character to guilt as well as credibility 247

Provisional proposals 247

PART XIV
SPECIAL CASES: OPTIONS FOR REFORM

14.1 In this Part we consider the special cases that we identified in Parts III and V above, where bad character evidence is either

(1) admissible by way of exception to the general rule that bad character evidence is inadmissible, or

(2) inadmissible although it might otherwise fall within an exception to that general rule.

SECTION 1(2) OF THE OFFICIAL SECRETS ACT 1911

14.2 In a prosecution under section 1 of the Official Secrets Act 1911, section 1(2) permits the Crown to adduce evidence of the defendant's character in order to show that his or her purpose was "a purpose prejudicial to the safety or interests of the State".[1]

14.3 **We invite views as to whether this provision should be repealed or amended.**

SECTION 27(3) OF THE THEFT ACT 1968

14.4 In certain cases where the charge is one of handling stolen goods, section 27(3) of the Theft Act 1968 permits the prosecution to adduce evidence in chief of criminal disposition in the form of evidence of prior possession of stolen goods (paragraph (a)) and previous convictions (paragraph (b)).[2]

Option 1: no change in the present law

14.5 The section has been widely criticised:[3] its width means that "in their perfectly proper concern for the liberty of the individual, the courts may have made something of a nonsense of the provision".[4] It also has numerous defects. In the first place, it relates not only to *previous* misconduct, but also to misconduct *after* the time of the alleged offence.[5] Second, paragraph (a) allows evidence to be given of an act of handling even though no charge has been brought. This is likely to lead to disputes as to whether the defendant *was* in possession of stolen goods on a previous occasion.

[1] See para 3.4 above.

[2] The current law on s 27(3) is set out at paras 3.8 – 3.22 above. The subsection is set out in Appendix A below.

[3] See, for example, R Munday, "Handling the Evidential Exception" [1988] Crim LR 345.

[4] A T H Smith, *Property Offences* (1994) para 30-64.

[5] See *Davies* [1972] Crim LR 431.

14.6 Paragraph (a) applies only if the goods were stolen not more than 12 months before the alleged handling: it is irrelevant when the alleged handler dealt with those goods. This leads to bizarre results.[6]

14.7 Another criticism of paragraph (a) is that it permits an inference of knowledge or belief that the goods in the present charge were stolen merely because the defendant has, within the specified period, been in possession of stolen goods, even though there is no allegation that the defendant knew or believed them to be stolen. Thus, an antique dealer charged with handling stolen goods could find herself faced with evidence that she had previously had stolen goods in her possession (albeit with no knowledge or belief that they were stolen), and this fact could then be used to suggest that she is guilty on the present charge.

14.8 Further, as we have said,[7] the fact-finders are given no details of an earlier transaction of which evidence is adduced under paragraph (a), and thus cannot gauge its relevance.

14.9 Finally, we have received complaints from prosecutors that it is almost impossible for them to be confident that the court will permit them to adduce evidence under this subsection. This, they say, makes it difficult for them to decide whether to institute a prosecution. Indeed, it appears to be uncommon for prosecutors to seek to invoke the subsection, possibly because it is thought unlikely that this course would be permitted.

14.10 **We provisionally reject this option.**

[6] J Parry, *Offences against Property* (1989) para 4.67, offers some illustrations:

> Let us assume in each case that the defendant is charged with receiving, in January 1989, a car which was stolen in October 1988.
>
> (1) In March 1988 he was found in possession of a van which had been stolen in February. His possession of the van is admissible evidence on the charge of receiving the car.
>
> (2) The van was not stolen until April 1989 and the defendant received it in May. His possession of the van in May is admissible on the charge of receiving the car in January.
>
> (3) The van was stolen in December 1987 but was not received by the defendant until September 1988. His possession of it is inadmissible, because the *theft* of the van took place more than twelve months before the alleged *receiving* of the car: it is immaterial that the car was *stolen* less than twelve months after the van was, and it is immaterial that the defendant did not *receive* the van until less than twelve months before receiving the car. If it were not clear exactly when he received the car, the prosecution might attempt to date the receiving as early as possible (eg November 1988) so as to bring the theft of the van within the critical period; but if the defendant denied having received the car within twelve months of the theft of the van, the prosecution would have to prove that he had.
>
> (4) In each of cases (1) to (3) above the defendant is charged with receiving the van as well as the car. His possession of the van is still admissible on the charge relating to the car in cases (1) and (2) and is still inadmissible in case (3). But in all three cases his possession of the car is admissible on the charge relating to the van.

[7] *Wood* [1987] 1 WLR 779; see para 3.11 above.

Option 2: evidence of previous convictions to be admissible where the accused admits the conduct alleged but denies criminal knowledge

14.11 This option was proposed by the CLRC in its Evidence Report,[8] and was adopted by the Royal Commission.[9] It has one striking advantage over option 1: it enables the prosecution to rely only on previous *convictions*, whereas paragraph (a) permits evidence of the mere fact that the defendant has had stolen goods in his or her possession, albeit without knowledge or belief that they were stolen.

14.12 However, we suspect that if this proposal were implemented, its effect could be easily avoided by disputing some other ingredient of the offence. For example, if it were disputed that the goods in question were stolen, it would not be possible to invoke the proposed rule as there would be an outstanding issue in the case other than knowledge. We have little doubt that this would seriously undermine the usefulness of this option, and **we provisionally reject it**.

Option 3: repeal section 27(3) and leave handling cases to be dealt with under the same rules as other cases

14.13 We have set out above the objections to section 27(3); the question is whether there should be *any* special rule for the admissibility of previous misconduct in handling cases. There are many other instances where the mental element of an offence may be difficult to prove, and previous misconduct might be of assistance – though this may be less of a problem now that inferences can be drawn from a defendant's failure to give evidence[10] – and we see no reason to single out one such offence for special treatment. Evidence of previous misconduct is not necessarily more probative, or less prejudicial, in the case of handling than in any other case. **Our provisional view is that this option should be adopted**.

CHILDREN UNDER 14

14.14 Under the presumption of doli incapax, a defendant aged under 14 must be proved to have known that his or her conduct was seriously wrong; and the prosecution may seek to prove this by adducing evidence of the defendant's previous misconduct.[11] As we have said,[12] we do not consider it appropriate for us to express a view in this paper on the desirability of retaining or abolishing the presumption, and we therefore consider how the problem can be tackled within the existing legal framework.

[8] Para 92; see paras 10.23 – 10.36 above.

[9] Report of the Royal Commission, ch 8 para 31, and Recommendation 192.

[10] Criminal Justice and Public Order Act 1994, s 35.

[11] The current law is set out at paras 3.23 – 3.29 above.

[12] See para 3.29 above.

14.15 There seem to be two possibilities:

(1) permitting the prosecution to adduce evidence of previous misconduct to rebut the presumption, even if such evidence would not otherwise be admissible; and

(2) preventing the prosecution from adducing such evidence to rebut the presumption if the evidence would not have been admissible against an adult.

14.16 The former course was disapproved by the Court of Appeal and the House of Lords in *C v DPP*;[13] the latter was the approach favoured by the House of Lords in the same case. We too prefer the second approach, as it does not seem fair that prejudicial evidence should be adduced against a child where it could not be adduced against an adult.

14.17 **We provisionally believe that the exclusionary rule should apply in respect of a child as in respect of an adult defendant, even if the prosecution proposes to adduce the bad character evidence merely to rebut the presumption of doli incapax.**

SECTION 16(2) OF THE CHILDREN AND YOUNG PERSONS ACT 1963[14]

14.18 We are not aware of any criticism of section 16(2) of the 1963 Act or of its effect in practice. **Thus, we make no proposal for any change to this provision.**

SPENT CONVICTIONS[15]

14.19 The Practice Direction[16] clearly provides useful guidance to trial judges on how to reduce "disclosure of spent convictions to a minimum [and secure] uniformity of approach".[17] Although it has been suggested that the Practice Direction appears to occupy a constitutionally anomalous position, as it apparently contradicts the provisions of section 7(2)(a) of the 1974 Act,[18] it would in our view be more accurate to say that the courts have accepted Parliament's implicit invitation to make procedural provision for the use of spent convictions in criminal proceedings; and we believe that the Practice Direction is an important adjunct to the 1974 Act. Significantly, the Court of Appeal in *Lawrence (Irvin)*[19] regarded it as being consistent with the intent and spirit of the Act.

[13] *C v DPP* [1995] 2 WLR 383.

[14] The current law on this provision is set out at paras 5.2 – 5.3 above.

[15] The current law on the admissibility of spent convictions is set out at paras 5.4 – 5.12 above.

[16] *Practice Direction (Crime: Spent Convictions)* [1975] 1 WLR 1065.

[17] *Ibid*, para 2, where it was pointed out that this was the intention behind the 1974 Act.

[18] This section is set out at Appendix A below.

[19] *Lawrence (Irvin)* [1995] Crim LR 815.

14.20 We therefore believe that the Practice Direction should continue to apply, although we recognise that there might be occasions when the exercise of discretion might have unfortunate results.[20]

14.21 Although we accept that (in the words of the Practice Direction) "It is not possible to give general directions which will govern all [the] different situations", in the light of our preference for "structured" discretion[21] we believe that it would be desirable for the court to continue to be given some guidance as to the factors that it should take into account in the exercise of its discretion. We do not, for example, believe that it would be helpful merely to state that it should exercise the discretion in "the interests of justice", as that is not sufficiently specific.

14.22 It would be possible for such guidance to continue to be given by the courts; but in the interests of simplicity and accessibility **our provisional view is that the Practice Direction should be enacted in statutory form**, especially as it requires the party adducing the conviction to seek the leave of the court, and requires the court to exercise its discretion judicially.

14.23 **We provisionally propose that in deciding whether to allow a party to refer to a "spent" conviction within the meaning of the 1974 Act, the court should take into account all factors relevant to the interests of all parties, including**

(a) the nature of the conviction and its relevance to any issue in the case;

(b) the length of time that has elapsed since the date of the conviction; and

(c) the age of the relevant witness at the time when the offence was committed.

ALLEGED MISCONDUCT WHICH HAS PREVIOUSLY RESULTED IN AN ACQUITTAL

14.24 **Our provisional view is that, save for those cases in which evidence of previous misconduct resulting in an acquittal can already be admitted, such evidence should continue to be inadmissible.**

[20] We share the concern of the Court of Appeal that the defendant in *Lawrence (Irvin)* [1995] Crim LR 815 was unable to refer to the spent conviction of a principal prosecution witness for perverting the course of justice. Such convictions, and possibly others for offences of dishonesty, would clearly have been relevant on the issue of the credibility of that prosecution witness; but we do not believe that there is any alternative but to continue to rely on a form of discretion, which should be considered in every case. Thus we believe that counsel should continue to have the duty to seek the leave of the court before referring to "spent" convictions.

[21] See paras 9.51 – 9.57 above.

Section 1(2) of the Official Secrets Act 1911 246

Section 27(3) of the Theft Act 1968 246

Option 1: no change in the present law 250

Option 2: evidence of previous convictions to be admissible where the accused admits the conduct alleged but denies criminal knowledge 252

Option 3: repeal section 27(3) and leave handling cases to be dealt with under the same rules as other cases 252

Children under 14 252

Section 16(2) of the Children and Young Persons Act 1963 253

Spent convictions 253

Alleged misconduct which has previously resulted in an acquittal 254

PART XV
SHOULD THE SAME RULES APPLY IN COURTS-MARTIAL AND PROFESSIONAL TRIBUNALS?

THE CURRENT POSITION

15.1 At present the rules on previous misconduct apply not only in magistrates' courts and the Crown Courts, but also in other courts and tribunals.[1]

Courts-martial

15.2 The most important of these are courts-martial, the disciplinary courts of the Armed Services. By virtue of section 99(1) of the Army Act 1955,[2] section 99(1) of the Air Force Act 1955, and regulation 73 of the Naval Courts-Martial Regulations the rules of evidence applicable in the armed forces are the same as those employed in ordinary English criminal proceedings.

Professional tribunals

15.3 Certain professional tribunals established by statute are also governed to a considerable extent by the rules of evidence in criminal proceedings. The regulatory bodies for doctors,[3] nurses, midwives and health visitors,[4] dentists[5] and opticians[6] (among others) have been created and are governed by statute, and the procedures followed by the professional conduct committees of these bodies are broadly similar to those followed in summary trials. These committees may not receive evidence of complaints which would not be admissible in ordinary criminal proceedings, unless the legal assessor serving on the committee is satisfied that the duty of the committee to make thorough and proper inquiries makes such receipt desirable.[7]

[1] There are no exclusionary rules of evidence applicable to proceedings in coroners' courts (save for certain rules relating to documentary evidence pertaining to a matter which is under dispute) and so we do not propose to discuss here the admissibility of evidence of previous misconduct in inquests.

[2] Section 99(1) of the Army Act 1955 provides that "The rules as to the admissibility of evidence to be observed in proceedings before courts-martial shall … be the same as those observed in civil courts in England"; s 99(1) of the Air Force Act 1955 is in identical terms. The phrase "civil court" is defined in s 225(1) of the Army Act 1955, and in s 223(1) of the Air Force Act 1955, as "a court of ordinary criminal jurisdiction".

[3] The General Medical Council.

[4] The United Kingdom Central Council for Nursing, Midwifery, and Health Visiting.

[5] The General Dental Council.

[6] The General Optical Council.

[7] General Medical Council Proceedings Committee and Professional Conduct Committee (Procedure) Rules of Order of Council 1988 (SI 1988 No 2255) r 50(1); Nurses, Midwives and Health Visitors (Professional Conduct) Rules Approval Order 1987 (SI 1993 No 893) Sch, r 12; General Dental Council Professional Conduct Committee (Procedure) Rules

THE ISSUE

15.4 Parliament has decided that the criminal rules of evidence should apply in the above tribunals, and in courts-martial, as they would if an individual were being prosecuted in the ordinary criminal courts. We have not carried out any preliminary consultation on this issue but **our provisional view is that any reformed rules on the admissibility of evidence of previous misconduct should apply in places where the criminal rules of evidence currently apply, namely courts-martial and professional tribunals established by statute.** We invite comment from those of our readers who have experience of these courts and tribunals. If there are any features peculiar to those courts or tribunals which would make our provisional proposals inappropriate, then we should be interested to hear of them.

Order of Council 1984 (SI 1984 No 1517) r 26(2); General Optical Council (Disciplinary Committee) (Procedure) Order of Council 1985 (SI 1985 No 1580) r 14.

The current position 251

Courts-martial.....255

Professional tribunals.....255

The issue 256

PART XVI
SUMMARY OF PROVISIONAL CONCLUSIONS, PROPOSALS AND CONSULTATION ISSUES

In this paper we have raised a large number of questions on this complicated topic, and have formed a provisional view on many of them. We summarise here our provisional conclusions and proposals, and the other issues on which we seek respondents' views. More generally, **we invite comments on *any* of the matters contained in, or the issues raised by, this paper, and any other suggestions that consultees may wish to put forward. For the purpose of analysing the responses it would be very helpful if, as far as possible, they could refer to the numbering of the paragraphs in this summary.**

GUIDING PRINCIPLES

The probative value of bad character evidence

The relevance of previous misconduct to propensity

1. Our provisional view is that

   (1) past behaviour can be probative on the question whether the defendant is likely to have acted in the way alleged; but

   (2) the probative value of a single previous instance can be easily over-estimated; and

   (3) the psychological research supports the emphasis currently placed on the importance of close and unusual similarities between the past conduct and that now alleged.

   (paragraph 6.40)

The relevance of previous convictions to credibility

THE NATURE OF THE PREVIOUS CONVICTIONS

2. Our provisional view is that

   (1) the instances of previous misconduct most relevant to credibility are convictions for perjury;

   (2) convictions for dishonesty may be relevant in some circumstances;

   (3) behaviour not involving dishonesty is unlikely to be relevant to credibility;

   but we do not think it appropriate to prescribe in a statute which kinds of conviction are and are not probative.

   (paragraph 6.63)

THE SIGNIFICANCE OF A PREVIOUS PLEA OR VERDICT

3. Our provisional view is that

   (1) a previous plea of guilty will be irrelevant to the prosecution case in later proceedings;

   (2) a previous plea of guilty *may* be relevant to the defence case;

   (3) where the defendant previously pleaded not guilty, the fact that the defendant was convicted will not usually prove that he or she lied; but

   (4) where it *can* be inferred that the defendant has lied to a court on a previous occasion, that fact may be relevant to his or her credibility.

(paragraph 6.70)

THE SIGNIFICANCE OF SIMILAR UNUSUAL DEFENCES

4. Our provisional view is that where a defendant has previously put forward substantially the same, unusual defence, that fact may be relevant to his or her credibility.

(paragraph 6.73)

The distinction between guilt and credibility

5. Our provisional view is that

   (1) where the prosecution are permitted to cross-examine the defendant about previous misconduct because he or she has wrongly claimed to be of good character, the evidence of previous misconduct adduced is relevant to the defendant's guilt, and the fact-finders should be able to use it in this way;

   (2) where the defendant is cross-examined about previous misconduct as a result of making imputations against prosecution witnesses, it is difficult to know for certain whether the convictions go merely to credibility or point to guilt – it all depends on the circumstances; and

   (3) juries and magistrates are likely to use previous convictions not only on credibility (as they are supposed to) but as showing that the defendant committed the offence.

(paragraphs 6.77, 6.78, 6.84)

The prejudicial effect of bad character evidence

6. Our provisional conclusions are as follows.

   (1) If the jury or magistrates hear evidence of the accused's bad character, they may give too much weight to that evidence; they may also be inclined to convict without being sure that the defendant is in fact guilty as charged.

(2) We are uncertain whether juries adequately understand or carry out directions given to them by judges on the use they are to make of evidence of previous misconduct.

(3) There is a danger that unfairness to those with criminal records would be built into the criminal justice system if previous convictions were freely admitted: law enforcement officers might be tempted to rely on the previous misconduct of the defendant, rather than on a thorough investigation of the offence.

(4) In deciding on the admissibility of evidence of previous misconduct, the court should take into account the dangers that

(a) the focus of the trial might be diverted on to the previous misconduct, and away from the question of the defendant's guilt of the offence charged; and

(b) the court's time might be wasted hearing evidence which is of low probative value.

(5) Any system permitting the admission of previous misconduct evidence should contain safeguards against such evidence taking the defendant by surprise.

(6) There is no reason why a court cannot weigh probative value and prejudicial effect against one another, adequately and fairly.

(paragraphs 7.36 – 7.41)

Should the defendant be treated in the same way as other witnesses?

7. Our provisional view is that the vulnerable position of the defendant justifies

(1) the special dispensation afforded to the defendant to call evidence of his or her good character; and

(2) some measure of special protection from evidence of the defendant's bad character being put in by another party or elicited from the defendant.

(paragraph 8.20)

SOME OPTIONS WE REJECT

8. We provisionally reject the following options:

(1) allow the defendant's criminal record to be adduced at the start of every trial;

(paragraph 9.23)

(2) allow the defendant's criminal record to be adduced in sex cases;

(paragraph 9.38)

(3) allow evidence of the defendant's previous misconduct to be adduced *only* where it is an ingredient of the offence charged;

(paragraph 9.44)

(4) a single inclusionary rule with an exception for evidence whose likely prejudicial effect outweighs its probative value;

(paragraph 9.69)

(5) an exclusionary rule with a single exception for evidence whose probative value outweighs its likely prejudicial effect.

(paragraph 9.71)

OUR PREFERRED APPROACH

Judicial discretion

9. Our provisional view is that, where any of the options for reform advanced in this paper involves the exercise of discretion, it would be better to adopt a "structured" discretion than an "ordinary" discretion.

(paragraph 9.57)

An exclusionary rule with separate exceptions for evidence admissible in chief and for evidence subsequently becoming admissible

10. We provisionally propose the adoption of option 6 in Part IX, namely

(1) that there should be a single exclusionary rule; and

(2) that there should be two distinct categories of exception to this rule, namely

(a) a rule permitting, in certain circumstances, the admission *in chief* of evidence falling within the scope of the exclusionary rule, and

(b) further rules to the effect that evidence which falls within the scope of the exclusionary rule, and is not admissible under the first exception, may in certain circumstances *become* admissible in consequence of the course that the trial has taken.

(paragraph 9.73)

The scope of the exclusionary rule

11. We provisionally reject the following options for the formulation of our proposed exclusionary rule:

(A) applying the rule to any evidence that (or from which the fact-finders are likely to infer that) the defendant has committed a criminal offence, or done anything else that is likely to reflect adversely on the defendant in the

minds of the fact-finders, other than the commission of the offence charged;

(paragraph 9.76)

(B) applying the rule to any evidence from which, if it were admitted, the fact-finders would be invited to draw any of certain specified kinds of inference.

(paragraph 9.83)

12. We provisionally propose the adoption of option C in Part IX – that

(1) subject to the exceptions we propose below, evidence should be inadmissible if, in the opinion of the court, its admission would be prejudicial; and

(2) for the purpose of this rule, the admission of evidence should be regarded as prejudicial if there is a risk that

(a) the fact-finders might treat the evidence as being more probative of guilt than it really is, or

(b) it might lead them to convict the defendant without being satisfied that he or she is guilty as charged.

(paragraph 9.92)

Section 1(f)(i) of the 1898 Act

13. We do not propose that the new legislation should include a provision corresponding to section 1(f)(i) of the 1898 Act.

(paragraph 9.94)

ADDUCING BAD CHARACTER EVIDENCE IN CHIEF

14. Our provisional view is that the admissibility of bad character evidence in chief should depend upon the probative value of the evidence, and not on the purpose for which it is proposed to adduce it; and that the evidence should not, therefore, be inadmissible merely because it is relevant only to propensity, provided that it is sufficiently probative.

(paragraph 10.14)

The options

15. We provisionally reject the following options:

(1) no change in the existing law;

(paragraph 10.22)

(2) allowing evidence of an accused's previous convictions to be adduced where the conduct is admitted but there is an issue as to whether it was performed with any criminal knowledge or intent;

(paragraph 10.37)

(3) allowing bad character evidence to be adduced in chief if it tends to show a disposition to commit the kind of offence charged or a general disposition to commit offences;

(paragraph 10.46)

(4) the Australian common law test, namely whether there is any reasonable explanation for the similar fact evidence other than that the defendant is guilty;

(paragraph 10.59)

(5) the scheme of the Australian Evidence Act 1995.

(paragraph 10.70)

16. We provisionally favour option 6 in Part X, which would allow bad character evidence to be adduced if

(1) it is relevant to a specific fact in issue; and

(2) on the assumption that the evidence is true, the *degree* to which it is relevant to that fact (in other words, its probative value) outweighs the risk that, if admitted, it might

(a) result in prejudice;

(b) mislead, confuse or distract the fact-finders; or

(c) cause undue waste of time.

(paragraph 10.85)

17. We provisionally propose that the factors to be taken into account in balancing these considerations should be expressly set out, and should include

(1) in the case of the evidence's probative value,

(a) the extent (if any) to which the evidence tends to suggest that the defendant has a *propensity* to act in the manner alleged;

(b) any *similarities* between the facts revealed by the evidence and those now alleged;

(c) the extent to which any such similarities may reasonably be attributed to coincidence; and

(d) any *dis*similarities between the facts revealed by the evidence and those now alleged; and

(2) in the case of the evidence's likely prejudicial effect,

(a) the risk of the fact-finders attaching undue significance to the evidence in question in determining whether the defendant is guilty as charged; and

(b) the risk of their convicting the defendant on the basis of his or her conduct on some other occasion or occasions, rather than because they are satisfied that he or she is guilty as charged.

(paragraphs 10.79 – 10.80)

The cogency of the evidence: collusion and contamination

Initial admissibility

18. On the question of how the possibilities of collusion and contamination should be dealt with at the stage when it falls to be determined whether the evidence should be admitted, we invite views on the following options:

(A) the test in *H*, which involves *assuming*, at this stage, that the evidence is true;

(B) the judge determines the cogency of the evidence on the basis of the documents;

(C) the judge holds a voir dire.

Of these options, we provisionally reject B.

(paragraphs 10.94 – 10.98)

Evidence of collusion or contamination emerging after the admission of similar fact evidence

19. We provisionally propose that where a judge is satisfied, after hearing *all* the evidence, that a conviction would be unsafe because, in the light of the risk of contamination or collusion, the probative value of any evidence admitted is outweighed by its likely prejudicial effect and the risk that the jury may be misled, confused or distracted, the judge should discharge the jury and consider whether to order a retrial or to enter a verdict of not guilty.

(paragraph 10.105)

Joinder and severance

20. We ask whether the present rules in respect of joinder of charges are adequate, or whether the courts should sever charges where prejudicial evidence is not inter-admissible between different charges, especially in sex cases.

(paragraph 10.111)

Bad character evidence adduced by the defendant

21. Our provisional view is that the defendant should be free to adduce evidence of his or her own bad character.

(paragraph 10.114)

Bad character evidence adduced by a co-defendant

22. We ask for views on the question whether one defendant should be entitled to call or elicit evidence of previous misconduct by a co-accused, provided that it is relevant, or whether there should be some balancing of the evidence's probative value against its likely prejudicial effect.

(paragraph 10.118)

THE 1898 ACT

Assertions of good character

Relevance

23. We believe

(1) that it is unrealistic to distinguish between the use of previous convictions to rebut false claims of good character, and their use in assessing how truthful the rest of the defendant's testimony is likely to be; and

(2) that, in some cases, it may also be unrealistic to distinguish between using the evidence of bad character to assess the likelihood that the defendant is telling the truth, and the likelihood that he or she committed the offence.

(paragraph 11.12)

Judicial warnings

24. Our provisional view is that, since evidence of previous misconduct adduced to refute a false assertion of good character may in truth relate not only to credibility but also to propensity, judicial warnings that it relates only to credibility are of little, if any, use.

(paragraph 11.14)

The need for reform

25. Our provisional view is that change is needed.

(paragraph 11.22)

What should count as an assertion of good character?

IMPLIED ASSERTIONS

26. Our provisional view is that the statute should make it clear that an implied assertion of good character will result in the loss of the shield in circumstances where an express assertion would do so.

(paragraph 11.27)

NON-VERBAL ASSERTIONS

27. We provisionally propose that, where

    (1) in the opinion of the court, a defendant's conduct in the proceedings is intended to give the impression that he or she possesses a specific attribute, and

    (2) had the defendant expressly claimed to possess that attribute, he or she would have been regarded as implicitly asserting that he or she is of good character,

    the defendant should be regarded as so asserting, and should therefore lose the shield.

(paragraph 11.31)

Who must make the assertion?

28. We provisionally propose that the shield should be lost if the assertion of the defendant's good character is made

    (1) by the defendant in the course of his or her evidence in chief, or in re-examination;

    (2) by a witness for the defendant in the course of his or her evidence in chief, or in re-examination, unless it is made in response to a question which does not appear to the court to have been intended to elicit the assertion;

    (3) by the defendant or a witness for the defendant in cross-examination, unless it is a reasonable response to the question asked;

    (4) by a prosecution witness, a co-defendant or a witness for a co-defendant in cross-examination by or on behalf of the defendant, if it is made in response to a question which appears to the court to have been intended to elicit the assertion; or

    (5) in a hearsay statement adduced by or on behalf of the defendant.

(paragraph 11.39)

If the defence asserts good character in only one respect, what evidence can be adduced to refute that assertion?

29. We provisionally propose that the defendant should be open to cross-examination only on *that part* of his or her character or truthfulness about which an assertion of good character has been made.

(paragraph 11.42)

How should the bad character evidence admitted as a result be used?

30. We provisionally propose that where the assertion of good character, and the evidence adduced to rebut that assertion, are directly relevant to the accused's propensities, the fact-finders should not be directed to treat the evidence as bearing solely on the accused's credibility.

(paragraph 11.45)

The defendant who asserts good character but does not testify

31. We ask whether, if a defendant asserts good character but does not testify, the prosecution should nevertheless be able to adduce evidence of the defendant's bad character, otherwise than by cross-examining the witness who makes the assertion or adducing evidence in rebuttal of that witness's denial.

(paragraph 11.48)

Imputations against prosecution witnesses

The options

32. We provisionally reject the following options:

(1) no change to the existing law;

(paragraph 12.49)

(2) limiting cross-examination of the accused about previous misconduct to cases where *unnecessary* imputations have been made.

(paragraph 12.70)

33. We provisionally propose option 3, the Australian solution: that imputations should result in the loss of the shield only if they do not relate to the witness's conduct in the incident or investigation in question.

(paragraph 12.79)

Imputations against the maker of a hearsay statement

34. We provisionally propose that, where an imputation is made which would have resulted in the loss of the shield if it had been made against a prosecution witness, it should equally result in the loss of the shield if it is made against the maker of any statement adduced by the prosecution under an exception to the rule against hearsay.

(paragraph 12.80)

Imputations made by a defendant who does not testify

35. We put forward five options:

(A) the *Butterwasser* approach, namely that where the defendant attacks the prosecution witnesses, evidence reflecting on his or her own credibility can be adduced only if he or she gives evidence;

(B) the approach of the Royal Commission, namely that evidence of the defendant's previous misconduct can be adduced whenever imputations are made against prosecution witnesses;

(C) allowing evidence of the defendant's previous misconduct to be adduced if the nature of the defence is such as to put the defendant's credibility in issue;

(D) allowing imputations to be made against a witness only where, if true, they would *substantially* undermine the witness's credibility; and

(E) a rule that the party calling a witness (except the defendant) must reveal any convictions which, in the opinion of the court, bear on the witness's credibility.

However, our provisional view is that options D and E raise issues going beyond the scope of this paper.

(paragraphs 12.86 – 12.115)

The direction that the bad character evidence is relevant only to the defendant's credibility

36. We ask for views on whether, where evidence of previous misconduct is admitted because the defendant has cast imputations, the fact-finders should invariably be directed to treat it as relevant only to the defendant's credibility.

(paragraph 12.116)

Cross-examination of a co-accused

The options

37. We provisionally reject the following options:

(1) no change in the existing law;

(paragraph 13.18)

(2) making the right to cross-examine a co-accused under section 1(f)(iii) wholly dependent on an unstructured judicial discretion;

(paragraph 13.22)

(3) repealing section 1(f)(iii), so that it would make no difference if one accused attacks another;

(paragraph 13.24)

(4) a rule that, where one defendant attacks another, *both* lose their shields;

(paragraph 13.27)

(5) a presumption that, where one defendant attacks another, the fact-finders should be allowed to hear evidence of the first defendant's character, coupled with a discretion to exclude it;

(paragraph 13.37)

(6) a presumption *against* the loss of the shield, coupled with a discretion to *admit* evidence of the defendant's character.

(paragraph 13.40)

38. We provisionally propose option 7 in Part XIII – namely that, where a defendant, in the course of his or her evidence, or through his or her witness or representative, undermines the defence of a co-accused charged in the same proceedings,

(1) if the challenge to the co-accused's account concerns the co-accused's conduct in the incident in question or the investigation of it, the shield should not be lost; but

(2) if this is not the case, any party to the proceedings should be entitled to apply to the court for leave to adduce evidence of the defendant's character.

(paragraph 13.46)

39. We provisionally propose that

(1) where the party making the application for leave is the co-accused whose defence has been undermined, leave should be granted unless the court considers that it would be contrary to the interests of justice to grant leave;

(2) where the party making the application for leave is not the co-accused whose defence has been undermined, leave should not be granted unless the court considers that it would be in the interests of justice for leave to be granted; and

(3) in deciding whether to grant leave a court should have regard, amongst any other relevant considerations, to

(a) the degree to which the co-accused's defence has been undermined;

(b) how unavoidable it is for the defendant to undermine the co-accused's defence;

(c) the nature, number and age of the matters of bad character which it is sought to adduce; and

(d) the relative characters of all the accused as they would appear to the fact-finders if the evidence of bad character were allowed.

(paragraph 13.55)

Attacks on a co-accused by a defendant who does not testify

40. We provisionally propose that, where an application could have been made for leave to cross-examine a defendant about his or her previous misconduct on the ground that he or she has undermined the defence of a co-accused, but the defendant does not testify, any other party should be able to apply for leave to adduce evidence of the defendant's previous misconduct if the nature of the defence is such as to put the defendant's own credibility in issue; and the criteria for determining the application should be the same as where the defendant does testify.

(paragraph 13.50)

Relevance of bad character to guilt as well as credibility

41. We provisionally propose the abolition of the common law rule that, where evidence of an accused's bad character is admitted under section 1(f)(iii), it is directly relevant only to the accused's credibility.

(paragraph 13.53)

SPECIAL CASES

Section 1(2) of the Official Secrets Act 1911

42. We invite views as to whether section 1(2) of the Official Secrets Act 1911 should be repealed or amended.

(paragraph 14.3)

Section 27(3) of the Theft Act 1968

43. We provisionally reject the following options:

(1) no change in the present law;

(paragraph 14.10)

(2) making evidence of an accused's previous convictions admissible where he or she admits the conduct alleged but denies that it was performed with any criminal knowledge.

(paragraph 14.12)

44. We provisionally propose that section 27(3) of the Theft Act 1968 should be repealed, and that handling cases should be dealt with under the same rules as other cases.

(paragraph 14.13)

Children under 14

45. We believe that the exclusionary rule should apply in respect of a child as in respect of an adult defendant, even if the prosecution proposes to adduce the bad character evidence merely to rebut the presumption of doli incapax.

(paragraph 14.17)

Section 16(2) of the Children and Young Persons Act 1963

46. We make no proposal for any change to section 16(2) of the Children and Young Persons Act 1963.

(paragraph 14.18)

Spent convictions

47. Our provisional view is that the Practice Direction (Crime: Spent Convictions) should be enacted in statutory form.

(paragraph 14.22)

48. We provisionally propose that in deciding whether to allow a party to refer to a "spent" conviction within the meaning of the Rehabilitation of Offenders Act 1974, the court should take into account all factors relevant to the interests of all parties, including

(a) the nature of the conviction and its relevance to any issue in the case;

(b) the length of time that has elapsed since the date of the conviction; and

(c) the age of the relevant witness at the time when the offence was committed.

(paragraph 14.23)

Alleged misconduct which has previously resulted in an acquittal

49. Our provisional view is that, save for those cases in which evidence of previous misconduct resulting in an acquittal can already be admitted, such evidence should continue to be inadmissible.

(paragraph 14.24)

COURTS-MARTIAL AND PROFESSIONAL TRIBUNALS

50. Our provisional view is that any reformed rules on the admissibility of evidence of previous misconduct should apply in places where the criminal rules of evidence currently apply, namely courts-martial and professional tribunals established by statute.

(paragraph 15.4)

APPENDIX A
SOME RELEVANT PROVISIONS OF ENGLISH AND AUSTRALIAN LAW

ENGLAND AND WALES

CRIMINAL PROCEDURE ACT 1865

6. ***Proof of conviction of witness for felony or misdemeanor may be given***

A witness may be questioned as to whether he has been convicted of any felony or misdemeanor, and upon being so questioned, if he either denies or does not admit the fact, or refuses to answer, it shall be lawful for the cross-examining party to prove such conviction … .

CRIMINAL EVIDENCE ACT 1898

1. ***Competency of witnesses in criminal cases***

Every person charged with an offence shall be a competent witness for the defence at every stage of the proceedings, whether the person so charged is charged solely or jointly with any other person. Provided as follows: –

…

(e) A person charged and being a witness in pursuance of this Act may be asked any question in cross-examination notwithstanding that it would tend to criminate him as to the offence charged:

(f) A person charged and called as a witness in pursuance of this Act shall not be asked, and if asked shall not be required to answer, any question tending to show that he has committed or been convicted of or been charged with any offence other than that wherewith he is then charged, or is of bad character, unless –

(i) the proof that he has committed or been convicted of such other offence is admissible evidence to show that he is guilty of the offence wherewith he is then charged; or

(ii) he has personally or by his advocate asked questions of the witnesses for the prosecution with a view to establish his own good character, or has given evidence of his good character, or the nature or conduct of the defence is such as to involve imputations on the character of the prosecutor or the witnesses for the prosecution; or

(iii) he has given evidence against any other person charged in the same proceedings … .

OFFICIAL SECRETS ACT 1911

1. ***Penalties for spying***

(2) On a prosecution under this section, it shall not be necessary to show that the accused person was guilty of any particular act tending to show a purpose prejudicial to the safety or interests of the State, and, notwithstanding that no such act is proved against him, he may be convicted if, from the circumstances

of the case, or his conduct, or his known character as proved, it appears that his purpose was a purpose prejudicial to the safety or interests of the State … .

INDICTMENTS ACT 1915

5. *Orders for amendment of indictment, separate trial, and postponement of trial*

(3) Where, before trial, or at any stage of a trial, the court is of opinion that a person accused may be prejudiced or embarrassed in his defence by reason of being charged with more than one offence in the same indictment, or that for any other reason it is desirable to direct that the person should be tried separately for any one or more offences charged in an indictment, the court may order a separate trial of any count or counts of such indictment.

CHILDREN AND YOUNG PERSONS ACT 1963

16. *Offences committed by children*

(2) In any proceedings for an offence committed or alleged to have been committed by a person of or over the age of twenty-one, any offence of which he was found guilty while under the age of fourteen shall be disregarded for the purposes of any evidence relating to his previous convictions; and he shall not be asked, and if asked shall not be required to answer, any question relating to such an offence, notwithstanding that the question would otherwise be admissible under section 1 of the Criminal Evidence Act 1898.

THEFT ACT 1968

27. *Evidence and procedure on charge of theft or handling stolen goods*

(3) Where a person is being proceeded against for handling stolen goods (but not for any offence other than handling stolen goods), then at any stage of the proceedings, if evidence has been given of his having or arranging to have in his possession the goods the subject of the charge, or of his undertaking or assisting in, or arranging to undertake or assist in, their retention, removal, disposal or realisation, the following evidence shall be admissible for the purpose of proving that he knew or believed the goods to be stolen goods: –

(a) evidence that he has had in his possession, or has undertaken or assisted in the retention, removal, disposal or realisation of, stolen goods from any theft taking place not earlier than twelve months before the offence charged; and

(b) (provided that seven days' notice in writing has been given to him of the intention to prove the conviction) evidence that he has within the five years preceding the date of the offence charged been convicted of theft or of handling stolen goods.

REHABILITATION OF OFFENDERS ACT 1974

4. *Effect of rehabilitation*

(1) Subject to sections 7 and 8 below, a person who has become a rehabilitated person for the purposes of this Act in respect of a conviction shall be treated for all purposes in law as a person who has not committed or been charged with or prosecuted for or convicted of or sentenced for the offence or offences which were the subject of that conviction; and, notwithstanding the provisions

of any other enactment or rule of law to the contrary, but subject as aforesaid –

(a) no evidence shall be admissible in any proceedings before a judicial authority exercising its jurisdiction or functions in Great Britain to prove that any such person has committed or been charged with or prosecuted for or convicted of or sentenced for any offence which was the subject of a spent conviction; and

(b) a person shall not, in any such proceedings, be asked, and, if asked, shall not be required to answer, any question relating to his past which cannot be answered without acknowledging or referring to a spent conviction or spent convictions or any circumstances ancillary thereto.

7. ***Limitations on rehabilitation under this Act, etc***

(2) Nothing in section 4(1) above shall affect the determination of any issue, or prevent the admission or requirement of any evidence, relating to a person's previous convictions or to circumstances ancillary thereto –

(a) in any criminal proceedings before a court in Great Britain (including any appeal or reference in a criminal matter) … .

PRACTICE DIRECTION (CRIME: SPENT CONVICTIONS) [1975] 1 WLR 1065

1. The effect of section 4(1) of the Rehabilitation of Offenders Act 1974 is that a person who has become a rehabilitated person for the purpose of the Act in respect of a conviction (known as a "spent" conviction) shall be treated for all purposes in law as a person who has not committed or been charged with or prosecuted for or convicted of or sentenced for the offence or offences which were the subject of that conviction.

2. Section 4(1) of the Act of 1974 does not apply to evidence given in criminal proceedings: section 7(2)(a). Convictions are often disclosed in such criminal proceedings. When the Bill was before the House of Commons on June 28, 1974, the hope was expressed that the Lord Chief Justice would issue a practice direction for the guidance of the crown courts with a view to reducing disclosure of spent convictions to a minimum and securing uniformity of approach.

3. During the trial of a criminal charge reference to previous convictions, and therefore to spent convictions, can arise in a number of ways. The most common is when the character of the accused or a witness is sought to be attacked by reference to his criminal record, but there are, of course, cases where previous convictions are relevant and admissible as, for instance, to prove system.

4. It is not possible to give general directions which will govern all these different situations, but it is recommended that both court and counsel should give effect to the general intention of Parliament by never referring to a spent conviction when such reference can be reasonably avoided. If unnecessary references to spent convictions are eliminated much will have been achieved.

5. After a verdict of guilty the court must be provided with a statement of the defendant's record for the purposes of sentence. The record supplied should contain all previous convictions, but those which are spent should, so far as practicable, be marked as such.

6. No one should refer in open court to a spent conviction without the authority of the judge, which authority should not be given unless the interests of justice so require.

7. When passing sentence the judge should make no reference to a spent conviction unless it is necessary to do so for the purpose of explaining the sentence to be passed.

POLICE AND CRIMINAL EVIDENCE ACT 1984

73. ***Proof of convictions and acquittals***

(1) Where in any proceedings the fact that a person has in the United Kingdom been convicted or acquitted of an offence otherwise than by a Service court is admissible in evidence, it may be proved by producing a certificate of conviction or, as the case may be, of acquittal relating to that offence, and proving that the person named in the certificate as having been convicted or acquitted of the offence is the person whose conviction or acquittal of the offence is to be proved.

(2) For the purposes of this section a certificate of conviction or of acquittal –

(a) shall, as regards a conviction or acquittal on indictment, consist of a certificate, signed by the clerk of the court where the conviction or acquittal took place, giving the substance and effect (omitting the formal parts) of the indictment and of the conviction or acquittal; and

(b) shall, as regards a conviction or acquittal on a summary trial, consist of a copy of the conviction or of the dismissal of the information, signed by the clerk of the court where the conviction or acquittal took place or by the clerk of the court, if any, to which a memorandum of the conviction or acquittal was sent;

and a document purporting to be a duly signed certificate of conviction or acquittal under this section shall be taken to be such a certificate unless the contrary is proved.

(3) References in this section to the clerk of a court include references to his deputy and to any other person having the custody of the court record.

(4) The method of proving a conviction or acquittal authorised by this section shall be in addition to and not to the exclusion of any other authorised manner of proving a conviction or acquittal.

78. ***Exclusion of unfair evidence***

(1) In any proceedings the court may refuse to allow evidence on which the prosecution proposes to rely to be given if it appears to the court that, having regard to all the circumstances, including the circumstances in which the evidence was obtained, the admission of the evidence would have such an adverse effect on the fairness of the proceedings that the court ought not to admit it.

(2) Nothing in this section shall prejudice any rule of law requiring a court to exclude evidence.

CRIMINAL JUSTICE AND PUBLIC ORDER ACT 1994

34. *Effect of accused's failure to mention facts when questioned or charged*

(1) Where, in any proceedings against a person for an offence, evidence is given that the accused –

(a) at any time before he was charged with the offence, on being questioned under caution by a constable trying to discover whether or by whom the offence had been committed, failed to mention any fact relied on in his defence in those proceedings; or

(b) on being charged with the offence or officially informed that he might be prosecuted for it, failed to mention any such fact,

being a fact which in the circumstances existing at the time the accused could reasonably have been expected to mention when so questioned, charged or informed, as the case may be, subsection (2) below applies.

(2) Where this subsection applies –

(a) a magistrates' court, in deciding whether to grant an application for dismissal made by the accused under section 6 of the Magistrates' Courts Act 1980 (application for dismissal of charge in course of proceedings with a view to transfer for trial);

(b) a judge, in deciding whether to grant an application made by the accused under –

(i) section 6 of the Criminal Justice Act 1987 (application for dismissal of charge of serious fraud in respect of which notice of transfer has been given under section 4 of that Act); or

(ii) paragraph 5 of Schedule 6 to the Criminal Justice Act 1991 (application for dismissal of charge of violent or sexual offence involving child in respect of which notice of transfer has been given under section 53 of that Act);

(c) the court, in determining whether there is a case to answer; and

(d) the court or jury, in determining whether the accused is guilty of the offence charged,

may draw such inferences from the failure as appear proper.

(3) Subject to any directions by the court, evidence tending to establish the failure may be given before or after evidence tending to establish the fact which the accused is alleged to have failed to mention.

(4) This section applies in relation to questioning by persons (other than constables) charged with the duty of investigating offences or charging offenders as it applies in relation to questioning by constables; and in subsection (1) above "officially informed" means informed by a constable or any such person.

(5) This section does not –

(a) prejudice the admissibility in evidence of the silence or other reaction of the accused in the face of anything said in his presence relating to the conduct in respect of which he is charged, in so far as evidence thereof would be admissible apart from this section; or

(b) preclude the drawing of any inference from any such silence or other reaction of the accused which could properly be drawn apart from this section … .

35. ***Effect of accused's silence at trial***

(1) At the trial of any person who has attained the age of fourteen years for an offence, subsections (2) and (3) below apply unless –

(a) the accused's guilt is not in issue; or

(b) it appears to the court that the physical or mental condition of the accused makes it undesirable for him to give evidence;

but subsection (2) below does not apply if, at the conclusion of the evidence for the prosecution, his legal representative informs the court that the accused will give evidence or, where he is unrepresented, the court ascertains from him that he will give evidence.

(2) Where this subsection applies, the court shall, at the conclusion of the evidence for the prosecution, satisfy itself (in the case of proceedings on indictment, in the presence of the jury) that the accused is aware that the stage has been reached at which evidence can be given for the defence and that he can, if he wishes, give evidence and that, if he chooses not to give evidence, or having been sworn, without good cause refuses to answer any question, it will be permissible for the court or jury to draw such inferences as appear proper from his failure to give evidence or his refusal, without good cause, to answer any question.

(3) Where this subsection applies, the court or jury, in determining whether the accused is guilty of the offence charged, may draw such inferences as appear proper from the failure of the accused to give evidence or his refusal, without good cause, to answer any question.

(4) This section does not render the accused compellable to give evidence on his own behalf, and he shall accordingly not be guilty of contempt of court by reason of a failure to do so.

(5) For the purposes of this section a person who, having been sworn, refuses to answer any question shall be taken to do so without good cause unless –

(a) he is entitled to refuse to answer the question by virtue of any enactment, whenever passed or made, or on the ground of privilege; or

(b) the court in the exercise of its general discretion excuses him from answering it.

(6) Where the age of any person is material for the purposes of subsection (1) above, his age shall for those purposes be taken to be that which appears to the court to be his age.

AUSTRALIA

EVIDENCE ACT 1995 (COMMONWEALTH)

Part 3.6 – Tendency and coincidence

94. *Application*

(1) This Part does not apply to evidence that relates only to the credibility of a witness.

(2) This Part does not apply so far as a proceeding relates to bail or sentencing.

(3) This Part does not apply to evidence of:

(a) the character, reputation or conduct of a person; or

(b) a tendency that a person has or had;

if that character, reputation, conduct or tendency is a fact in issue.

95. *Use of evidence for other purposes*

(1) Evidence that under this Part is not admissible to prove a particular matter must not be used to prove that matter even if it is relevant for another purpose.

(2) Evidence that under this Part cannot be used against a party to prove a particular matter must not be used against the party to prove that matter even if it is relevant for another purpose.

96. *Failure to act*

A reference in this Part to doing an act includes a reference to failing to do that act.

97. *The tendency rule*

(1) Evidence of the character, reputation or conduct of a person, or a tendency that a person has or had, is not admissible to prove that a person has or had a tendency (whether because of the person's character or otherwise) to act in a particular way, or to have a particular state of mind, if:

(a) the party adducing the evidence has not given reasonable notice in writing to each other party of the party's intention to adduce the evidence; or

(b) the court thinks that the evidence would not, either by itself or having regard to other evidence adduced or to be adduced by the party seeking to adduce the evidence, have significant probative value.

(2) Paragraph (1)(a) does not apply if:

(a) the evidence is adduced in accordance with any directions made by the court under section 100; or

(b) the evidence is adduced to explain or contradict tendency evidence adduced by another party.

98. *The coincidence rule*

(1) Evidence that 2 or more related events occurred is not admissible to prove that, because of the improbability of the events occurring coincidentally, a person did a particular act or had a particular state of mind if:

(a) the party adducing the evidence has not given reasonable notice in writing to each other party of the party's intention to adduce the evidence; or

(b) the court thinks that the evidence would not, either by itself or having regard to other evidence adduced or to be adduced by the party seeking to adduce the evidence, have significant probative value.

(2) For the purposes of subsection (1), 2 or more events are taken to be related events if and only if:

(a) they are substantially and relevantly similar; and

(b) the circumstances in which they occurred are substantially similar.

(3) Paragraph (1)(a) does not apply if:

(a) the evidence is adduced in accordance with any directions made by the court under section 100; or

(b) the evidence is adduced to explain or contradict coincidence evidence adduced by another party.

99. ***Requirements for notices***

Notices given under section 97 or 98 are to be given in accordance with any regulations or rules of court made for the purposes of this section.

100. ***Court may dispense with notice requirements***

(1) The court may, on the application of a party, direct that the tendency rule is not to apply to particular tendency evidence despite the party's failure to give notice under section 97.

(2) The court may, on the application of a party, direct that the coincidence rule is not to apply to particular coincidence evidence despite the party's failure to give notice under section 98.

(3) The application may be made either before or after the time by which the party would, apart from this section, be required to give, or to have given, the notice.

(4) In a civil proceeding, the party's application may be made without notice of it having been given to one or more of the other parties.

(5) The direction:

(a) is subject to such conditions (if any) as the court thinks fit; and

(b) may be given either at or before the hearing.

(6) Without limiting the court's power to impose conditions under this section, those conditions may include one or more of the following:

(a) a condition that the party give notice of its intention to adduce the evidence to a specified party, or to each other party other than a specified party;

(b) a condition that the party give such notice only in respect of specified tendency evidence, or all tendency evidence that the party intends to adduce other than specified tendency evidence;

(c) a condition that the party give such notice only in respect of specified coincidence evidence, or all coincidence evidence that the party intends to adduce other than specified coincidence evidence.

101. ***Further restrictions on tendency evidence and coincidence evidence adduced by prosecution***

(1) This section only applies in a criminal proceeding and so applies in addition to sections 97 and 98.

(2) Tendency evidence about a defendant, or coincidence evidence about a defendant, that is adduced by the prosecution cannot be used against the defendant unless the probative value of the evidence substantially outweighs any prejudicial effect it may have on the defendant.

(3) This section does not apply to tendency evidence that the prosecution adduces to explain or contradict tendency evidence adduced by the defendant.

(4) This section does not apply to coincidence evidence that the prosecution adduces to explain or contradict coincidence evidence adduced by the defendant.

Part 3.7 – Credibility

102. ***The credibility rule***

Evidence that is relevant only to a witness's credibility is not admissible.

103. ***Exception: cross-examination as to credibility***

(1) The credibility rule does not apply to evidence adduced in cross-examination of a witness if the evidence has substantial probative value.

(2) Without limiting the matters to which the court may have regard in deciding whether the evidence has substantial probative value, it is to have regard to:

(a) whether the evidence tends to prove that the witness knowingly or recklessly made a false representation when the witness was under an obligation to tell the truth; and

(b) the period that has elapsed since the acts or events to which the evidence relates were done or occurred.

104. ***Further protections: cross-examination of accused***

(1) This section applies only in a criminal proceeding and so applies in addition to section 103.

(2) A defendant must not be cross-examined about a matter that is relevant only because it is relevant to the defendant's credibility, unless the court gives leave.

(3) Despite subsection (2), leave is not required for cross-examination by the prosecutor about whether the defendant:

(a) is biased or has a motive to be untruthful; or

(b) is, or was, unable to be aware of or recall matters to which his or her evidence relates; or

(c) has made a prior inconsistent statement.

(4) Leave must not be given for cross-examination by the prosecutor about any matter that is relevant only because it is relevant to the defendant's credibility unless:

(a) evidence has been adduced by the defendant that tends to prove that the defendant is, either generally or in a particular respect, a person of good character; or

(b) evidence adduced by the defendant has been admitted that tends to prove that a witness called by the prosecutor has a tendency to be untruthful, and that is relevant solely or mainly to the witness's credibility.

(5) A reference in paragraph (4)(b) to evidence does not include a reference to evidence of conduct in relation to:

(a) the events in relation to which the defendant is being prosecuted; or

(b) the investigation of the offence for which the defendant is being prosecuted.

(6) Leave is not to be given for cross-examination by another defendant unless:

(a) the evidence that the defendant to be cross-examined has given includes evidence adverse to the defendant seeking leave to cross-examine; and

(b) that evidence has been admitted.

105. ***Further protections: defendants making unsworn statements***

(1) This section applies only in a criminal proceeding in which a defendant has, under a law of a State or Territory, made an unsworn statement.

(2) Evidence that is relevant only to the defendant's credibility may be adduced from a person other than the defendant if:

(a) the evidence has substantial probative value; and

(b) subsection (4) or (5) applies.

(3) Without limiting the matters to which the court may have regard in deciding whether the evidence has substantial probative value, it is to have regard to:

(a) whether the evidence tends to prove that the defendant knowingly or recklessly made a false representation when the defendant was under an obligation to tell the truth; and

(b) the period that has elapsed since the acts or events to which the evidence relates were done or occurred.

(4) The evidence may be adduced if it is relevant to whether the defendant:

(a) is biased or has a motive to be untruthful; or

(b) is, or was, unable to be aware of or recall matters to which his or her statement relates; or

(c) has made a prior inconsistent statement.

(5) The evidence may, if the court gives leave, be adduced if the defendant has:

(a) suggested in his or her statement that he or she is of good character, either generally or in a particular respect; or

(b) suggested in his or her statement that a witness called by the prosecutor has a tendency to be untruthful, and the suggestion is relevant solely or mainly to the witness's credibility.

(6) A reference in paragraph 5(b) to a suggestion by the defendant does not include a reference to a suggestion about conduct relating to:

(a) the events in relation to which the defendant is being prosecuted; or

(b) the investigation of the offence for which the defendant is being prosecuted.

106. *Exception: rebutting denials by other evidence*

The credibility rule does not apply to evidence that tends to prove that a witness:

(a) is biased or has a motive for being untruthful; or

(b) has been convicted of an offence, including an offence against the law of a foreign country; or

(c) has made a prior inconsistent statement; or

(d) is, or was, unable to be aware of matters to which his or her evidence relates; or

(e) has knowingly or recklessly made a false representation while under an obligation, imposed by or under an Australian law or a law of a foreign country, to tell the truth;

if the evidence is adduced otherwise than from the witness and the witness has denied the substance of the evidence.

107. *Exception: application of certain provisions to makers of representations*

If:

(a) because of a provision of Part 3.2, the hearsay rule does not apply to evidence of a previous representation; and

(b) evidence of the representation has been admitted; and

(c) the person who made the representation has not been called to give evidence;

the credibility rule does not apply to evidence about matters as to which the person could have been cross-examined if he or she had given evidence.

108. *Exception: re-establishing credibility*

(1) The credibility rule does not apply to evidence adduced in re-examination of a witness.

(2) The credibility rule does not apply to evidence that explains or contradicts evidence adduced as referred to in section 105 or 107, if the court gives leave to adduce that evidence.

(3) The credibility rule does not apply to evidence of a prior consistent statement of a witness if:

(a) evidence of a prior inconsistent statement of the witness has been admitted; or

(b) it is or will be suggested (either expressly or by implication) that evidence given by the witness has been fabricated or re-constructed (whether deliberately or otherwise) or is the result of a suggestion;

and the court gives leave to adduce the evidence of the prior consistent statement.

Part 3.8 – Character

109. *Application*

This part applies only in a criminal proceeding.

110. *Evidence about character of accused persons*

(1) The hearsay rule, the opinion rule, the tendency rule and the credibility rule do not apply to evidence adduced by a defendant to prove (directly or by implication) that the defendant is, either generally or in a particular respect, a person of good character.

(2) If evidence adduced to prove (directly or by implication) that a defendant is generally a person of good character has been admitted, the hearsay rule, the opinion rule, the tendency rule and the credibility rule do not apply to evidence adduced to prove (directly or by implication) that the defendant is not generally a good person of good character.

(3) If evidence adduced to prove (directly or by implication) that a defendant is a person of good character in a particular respect has been admitted, the hearsay rule, the opinion rule, the tendency rule and the credibility rule do not apply to evidence adduced to prove (directly or by implication) that the defendant is not a person of good character in that respect.

(4) A reference in this section to adducing evidence to prove a matter includes a reference to a defendant making an unsworn statement, under a law of a State or Territory, in which that matter is raised.

111. *Evidence about character of co-accused*

(1) The hearsay rule and the tendency rule do not apply to evidence of a defendant's character if:

(a) the evidence is evidence of an opinion about the defendant adduced by another defendant; and

(b) the person whose opinion it is has specialised knowledge based on the person's training, study or experience; and

(c) the opinion is wholly or substantially based on that knowledge.

(2) If such evidence has been admitted, the hearsay rule, the opinion rule and the tendency rule do not apply to evidence adduced to prove that that evidence should not be accepted.

112. *Leave required to cross-examine about character of accused or co-accused*

A defendant is not to be cross-examined about matters arising out of evidence of a kind referred to in this Part unless the court gives leave.

Part 3.11 – Discretions to exclude evidence

135. *General discretion to exclude evidence*

The court may refuse to admit evidence if its probative value is substantially outweighed by the danger that the evidence might:

(a) be unfairly prejudicial to a party; or

(b) be misleading or confusing; or

(c) cause or result in undue waste of time.

136. ***General discretion to limit use of evidence***

The court may limit the use to be made of evidence if there is a danger that a particular use of the evidence might:

(a) be unfairly prejudicial to a party; or

(b) be misleading or confusing.

137. ***Exclusion of prejudicial evidence in criminal proceedings***

In a criminal proceeding, the court must refuse to admit evidence adduced by the prosecutor if its probative value is outweighed by the danger of unfair prejudice to the defendant.

APPENDIX B
THE LAW IN OTHER JURISDICTIONS

B.1 In this Part, we examine the state of the law in a number of other jurisdictions. We consider, in some detail, the law in Scotland, Australia, Canada, New Zealand, and the United States. We also examine the position on the Continent.

SCOTLAND

B.2 Despite Scotland's position as an integral part of the United Kingdom, the continued existence of a distinctively Scottish law and legal system was guaranteed by the 1707 Act of Union. Although in many areas of law statutes common to both Scotland and England and Wales have come to predominate, in the field of criminal evidence and procedure, Scottish law is significantly different from that applying in England and Wales.

Previous convictions

B.3 At common law neither the prosecutor nor a co-accused[1] is entitled to attack the character of the accused unless the accused has adduced evidence as to his or her good character.[2] Much of the law as to the admissibility of evidence of the accused's bad character or previous convictions is contained in the Criminal Procedure (Scotland) Act 1995.[3] This is a consolidating statute which replaces a number of enactments including the Criminal Procedure (Scotland) Act 1975 and the Criminal Justice (Scotland) Act 1995. The latter Act amended earlier provisions, and introduced new provisions, as to Scottish criminal evidence and procedure, and was consolidated and repealed by the Criminal Procedure (Scotland) Act 1995. This Act formed an important part of a programme of reform of Scottish criminal law, evidence and procedure, which included three other statutes: the Criminal Law (Consolidation) (Scotland) Act 1995, the Criminal Law (Consequential Provisions) (Scotland) Act 1995 and the Proceeds of Crime (Scotland) Act 1995. The High Court of Justiciary provided for the detailed application of the new rules of procedure by enacting the comprehensive Act of Adjournal (Criminal Procedure Rules) 1996.

B.4 The Criminal Procedure (Scotland) Act 1995 deals with the admissibility of evidence of the accused's previous convictions or bad character by laying down the general rule that evidence of previous convictions is inadmissible, while providing for the admissibility of evidence of previous convictions or bad character in three specific situations. The general rule is that previous convictions may not be laid before the jury (or before the judge, in summary proceedings) before the verdict is returned.[4] The first exception to this rule arises where evidence of previous

[1] *Slane* 1984 SLT 293, 1984 SCCR 77.

[2] W G Dickson, *The Law of Evidence in Scotland* (3rd ed 1887, ed P J Hamilton Grierson) para 15.

[3] See I Bradley and R S Shiels, *The Criminal Procedure (Scotland) Act 1995* (1996), and their annotations of the Act in *Current Law Statutes*.

[4] Criminal Procedure (Scotland) Act 1995, ss 10(1) (solemn proceedings, ie jury trial), 166(3) (summary proceedings).

convictions is competent in support of a substantive charge. Thus, where the accused is charged with driving while disqualified, evidence of the conviction that led to the disqualification is admissible;[5] and in a trial for prison-breaking, evidence of the conviction that led to the sentence is admissible to establish that the accused had been lawfully confined.[6]

B.5 Deliberate disclosure of the accused's previous convictions in breach of this provision will usually lead to the conviction being quashed on appeal, providing that the disclosure constituted a miscarriage of justice of sufficient gravity to warrant the quashing of the conviction.[7] The prosecutor must also avoid placing the defence in such a position as to force an accused person to disclose his or her previous convictions.[8] An accidental disclosure by the prosecutor may also imperil the conviction,[9] although an accidental disclosure by a witness will not do so, provided that the revelation was made without malice.[10]

B.6 The second situation for which the Criminal Procedure (Scotland) Act 1995 provides is the cross-examination of the accused as to bad character or previous convictions. Section 266(4), which derives, with modifications, from section 1(f) of the 1898 Act in England and Wales, provides:

> An accused who gives evidence on his own behalf in pursuance of this section shall not be asked, and if asked shall not be required to answer, any question tending to show that he has committed, or been convicted of, or been charged with, any offence other than that with which he is then charged, or is of bad character, unless –
>
> (a) the proof that he has committed or been convicted of such other offence is admissible evidence to show that he is guilty of the offence with which he is then charged; or
>
> (b) the accused or his counsel or solicitor has asked questions of the witnesses for the prosecution with a view to establishing the accused's good character or impugning the character of the complainer,[11] or the accused has given evidence of his own good character, or the nature or conduct of the defence is such as to involve imputations on the character of the prosecutor[12] or of the witnesses for the prosecution or of the complainer; or
>
> (c) the accused has given evidence against any other person charged in the same proceedings.

5 *Boustead v McLeod* 1979 JC 70, 1979 SLT (Notes) 48.

6 *Varey* 1986 SLT 321, 1985 SCCR 425.

7 *Graham* 1983 SCCR 314, 1984 SLT 67.

8 See *Cordiner* 1978 JC 64, where the accused was effectively compelled to lead evidence of his own imprisonment for a previous offence.

9 *Binks* 1984 SCCR 335, 1985 SLT 59.

10 *Kepple* 1936 JC 76, 1936 SLT 294; *Smith* 1975 SLT (Notes) 89; *Fyfe* 1989 SCCR 429, 1990 SLT 50.

11 "Complainer" here includes a victim who is deceased: s 266(7).

12 The prosecutor in Scotland is almost invariably the public prosecutor: private prosecutions are extremely rare.

B.7 The second branch of paragraph (b), which permits cross-examination on the prohibited lines if "the nature or conduct of the defence" is as there described, is interpreted in substantially the same way as the second limb of section 1(f)(ii) of the 1898 Act in England and Wales was interpreted in *Selvey v DPP*.[13] The Scottish courts used to draw a distinction between cross-examination necessary to enable the accused fairly to establish a defence, which did not deprive the accused of the protection of the prohibition, and cross-examination attacking the general character of the witness, which did;[14] but this distinction was authoritatively disapproved in *Leggate*, where it was made clear that if the nature or conduct of the defence is as described in paragraph (b) then, whatever the *purpose* of the imputations might be, the case falls within the scope of that paragraph and the accused may be liable to lose the protection that he or she would otherwise have.[15]

B.8 In a case to which paragraph (b) applies, the prosecutor may ask a question prohibited by the substantive part of the subsection only if the court, on the prosecutor's application (made, in solemn proceedings, in the absence of the jury), so permits.[16] It was suggested in *Leggate* that if the trial judge were satisfied that the questions put to the Crown witnesses were truly an integral part of the defence and were necessary to enable the accused fairly to establish a defence, the judge might consider that the accused should not be deprived of the protection of the Act; but if the judge concluded that the cross-examination constituted a deliberate attack upon the character of the Crown witnesses, he or she might be inclined to exercise the discretion in favour of the Crown.[17] In a case to which paragraph (c) applies, on the other hand, the co-accused has the *right* to cross-examine the accused as to his or her criminal record: the trial judge has no discretion to prohibit this.[18]

B.9 The third situation for which the Criminal Procedure (Scotland) Act 1995 provides is that in which the defence sets up the accused's good character, or casts imputations on the character of any prosecution witness, of the complainer or of a deceased victim, and the accused does not give evidence. Section 266(4) comes into play only where the defence takes that line and the accused gives evidence on his or her own behalf. Section 270, however, provides for a case where the accused does not do so. It allows the prosecutor to apply to the court for leave to lead evidence as to the bad character or previous convictions of the silent accused.

Similar fact evidence

B.10 By virtue of the general rule that previous convictions against the accused cannot be laid before the court before the verdict is returned, evidence may not be led that the accused has been convicted of a crime similar to that for which he or she is being tried. In practice, where the Crown has evidence that a culprit has been guilty of similar criminal conduct on two or more occasions which are so

[13] [1970] AC 304; see *Leggate* 1988 SLT 665, 1988 SCCR 391.

[14] *O'Hara* 1948 JC 90, 1948 SLT 372.

[15] *Leggate* 1988 SLT 665, 671; 1988 SCCR 391, 407–408.

[16] s 266(5), (6).

[17] *Leggate* 1988 SLT 665, 672–673; 1988 SCCR 391, 410–411.

[18] *McCourtney* 1977 JC 68, 1978 SLT 10.

connected in time, character and circumstances as to justify the inference that they are instances of a course of criminal conduct systematically pursued, it is usual for each crime to be made the subject of a separate charge in a single indictment (in solemn proceedings) or complaint (in summary proceedings). In such a case the evidence of a single credible witness to each charge can provide material for mutual corroboration; and thus it is possible to satisfy the Scottish general rule that in criminal cases crucial or essential facts may be proved only by corroborated evidence.[19]

B.11 The law as to the admissibility in other cases of evidence of criminal conduct which is similar to that charged remained in doubt until the decision of a court of five judges in *Nelson*.[20] The court stated the rule in these terms:

> The Crown can lead any evidence relevant to the proof of a crime charged, even though it may show or tend to show the commission of another crime not charged, unless fair notice requires that that other crime should be charged or otherwise referred to expressly in the complaint or indictment. This will be so if the evidence sought to be led tends to show that the accused was of bad character and that other crime is so different in time, place or character from the crime charged, that the libel does not give fair notice to the accused that evidence relating to that other crime may be led; or if it is the intention as proof of the crime charged to establish that the accused was in fact guilty of that other crime.[21]

AUSTRALIA

B.12 The Australian Senate Standing Committee on Constitutional and Legal Affairs recommended in 1972[22] that the ALRC should conduct a review of the law of evidence, with the objectives of producing an evidence code appropriate to the modern day, and of drafting a Uniform Evidence Act. An interim report was published in 1985,[23] followed by the final report[24] two years later.

B.13 The recommendations of the ALRC formed the basis of the Commonwealth Evidence Act 1995.[25] The introductory note to the Act says that "This Act sets out the federal rules of evidence". This note is significant, both for the nod thus given

[19] See *The Laws of Scotland: Stair Memoral Encylopaedia* vol 10 (1990) *sv* "Evidence", paras 626, 766–769.

[20] *Nelson* 1994 SLT 389, 1994 SCCR 192.

[21] 1994 SLT 389, 395–396; 1994 SCCR 192, 203.

[22] Report on the Reference: The Evidence (Australian Capital Territory) Bill 1972.

[23] Evidence (1985) ALRC Interim Report No 26.

[24] Evidence (1987) ALRC Report No 38.

[25] They also formed the basis of the Evidence Act 1995 of New South Wales. The introductory note to the Commonwealth Act states: "This Act is in most respects uniform with the Evidence Act 1995 of New South Wales. The 2 Acts are drafted in identical terms except so far as differences are identified in the Acts by appropriate annotations to the texts, and except so far as minor drafting variations are required because one Act is a Commonwealth Act and one Act is a New South Wales Act." This Appendix deals only with the Commonwealth Act. The main provisions of relevance to this paper are set out in Appendix A above.

to the US Federal Rules and as an indication that the Act is to be treated as a comprehensive evidence code.[26] The Act applies in Australian federal courts and courts in the Australian Capital Territory.[27]

Relevance

B.14 Section 55 of the Act defines "relevant evidence". For evidence to be relevant it must be capable, if accepted, of rationally affecting (directly or indirectly) the assessment of the probability of the existence of a fact in issue.[28] Evidence is not irrelevant merely because it relates only to the credibility of a witness, the admissibility of other evidence, or a failure to adduce evidence.[29]

B.15 Section 56 lays down two fundamental principles: irrelevant evidence is *always* inadmissible,[30] while relevant evidence is admissible except as otherwise provided *by the Act*.[31] The common law therefore ceases to apply. Evidence of previous misconduct is admissible if it is relevant *and* it falls within the scope of neither the "tendency rule" nor the "coincidence rule".[32] This may be so if the previous misconduct is a necessary element in the proof of the present charge (for example, where the charge is one of driving while disqualified) or is an integral part of the background to the case (for example, in the case of one prisoner assaulting another).

The tendency and coincidence rules

B.16 Sections 97 and 98 set out the "tendency rule" and the "coincidence rule" respectively. Section 97 provides that evidence of character, reputation or conduct is not admissible to prove that a person has or had a tendency to act in a given way, or to have a given state of mind, unless reasonable notice has been given to the other parties[33] and the court thinks that the evidence (either by itself or having regard to other evidence) would have *significant* probative value.[34] Section 98

[26] The Australian Attorney-General's Department describes the Act as "clearly not a code of the law of evidence", as it does not prevail over other federal statutes, or over the ASC Law or the Corporations Law. Some State provisions persist, relating to the admissibility of evidence of the deliberations of a jury on appeal, requirements for the admission of evidence supporting an alibi, court powers to dispense with rules of evidence and procedure in interlocutory proceedings, certain rules providing for legal and evidential presumptions, notice requirements, the weight to be accorded to documentary evidence under state laws, and the proof of title to property. The Department points out, however, that the ALRC's draft Bill was probably intended as a code: see G Bellamy and P Meibusch, *Commonwealth Evidence Law* (1995) pp 1, 18–22.

[27] Certain provisions relating to the authenticity of public documents apply to all courts in Australia.

[28] s 55(1).

[29] s 55(2).

[30] s 56(2).

[31] s 56(1).

[32] See para B.16 below.

[33] This requirement may be dispensed with by direction of the court (ss 97(2)(a), 100), and does not apply to evidence adduced to explain or contradict tendency evidence adduced by another party (s 97(2)(b)).

[34] The rule does not apply to evidence adduced by a defendant of the defendant's good character (s 110, para B.25 below), nor to expert evidence of a defendant's character

provides that evidence of the occurrence of two or more related events[35] is not admissible to prove that a person did a particular act, or had a particular state of mind, because the events are unlikely to have occurred coincidentally, unless the same requirements are satisfied.[36]

B.17 Section 101 provides that tendency and coincidence evidence adduced *by the prosecution* about a defendant cannot be used against the defendant unless its probative value *substantially* outweighs any prejudicial effect it may have on the defendant.[37] This requirement is *in addition* to the tendency and coincidence rules in sections 97 and 98.[38]

B.18 Section 95 provides that if evidence is inadmissible to prove a particular matter by virtue of the tendency and coincidence rules, or section 101, it must not be used to prove that matter even if it is relevant (and admissible) for some other purpose.

The credibility rule

B.19 Section 102 lays down the "credibility rule": evidence is not admissible if it is relevant only to a witness's credibility.[39] This rule has four main[40] exceptions:[41]

(1) evidence adduced in cross-examination;[42]

(2) evidence in rebuttal of a denial;[43]

adduced by another defendant (s 111). Clauses 86–87 of the ALRC's draft Bill provided that tendency evidence is generally inadmissible, but that, where there is a question whether a person did a particular act or had a particular state of mind, and it is reasonably open to find that (a) the person did some other act or had some other state of mind, and (b) all the acts or states of mind, and their circumstances, are *substantially and relevantly similar*, evidence that the person did the other act or had the other state of mind is admissible.

35 Two or more events are "related events" if (and only if) they are substantially and relevantly similar, and the circumstances in which they occurred are substantially similar: s 98(2).

36 In this case the notice requirement does not apply to evidence adduced to explain or contradict *coincidence* evidence adduced by another party: s 98(3)(b). Section 98 corresponds to cl 88 of the ALRC's draft Bill, under which coincidence evidence would have been admissible only where all the events alleged, and their circumstances, are *substantially and relevantly similar*.

37 s 101(2). Clause 89 of the ALRC's draft Bill provided that evidence of similar conduct by the defendant is admissible only if it has *substantial probative value*, and listed factors to which the court was to have regard in deciding whether this requirement was satisfied.

38 s 101(1). It does not apply to tendency evidence adduced to explain or contradict tendency evidence adduced by the defendant, or to coincidence evidence adduced to explain or contradict coincidence evidence adduced by the defendant: s 101(3), (4).

39 Clauses 94–101 of the ALRC's draft Bill are similar.

40 There is a fifth exception, for evidence adduced in response to an unsworn statement by an accused (s 105); but the making of such a statement is now permitted only on Norfolk Island (an external territory of Australia, lying about 1,500 kilometres off the coast of Queensland).

41 The Note to s 102 provides that "Other provisions of this Act, or of other laws, may operate as further exceptions." However, as s 56(1) provides that relevant evidence is admissible except as otherwise provided by the Act, and s 56(2) provides that irrelevant evidence is always inadmissible, there would seem to be no room for the application of other laws.

42 ss 103, 104, and 107.

(3) evidence to re-establish credibility;[44] and

(4) evidence of the good character of an accused person.[45]

Cross-examination

B.20 In general, evidence elicited in the cross-examination of a witness is not subject to the credibility rule,[46] provided that the evidence has *substantial* probative value;[47] but the defendant to a criminal charge is given further protection by section 104. A defendant may not be cross-examined about a matter that is relevant only to the defendant's credibility (other than a possile bias or motive to lie, the defendant's awareness or memory of the matters to which he or she testifies, or a prior inconsistent statement)[48] without the leave of the court.[49]

B.21 Leave may be granted to the *prosecution* only if the defendant has

(a) adduced evidence that he or she is of good character, either generally or in a particular respect;[50] or

(b) been permitted to adduce evidence[51] which tends to prove that a witness called by the prosecution has a tendency to be untruthful, and which is relevant mainly or solely to that witness's credibility.[52] This does *not* include evidence of conduct in relation to the events or the investigation of the offence charged.[53]

[43] s 106.

[44] s 108.

[45] s 110.

[46] If evidence of a previous representation has been admitted because a provision of the Act exempts it from the hearsay rule, and the person who made the statement does not give evidence, the credibility rule does not apply to evidence concerning matters as to which the person *could* have been cross-examined if he or she had given evidence: s 107. Nor does it apply to evidence adduced to explain or contradict such evidence: s 108(2).

[47] In determining whether the evidence has substantial probative value, the court is required by s 103(2) to have regard to the tendency of the evidence to prove that the witness knowingly or recklessly made a false representation while under an obligation to tell the truth, and to the period that has elapsed since the acts or events to which the evidence relates were done or occurred.

[48] s 104(3).

[49] s 104(2).

[50] s 104(4)(a).

[51] A suggestion made to a prosecution witness during cross-examination that he or she is a thief will *not* trigger the loss of the defendant's shield under s 104, as questions are not evidence: *answers* are evidence. If the suggestion is denied, no evidence will have been adduced; but if it is accepted, evidence that the witness has a tendency to be untruthful will have been adduced, and the shield will be lost.

[52] s 104(4)(b).

[53] s 104(5).

B.22 Leave may be granted to *another defendant* only if the defendant to be cross-examined has given evidence adverse to the defendant seeking leave, and that evidence has been admitted.[54]

Evidence in rebuttal of a denial

B.23 The credibility rule does not apply to evidence which tends to prove that a witness is biased or has a motive to be untruthful, has been convicted of an offence, has made a prior inconsistent statement, is or was unable to be aware of matters to which his or her evidence relates, or has knowingly or recklessly made a false representation while under a legal obligation to tell the truth, *provided* that such evidence is adduced from a source other than the witness *and* that the witness has denied the substance of the evidence.[55]

Evidence to re-establish credibility

B.24 The credibility rule does not apply to evidence adduced in re-examination of a witness.[56] Nor does it apply to evidence of a prior consistent statement made by a witness where a prior *in*consistent statement by the witness has been admitted, or it is or will be suggested that the witness's evidence has been fabricated or re-constructed, or is the result of a suggestion, and (in either case) the court grants leave to adduce the prior consistent statement.[57]

Evidence of the defendant's character

B.25 Neither the tendency rule nor the credibility rule applies to evidence adduced by a defendant to prove (directly or by implication) that the defendant is, either generally or in a particular respect, a person of good character.[58] Nor do they apply to evidence adduced, in rebuttal of evidence that a defendant is generally a person of good character, to prove that he or she is not;[59] nor to evidence adduced, in rebuttal of evidence that he or she is of good character in a particular respect, to prove that he or she is not of good character *in that respect*.[60] However, a defendant may not be cross-examined about such matters without the leave of the court.[61]

General exclusionary discretions

B.26 Section 135 provides that the court *may exclude* evidence if its probative value is *substantially* outweighed by the danger that it might be unfairly prejudicial to any party, or be misleading or confusing, or result in an undue waste of time.

[54] Even if these conditions are satisfied, leave will not be given if the probative value of the defendant's record would be substantially outweighed by the danger of unfair prejudice to that defendant: s 135. See para B.26 below.

[55] s 106.

[56] s 108(1).

[57] s 108(3).

[58] s 110(1).

[59] s 110(2).

[60] s 110(3).

[61] s 112.

B.27 Section 136 provides that the court *may limit the use* to be made of evidence if there is *a danger*[62] that a particular use of the evidence might be unfairly prejudicial, misleading or confusing.[63]

B.28 Section 137 provides that the court *must exclude* evidence adduced *by the prosecution* if its probative value is outweighed by the danger of unfair prejudice to the defendant.[64]

CANADA

Similar fact evidence

B.29 The approach taken to similar fact evidence in Canada broadly follows that of the common law in England.[65] However, the Canadian Charter of Human Rights and Fundamental Freedoms must also be considered.

B.30 Two fundamental principles of justice, both enshrined in the Charter, are potentially jeopardised when evidence of an accused person's previous misconduct is admitted. The first of these is the principle that the accused stands trial only to answer those charges set out in the indictment: the admission of evidence of previous convictions undermines this right not to be tried or punished twice for the same offence.[66] The second is the principle that the accused is innocent until proven guilty.[67] In the case of *D(LE)*[68] the Supreme Court of Canada noted ways in which the jury might be adversely influenced by such evidence, assuming that the accused is either a "bad person" who is likely to be guilty or deserves to be punished for his or her previous misdeeds.

B.31 Until the case of *B (CR)*,[69] it was thought to be clear that the Supreme Court of Canada had decisively rejected the admission of evidence of the accused's bad character where its only relevance is to show a general propensity to crime or a "bad" disposition. In this respect, the common law in Canada and in England had developed along broadly similar lines. However, in *B (CR)*, the Supreme Court seemed to relax the rigorous application of the rule.

[62] In contrast to s 135, there is no requirement that the probative value of the evidence be substantially outweighed by the danger.

[63] The ALRC did not include such a provision in its draft Bill.

[64] The discretion conferred upon the court by s 137 is therefore a "weak" discretion: once the court has determined that the danger of unfair prejudice outweighs the evidence's probative value, it has no option but to exclude the evidence. The discretions granted by ss 135 and 136, on the other hand, are "strong" discretions: the court has the option not to act, even when the specified conditions are satisfied. See R Dworkin, *Taking Rights Seriously* (1977) pp 31–35, 68–71.

[65] The Privy Council ceased to be the final court of appeal for Canada in 1949. Decisions of the English appellate courts do not bind the Canadian courts, although they are treated with respect. Decisions from other common law jurisdictions are also regarded as having persuasive authority; special attention is paid to decisions of the US appellate courts.

[66] *Koufis* [1941] SCR 481, 490, *per* Taschereau J. This right is protected by ss 7, 9, 11(a) 11(b) and 11(h) of the Charter.

[67] Section 11(d) of the Charter.

[68] [1989] 2 SCR 111, 127–128, *per* Sopinka J.

[69] *B (CR)* [1990] 1 SCR 717.

B.32 B was charged with sexual offences against his daughter, who was in his care following the death of her mother. To support the daughter's evidence, the prosecution sought to adduce evidence that D had had sexual relations with the young daughter of his partner in a previous relationship. McLachlin J held that the trial judge had been mistaken in ruling that the similar fact evidence went to the question of identity (which was not an issue) rather than to corroboration of the daughter's evidence.

B.33 McLachlin J (for the majority) interpreted the test set out in *Boardman*[70] as meaning that evidence of the accused's bad character, which tends to show a disposition towards the type of criminal conduct in question, *could* in exceptional circumstances be admitted, if its probative value outweighs its prejudicial effect:

> While the language of some of the assertions of the exclusionary rule admittedly might be taken to suggest that mere disposition evidence can *never* be admissible, the preponderant view prevailing in Canada is the view taken by the majority in *Boardman* – evidence of propensity, while generally inadmissible, may exceptionally be admitted where the probative value of the evidence in relation to an issue in question is so high that it displaces the heavy prejudice which will inevitably inure to the accused where evidence of prior immoral or illegal acts is presented to the jury.[71]

B.34 The majority concluded that in the type of case in question, where the word of the child is set against that of the accused, similar fact evidence may be central to the issue of credibility. The fact that the accused had also established a father-daughter relationship with the first girl before the sexual assaults started might tend to show a pattern of similar behaviour, suggesting that the complainant's story was true.[72]

B.35 The minority[73] stressed that for similar fact evidence to be admissible, the similar acts "must have relevance other than simply to show a general disposition to commit the crime charged".[74] They appealed both to the case law preceding *B (CR)* and to the reasoning behind the similar fact evidence rule to show that *Boardman* did not effect a radical change in the law:

> The principal reason for the exclusionary rule relating to propensity is that there is a natural human tendency to judge a person's action on the basis of character. Particularly with juries, there would be a strong inclination to conclude that a thief has stolen, a violent man has

[70] *Boardman* [1975] AC 421. An approach similar to that adopted by the House of Lords in *Boardman* was taken by the Supreme Court of Canada in *Robertson* (1987) 39 DLR (4th) 321.

[71] [1990] 1 SCR 717, 731–2.

[72] Although it did *not* show an overall system or design: J Sopinka, S N Lederman and A W Bryant, *The Law of Evidence in Canada* (1992) p 497.

[73] Sopinka and Lamer JJ.

[74] [1990] 1 SCR 717, 740.

> assaulted and a paedophile has engaged in paedophiliac acts. Yet the policy of the law is wholly against this reasoning.[75]

B.36 The minority thought that the trial judge had erred in admitting the evidence at all. In their view, to hold that the evidence supported the complainant's credibility was to say no more than that the evidence pointed to the guilt of the accused, which is itself tantamount to saying that the accused must have been guilty because he had engaged in similar conduct on a previous occasion. In order to be admissible, the similarities must be such that it would be an "affront to common sense"[76] to suggest that they were due to coincidence. In *B (CR)*, the minority held that the previous conduct was insufficiently similar, and that to admit the evidence would be to set the standard of "striking similarity" so low as to be meaningless.

B.37 It has been argued that the judgment in *B (CR)* did not mean that evidence of a general propensity towards crime is generally admissible.[77] The majority's decision is based on the argument that the evidence had a *particular role* in that case – that is, that, where the only evidence against the accused is the testimony of the complainant (as in this case), it may be argued that similar fact evidence *must* be admissible, as the prosecution would otherwise be left without any means of persuading the jury of the complaint.

B.38 However, another commentator[78] has taken the view that the decision in *B (CR)* represented a welcome change to the law by recognising that evidence of disposition can by itself be sufficiently probative of guilt to allow admission.[79] Evidence of disposition can be so powerful that it does more than simply point out that the accused is an immoral person: it can point to the accused as *the* person who did the act complained of, particularly where identification is an issue.

B.39 It was at first thought that the decision in *B (CR)* amounted to a final rejection of the old category approach to similar fact evidence associated with *Makin*,[80] in favour of "the modern, principled approach set out in *Boardman*". However, in *C (MH)*,[81] the Supreme Court confirmed the conservative interpretation of *B (CR)*, that it did not abolish the rule that similar fact evidence, to be admissible, must be relevant to issues in the case other than by demonstrating a general disposition towards crime.

> Evidence as to disposition, which shows only that the accused is the type of person likely to have committed the offence in question, is generally inadmissible … . There will be occasions, however, where the

[75] *Ibid*, at p 744.

[76] *Boardman* [1975] AC 421, 456H, *per* Lord Cross.

[77] J Sopinka, S N Lederman and A W Bryant, *The Law of Evidence in Canada* (1992) p 498.

[78] R J Delisle "Principles for Similar Fact Evidence" (1991) 4 CR (4th) 17.

[79] A similar view of *B (CR)* was taken by the Newfoundland Court of Appeal in *P(PN)* (1993) 81 CCC (3d) 525, 538, *per* Marshall J.

[80] *Makin v A-G for New South Wales* [1894] AC 57.

[81] *C (MH)* (1991) 63 CCC (3d) 385.

> similar fact evidence will go to *more than disposition*, and will be considered to have real probative value.[82]

B.40 McLachlin J's view that probative value "usually arises from the fact that the acts compared are so strikingly similar that their similarities cannot be attributed to coincidence"[83] has been criticised as "an unfortunate retreat"[84] from her approach in *B (CR)*, where she rejected the idea of "striking similarity" as a requirement of admissibility. Although McLachlin J's words are not of themselves a retreat, they may be seen as an attempt to reconcile the test in *B(CR)* with that of *Boardman* and *Robertson*.[85] However, the same commentator also pointed out:

> In *C (MH)* Justice McLachlin does profess that she is following the law as described in *B (CR)* and that case was much more fully reasoned. Perhaps the above comments in *C (MH)* were not made with the greatest consideration and do not, therefore, deserve emphasis.[86]

B.41 However, in *B (FF)*,[87] the Supreme Court reaffirmed the rule that disposition evidence will not be admitted unless it is relevant to some other issue in the case. On five counts charging sexual offences and offences of violence against the niece of the accused, the Crown sought to adduce evidence from the nephew of the accused that he had been subjected to various acts of violence by the accused. Iacobucci J, giving the judgment of the majority, held that

> evidence which tends to show bad character or a criminal disposition on the part of the accused is admissible if (1) relevant to some other issue beyond disposition or character, and (2) the probative value outweighs the prejudicial effect.[88]

B.42 He concluded that, although the evidence in question tended to show that the accused was a person of bad character, with a propensity for violence, it *was* also relevant to other issues in the case. In particular, it was relevant to rebut the accused's defence of innocent association, to demonstrate the system of violent control that the accused exercised over the family (which would explain why the abuse was allowed to occur, and why the complainant was afraid to press charges until much later), and to counter the suggestion that the complainant's mother was responsible for the complainant's injuries.

B.43 As to the issue of prejudice, Iacobucci J cited McLachlin J in *B (CR)*[89] to the effect that where the evidence sought to be adduced concerns a

[82] *Ibid*, at p 392c, *per* McLachlin J, giving the judgment of the court.

[83] *Ibid*, at p 392e.

[84] R J Delisle "Principles for Similar Fact Evidence" (1991) 4 CR (4th) 17, 19.

[85] *Robertson* (1987) 39 DLR (4th) 321; see n 70 above.

[86] (1991) 4 CR (4th) 17, 19.

[87] *B (FF)* (1993) 18 CR (4th) 261.

[88] *Ibid*, at p 275.

[89] [1990] 1 SCR 717, 735.

> morally repugnant act committed by the accused, the potential prejudice is great and the probative value must be high indeed to permit its reception.[90]

In *B (FF)*, although the evidence was clearly prejudicial to the accused, the court was of the opinion that its probative value outweighed its prejudicial effect, and it had been properly admitted.

B.44 The decision in *B (FF)* may be viewed as another departure from *B (CR)*.[91] It has been suggested that the admission of the evidence because of its relevance to the defence of innocent association represented an unfortunate return to the "category" approach rejected in *B (CR)*. Further, it is suggested that the court in *B (FF)* used the very mode of reasoning that it criticised – that is, that the court allowed the evidence of the defendant's previous violent conduct to be admitted *because* it demonstrated a propensity towards such behaviour, and the justifications offered for the reception of the evidence are not the real reason for its admittance, or at best are restatements of the real reason. This illustrates the fundamental difficulties involved in an approach which concentrates upon distinctions between modes of reasoning, such as that adopted by the Privy Council in *Makin*.[92]

B.45 A different approach to the use of propensity or disposition evidence is disclosed by the decision of the Supreme Court in *Litchfield*.[93] In this case the appellant, a medical general practitioner, was charged with 14 counts of sexual assault involving seven complainants who had been patients of his at various times in the past. Prior to the commencement of the trial proper the defendant applied for an order that each of the counts against him should be tried separately and, in the alternative, that the counts should be severed by complainant. The order for separate trials was granted, the counts were also severed, and separate trials were arranged. At the first trial the Crown sought to adduce evidence relating not only to the indictment before the court but also to the severed counts. The trial judge, following a voir dire, held that the evidence he had received on the severed counts was inadmissible because it was irrelevant or prejudicial; he went on to grant a motion for a non-suit, and the appellant was acquitted. An appeal was launched, which eventually reached the Supreme Court.

B.46 While the judgment of the Supreme Court, allowing the appeal, was chiefly concerned with the question of severance, the Court also made some illuminating remarks about the use of the evidence on the severed counts. In particular, Iacobucci J stated that the evidence on the other counts ought to have been admitted, but he justified this on grounds distinguishable from those on which similar fact evidence is admitted:

> While this evidence [on the other counts] could be characterized as evidence of similar acts or events, the evidence was not tendered solely to show that the respondent was a person of bad character or of a disposition likely to commit the alleged offences. Rather, the evidence

[90] (1993) 18 CR (4th) 261, 277.

[91] See the annotation by Delisle to *B (FF)* 18 CR (4th) 261, 265.

[92] *Makin v A-G for New South Wales* [1894] AC 57.

[93] *Litchfield* [1993] 4 SCR 333.

> provided information highly relevant to understanding the context in which the alleged offences occurred and shed light on the nature of the respondent's relationship with his patients, particularly the standard of medical treatment he provided. The evidence provided a different perspective on the alleged assaults from that afforded by the medical evidence. The evidence going to the severed counts, if accepted by a jury, would also tend to show a distinct pattern of behaviour engaged in by the respondent. While the probative value of one complainant's evidence with respect to other complainants' allegations is somewhat less than that described above, and the prejudicial effect higher, I would nonetheless find that the probative value outweighs the prejudicial effect.[94]

B.47 If evidence which would otherwise be inadmissible can be said to be part of the "context" or background of the case, it may thus become admissible. This bears some similarity to the approach taken by the English Court of Appeal in *Fulcher*[95] and the line of authority that preceded it.[96] There has been academic criticism of the *Litchfield* decision, and in particular of the vagueness of the concept of "context". Evidence of propensity or disposition may go to the issue of context, or it may have some relevance other than as showing propensity or disposition. Finally, context may be used to justify the use of evidence which is of general background relevance, to enable the fact-finder to assemble a fuller picture of the facts of the offence charged. It has been pointed out that the risk of prejudice is such that if the use of background evidence, of the type sought to be adduced in *Litchfield*, is to be generally permitted then it "should be policed with the strongest scrutiny".[97]

Previous convictions

B.48 Although the common law in Canada has diverged little from that in England (and remains an important source of law in this area),[98] two statutory provisions have altered the law significantly.

B.49 Section 666 of the Canadian Criminal Code provides:

> Where, at a trial, the accused adduces evidence of his good character the prosecutor may, in answer thereto, before a verdict is returned, adduce evidence of the previous conviction of the accused for any

[94] *Ibid*, at pp 357j–358d.

[95] *Fulcher* [1995] 2 Cr App R 251.

[96] Eg *Ball* [1911] AC 47, 68 *per* Lord Atkinson; and see paras 2.70 – 2.84 above.

[97] [1995] 6 Supreme Court Law Review (2d) 379, 397. "Unlike evidence admitted under the narrower constructions of similar facts, which is affirmative evidence of probability concerning the offender's conduct, evidence of 'context' achieves a small measure of pseudo-relevance because it suggests the improbability that other inculpatory evidence before the court is mistaken": *ibid*, pp 397–398.

[98] "[T]he courts have not remained as somnolent as the legislative bodies. They have shown that there still is some vitality in the common law … . Courts have been prepared to return to basic principles in the examination of whether evidence should be received or not … . Judges have been assuming a greater discretion in weighing the relevant factors bearing on the question of whether it is safe, or not harmful, to other societal interests to accept certain kinds of evidence": J Sopinka, S N Lederman and A W Bryant, *The Law of Evidence in Canada* (1992) pp 5–6.

> offences, including any previous conviction by reason of which a greater punishment may be imposed.

This provision ensures that evidence of previous convictions may be adduced in order to rebut the claim of an accused person to a character that he or she does not possess, without the rule against the reception of evidence of particular discreditable acts being violated.[99]

B.50 Before section 666 can be invoked, the accused person must have advanced evidence of good character. The test for this is the same as that laid down at common law; therefore, section 666 cannot be used where a defence witness gives a purely personal opinion of the accused's good character under cross-examination, as this is not properly admissible as evidence of good character.

B.51 Notionally, *any* of the accused's previous convictions may be admitted under section 666, as the common law doctrine of the indivisibility of character applies. In practice, however, some convictions will be deemed to lack sufficient probative value. Offences committed after the date of the alleged offence may be admitted as evidence, provided that they are sufficiently close in time to be relevant to the disposition of the accused.

B.52 All the Canadian jurisdictions except Quebec have legislated in very similar terms for the impeachment of the credibility of a witness (including the accused as witness) by the admission of a previous conviction. Section 12(1) of the Canada[100] Evidence Act 1985 is typical of these provisions:

> A witness may be questioned as to whether he has been convicted of an offence, and on being so questioned, if he either denies the fact or refuses to answer, the opposite party may prove the conviction.[101]

The cross-examination permitted by section 12 is limited to the identity of the crime, the substance and effect of the indictment, the place of conviction, and the penalty imposed.[102]

B.53 Section 12 also permits examination *in chief* on previous convictions. Defence counsel may wish to question an accused person on his or her previous record, to reduce or negate altogether any adverse effect that this information may have on the jury. The trial judge has a discretion to prevent such questioning, but it will usually be exercised in favour of the accused.

B.54 Evidence of previous convictions admitted under section 12 is deemed to be relevant only to the issue of credibility; the jury must be directed to this effect.[103] As with section 666 of the Canadian Criminal Code, a conviction for any offence[104]

[99] *Morris* (1979) 43 CCC (2d) 129, 158, *per* Pratte J.

[100] Applying to the Federal jurisdiction.

[101] Thus if the witness acknowledges the conviction, it is proved, and extrinsic evidence of it is inadmissible.

[102] *Laurier* (1983) 11 WCB 165, 1 OAC 128.

[103] *Fushtor* (1946) 85 CCC 283.

[104] Including offences committed outside the jurisdiction, where they would lead to a conviction in Canada: *Stratton* (1978) 42 CCC (2d) 449.

may be proved.[105] There must have been a conviction: evidence of suspicion,[106] a charge,[107] an acquittal,[108] or an absolute or conditional discharge,[109] is not admissible.

B.55 It is for the jury to decide what weight to give to the evidence, and it is therefore a misdirection for the trial judge to express an opinion on the effect of the evidence on the credibility of the witness.[110] However, it has been held that a trial judge may advise a jury to disregard evidence of a previous conviction where it is of little or no probative value on the question of credibility.[111]

B.56 In *Corbett*,[112] the Supreme Court of Canada held that the trial judge has a discretion to exclude evidence of previous convictions in an appropriate case. The court set out a (non-exhaustive) list of factors for the judge to consider in the exercise of this discretion, namely the staleness of the previous conviction, its nature, and the fairness to the prosecution of excluding it after an attack by the accused on the credibility of Crown witnesses. The present test for the balance of prejudice over probative value that would warrant exclusion is that the prejudicial effect of the conviction would be out of all proportion to its evidential value.[113]

B.57 Section 12 is open to criticism on several grounds. First, the accused person who wishes to testify is faced with a difficult choice. If he or she testifies, the prosecution may impeach his or her credibility as a witness by bringing in evidence of previous convictions, and the jury may, despite the judge's direction, view such evidence as evidence of guilt; if the accused does not testify, the jury may infer that he or she has something to hide. Although section 4(6) of the Canada Evidence Act 1985 prohibits the judge and prosecution counsel from making adverse *comment* on the accused's failure to testify, the jury is not precluded from drawing adverse *inferences*.

B.58 Second, by admitting all convictions, even if they have no bearing on the issue of the witness's credibility, section 12 may permit irrelevant evidence to be received which may be highly prejudicial to an accused person (although such evidence ought to be excluded by the *Corbett* discretion). In addition, the section has been

[105] *Brown* (1978) 38 CCC (2d) 339, 342–343, *per* Martin JA.

[106] *Koufis* [1941] SCR 481.

[107] *Maxwell v DPP* [1935] AC 309, 319–320, *per* Viscount Sankey LC.

[108] *Ibid*.

[109] *Tan* (1974) 22 CCC (2d) 184.

[110] *Todish* (1985) 18 CCC (3d) 159.

[111] *Tennant and Naccarato* (1975) 31 CRNS 1.

[112] [1988] 1 SCR 670; 41 CCC (3d) 385. *Corbett* was applied very recently by the British Columbia Court of Appeal in *Ramirez* (1995) 97 CCC (3d) 353. In this case the accused, charged with trafficking in narcotics, testified under cross-examination that he had never used, manufactured, administered, sold, distributed or delivered narcotics. He was then questioned about a previous conviction for trafficking in narcotics, and convicted. On appeal, his conviction was upheld. The Court of Appeal stated that his previous conviction had been properly referred to under s 12(1), in that he had clearly put his own credibility in issue.

[113] *Corbett* [1988] 1 SCR 670, 733, *per* La Forest J, citing Lord Fraser in *Sang* [1980] AC 402.

criticised on the more general ground that the fact of a previous conviction is of little or no value in predicting whether a witness will be truthful in court.

NEW ZEALAND

B.59 The law on "similar fact evidence" and the admission of evidence of previous convictions in New Zealand is broadly similar to the English law.[114]

Similar fact evidence

B.60 After *Makin*,[115] the New Zealand case law developed along similar lines to that in England and Wales, although it could be said that the New Zealand courts identified earlier than the English courts the undesirability of treating Lord Herschell's dictum as drawing up a closed list of exceptions to the general rule that evidence of propensity is inadmissible.[116]

B.61 The House of Lords decision in *Boardman*[117] was adopted by the New Zealand Court of Appeal in *Te One*.[118] In that case, it was held that the possession of incriminating items by an accused person on arrest did not automatically make evidence of the finding of the items admissible. The central point was the *relevance* of the evidence; thus the "degree of relevance" approach of *Boardman* was endorsed, and the category approach of *Makin* rejected. In order to establish relevance, the court should ask what the evidence is supposed to prove, and identify the nexus by which the evidence is probative.[119] The court found that the evidence was relevant because the jury could have regarded it as confirming the testimony of the prosecution witnesses, and it would tend to rebut the defence that the money was planted. However, the court was not enthusiastic about the phrase

[114] New Zealand is one of a diminishing number of Commonwealth countries that have chosen to retain the Privy Council in London as their ultimate court of appeal. Although decisions of the House of Lords are not binding in New Zealand, they are of great persuasive authority, and the New Zealand courts "are always slow and reluctant to differ from them": *Hayward v Giordani* [1983] NZLR 140, 145. Judgments of the English Court of Appeal are also invested with a degree of authority.

[115] *Makin v A-G for New South Wales* [1894] AC 57.

[116] Eg *Whittia* [1921] NZLR 519, *per* Salmond J.

[117] *Boardman* [1975] AC 421.

[118] *Te One* [1976] 2 NZLR 510. Te One and Ward were jointly charged with supplying heroin and cannabis to one F, an undercover police officer. A search of Te One and Ward's premises by the police discovered two bundles of notes which had been marked and used by an informer and an undercover police officer to purchase drugs, and also approximately $2,000 in unmarked banknotes. Ward's Post Office savings book was also found, and revealed both a substantial balance and a large number of transactions in a short period of time.

The prosecution put the case on the basis that the defendants were dealers, explaining the large amount of money on the premises and held in the savings account. The inference the jury were invited to draw was that these sums represented the proceeds of the sale of drugs. The defence contended that the evidence of the unmarked money and the savings account should not have been admitted, as it was irrelevant and purely prejudicial. The accused also claimed that the sale of the heroin and the cannabis had not taken place, that the marked money had been planted, and that the police were framing them. Thus, the credibility of the informer and of F were in issue.

[119] Applying the test set out in *Thompson* [1918] AC 221.

"similar fact evidence", saying that, beyond sounding a note of warning, that label does not go far towards solving the problem.[120]

B.62 After *Te One*, the phrase "striking similarity", used by Lords Morris and Salmon in *Boardman*, was taken up and applied by the New Zealand courts, but they encountered similar problems to the English courts in deciding whether or not "striking similarity" actually existed in particular cases. Lord Mackay's speech in *DPP v P* referred with approval to decisions of the New Zealand Court of Appeal.[121]

B.63 The New Zealand Court of Appeal has not interpreted *Boardman* restrictively, but has instead consistently applied the principle that *only* evidence of sufficient probative value is admissible. Rather than pay obeisance to the phrase "striking similarity", the New Zealand Court of Appeal regarded it as an "expression of convenience rather than precision",[122] useful as a reminder to counsel and the court that the evidence must go to more than mere propensity.[123] The approach in *DPP v P* has been followed by the New Zealand Court of Appeal in *R v Accused*[124] and *McIntosh*.[125] In *Julian*,[126] the New Zealand Court of Appeal held that the requisite degree of similarity could be reached by a combination of facts, and not only by a single striking similarity. This view has been confirmed by subsequent decisions.[127]

B.64 The courts maintain that the trial judge always has a residual discretion to exclude "similar fact" evidence, even where it is tendered by a defendant, on the grounds that its prejudicial effect exceeds its probative value or that its exclusion would be in the wider interests of justice.[128]

B.65 There is a special statutory provision for poisoning cases. Following the *cause célèbre Hall*,[129] the Evidence Act 1908 was enacted. Section 23 provides that

[120] [1976] 2 NZLR 510, *per* Cooke J.

[121] *DPP v P* [1991] 2 AC 447, 461–2.

[122] *McIntosh* (1991) 8 CRNZ 514.

[123] *Hsi En Feng* [1985] 1 NZLR 222, 225.

[124] *R v Accused* (1991) 7 CRNZ 604.

[125] *McIntosh* (1991) 8 CRNZ 514.

[126] *Julian* [1981] 1 NZLR 743.

[127] See *R v Accused* [1988] 1 NZLR 573, 574, where the court regarded the law on this point as so settled that it did not require counsel to go over the ground.

[128] *Katipa* (1987) 2 CRNZ 4. The accused faced various charges relating to the cultivation and sale of illegal drugs. The defence sought to adduce evidence showing that the main prosecution witness, an undercover police officer, had incited other accused persons to commit offences, rather than simply detecting their offences, in support of the defence contention that this had happened to the defendant.

It was held that similar fact evidence could be adduced on behalf of the accused, but only if it bore such a strong relationship to the facts that it was very pertinent. On that basis, some of the evidence adduced by the defence was admitted, and some was disallowed for generality.

[129] *Hall* (1887) 5 NZLR 93. Hall was charged with the murder of one Captain Cain by poisoning. The prosecution sought to adduce evidence that he had subsequently attempted to murder Mrs Hall by similar means. The evidence indicated strongly that both victims

evidence of previous poisonings or attempted poisonings carried out by the accused, regardless of the person poisoned and the time of the alleged poisoning, shall be admissible at any stage of the proceedings and deemed to be relevant to the question of the guilt of the defendant and to the question of intent. This provision essentially abolishes the similar fact evidence rules for poisoning cases.

B.66 As in England and Wales,[130] specific statutory provision is made in New Zealand for the admission of otherwise inadmissible evidence where a person is charged with receiving stolen goods. Section 258 of the Crimes Act 1961 provides that the fact that property obtained by crime was in the possession of the accused within a year before the charge in the instant case, or that the accused has been convicted of receiving in the five years before the charge, is admissible to prove guilty knowledge.

B.67 At some stage of the trial, it must be proved that the goods were stolen: otherwise the issue of guilty knowledge does not arise, and the evidence therefore cannot be admitted. If the accused person has in the past been charged with receiving but acquitted, evidence of the fact of possession of stolen property is nevertheless admissible, unless the acquittal was on the ground that the property was not stolen.[131]

B.68 There are two important restrictions on this provision. First, it does not apply if the accused is facing charges of offences other than receiving.[132] Second, the court retains an overriding discretion to exclude evidence which is unduly prejudicial. It will exercise that discretion where admission of the evidence would make it virtually impossible for the jury to take a dispassionate view of crucial facts, particularly where mens rea is not a real issue. For example, in *Rogers*[133] the defence put forward a two-fold case. The defendant denied that some of the goods were stolen, and denied being aware that the rest were in the house. Thus, whether she *knew* the goods to have been *stolen* was not in issue. The Court of Appeal held that evidence of her previous convictions *was* technically admissible, but that the discretion should have been exercised so as to exclude it. It may be doubted whether, on a true reading of the statute, the evidence was admissible at all.

had been affected by poison, and that Hall had tended them closely and had ample opportunity and motive to kill. The Court of Appeal held that the issues were: (1) Did Hall administer the poison to Cain? and (2) If he did, did he do it wilfully and with felonious intent? The Court of Appeal held that the evidence of the attempt on the life of Mrs Hall was inadmissible because the two crimes were "unconnected", holding that "evidence of the commission of one crime cannot be used as proof of the commission of another"; and also because it could not be proved by other evidence that Hall had administered the poison at all, and so the question of accidental or deliberate administration did not arise.

[130] Theft Act 1968, s 27(3).

[131] *McDonald* [1976] 2 NZLR 99.

[132] s 258(3). This provision is a recognition of the prejudicial effect on the jury of hearing about any conviction of the accused, and an implicit acknowledgment that they may use it for a wider purpose than that for which it is admitted.

[133] *Rogers* [1979] 1 NZLR 311.

Previous convictions

B.69 In New Zealand, the admissibility of the criminal record of the accused is governed by section 5(2)(d) of the Evidence Act 1908:

> A person charged and called as a witness in pursuance of this subsection is liable to be cross-examined like any other witness on any matter, though not arising out of his examination-in-chief; but so far as the cross-examination relates to any previous conviction of the person so charged, or to his credit, the Court may limit the cross-examination as it thinks proper, although the proposed cross-examination may be permissible in the case of any other witness.

B.70 The matter is left to the discretion of the trial judge. In *Clark*,[134] the Court of Appeal directed that the discretion should be exercised along the lines of the corresponding English provision, namely section 1(f) of the 1898 Act. However, the discretion is wider than that granted by section 1(f), and questions may be put which would not be permissible under the English case law.[135] The discretion is technically distinct from the overriding discretion of the court to exclude evidence which, though technically admissible, may have a prejudicial effect that outweighs its probative value; but "it is not to be thought that in a practical world the Courts will carefully discriminate between the two discretions".[136]

B.71 Where the cross-examination relates to an issue in the trial, and not simply to the accused's credit, the discretion of the judge in New Zealand has developed in an independent direction. In *Fox*[137] a distinction was drawn between examination of the accused as to *credibility*, in which case it was held that the New Zealand courts ought to follow the principles distilled from the decisions of the English courts, and cross-examination as to the *issues* in the trial, where the English decisions have no relevance and the court must exercise a discretion so as to ensure that the questions asked are fair ones in the context of the trial.

THE UNITED STATES OF AMERICA

B.72 The United States legal system is divided into fifty state jurisdictions and the Federal jurisdiction.[138] The law of evidence was traditionally established through case law, although most states have adopted statutes which deal with specific evidentiary issues. The content of these laws varies between the states. An element of uniformity has been introduced by the promotion of comprehensive evidence codes.[139]

B.73 The Federal Rules of Evidence were adopted in 1975 and are applied in the Federal courts.[140] They have proved to be the most successful of all the codes. The

[134] *Clark* [1953] NZLR 823.

[135] *Leadbitter* [1958] NZLR 335.

[136] D L Mathieson, *Cross on Evidence* (4th ed 1989) p 421.

[137] *Fox* [1973] 1 NZLR 458.

[138] There are also a small number of other jurisdictions covering dependent territories of the United States, such as Puerto Rico, Guam, and the US Virgin Islands.

[139] Some states, eg California, have adopted their own independent codes.

[140] Including the courts of the District of Columbia.

Rules were formulated by an advisory committee consisting of practitioners, judges and academics, appointed by the Supreme Court, then considered by the Judicial Committees of both chambers of Congress. More than half of the states have adopted a code of evidence which follows the pattern set by the Federal Rules; and in a number of states which have not formally ratified the Rules, or adopted codes based upon them, the courts have quoted the Rules with approval, or adopted particular rules outright.

Similar fact evidence

B.74 In the absence of specific rules, the courts have been cautious in their approach. The general policy appears to be that evidence of a past event will not be admitted unless it is substantially similar to the event at issue in the instant case.

B.75 Rule 401 provides:

> "Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

B.76 Rule 402 provides:

> All relevant evidence is admissible, except as provided by the Constitution of the United States, by Act of Congress, by these rules, or by other rules prescribed by the Supreme Court pursuant to statutory authority. Evidence which is not relevant is not admissible.

B.77 Rule 403 gives the court a discretion to exclude relevant evidence

> if its probative value is substantially outweighed by the danger of unfair prejudice,[141] confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

This test is not precise, but it has been suggested that cases of a comparable nature recur sufficiently often to allow basic patterns to be identified.[142]

[141] Evidence of previous convictions of an unrelated nature have been excluded under this test where the court has decided that the conviction might encourage the jury to convict more readily: see *Carter v Hewitt* 617 F 2d 961 (3rd Cir 1980).

[142] *McCormick on Evidence* (4th ed 1992) p 784.

B.78 Colin Tapper[143] has noted that the early drafts of Rule 403 divided the rule into two portions, the first of which dealt with excessively prejudicial evidence and provided for its *mandatory* exclusion. Only in the final draft were the two parts merged, and the exclusionary *discretion* intended for the second part (relating to considerations of delay and the convenience of the court) applied to the first.[144]

B.79 The use of specific examples of the accused's conduct to challenge his or her testimony is generally prohibited. Such evidence cannot be used in order to undermine the accused's testimony, nor to prove that he or she is prone to acting in a particular way. Rule 404(b) provides:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

B.80 In *Beechum*[145] a postman was accused of theft from the post. A coin had been placed (as bait) in a letter on his route. This coin was later found in his pocket, along with two credit cards which did not belong to him. The defence submitted that the evidence relating to the credit cards should be excluded because of its highly prejudicial nature. The Fifth Circuit Court of Appeals demurred, holding that the evidence was "highly probative" on the question of intention. The majority held, obiter, that evidence of previous misconduct is *always* admissible under Rule 404(b) if it does not fail the test of unfair prejudice under Rule 403.

B.81 The minority argued that the majority decision failed to give full effect to the first sentence of Rule 404(b), holding that if the drafters of the Rules had not thought that the admission of "extrinsic act evidence" was potentially dangerous, the general balancing test of Rule 403 would have sufficed. Also, if the first sentence of Rule 404(b) has as little effect as the majority decision implies, it is rendered otiose by Rule 402, which excludes irrelevant evidence.

B.82 Most federal circuits have not adopted the *Beechum* test, preferring to follow the leading authority prior to the Federal Rules, *Broadway*.[146] The standard laid down by *Broadway* is that similar fact evidence ought to be "clear and convincing" before it is admitted. This standard resembles that laid down by the House of Lords in *DPP v P*.[147]

B.83 In August 1994, the US Congress passed the Violent Crime Control and Law Enforcement Act 1994. Section 320935 of that Act provided for three new rules to be added to the Federal Rules of Evidence. Rule 413 provides that where the

[143] Colin Tapper, "Proof and Prejudice" in E Campbell and L Walker (eds) *Well and Truly Tried* (1982) p 177, at p 189.

[144] This original version became law in Nevada. Tapper notes that even the Nevadan courts employ the language of discretion, and suggests that this shows that the balancing of proof against prejudice requires the assessment of such a variety of factors that a judge must use his or her discretion in order to strike the balance: *ibid*.

[145] *Beechum* 582 F 2d 898 (5th Cir) (1978).

[146] *Broadway* 477 F 2d 991 (5th Cir) (1973).

[147] *DPP v P* [1991] 2 AC 447.

defendant is charged with sexual assault, evidence that the defendant has previously committed such an offence is admissible. Similarly, Rule 414 provides that where the defendant is charged with "an offense of child molestation", evidence that he or she has previously committed such an offence is admissible. The terms "offense of sexual assault" and "offense of child molestation" are defined in the Rules. Broadly speaking, the former covers any non-consensual genital contact, an offence which involves deriving sexual pleasure from the infliction of pain, injury or death on another, and conspiracy to engage in such conduct. The latter covers the same acts if inflicted on a child. "Child" means a person under the age of 14.[148]

B.84 These provisions permit the introduction of such evidence on any relevant matter, subject to a notice requirement in the case of evidence adduced by the prosecution (but not evidence adduced by a co-accused).

B.85 The new rules do not state explicitly that evidence admitted under Rules 413 and 414 is immune from the general Rule 404 ban on evidence of propensity. This might be thought to imply that such evidence cannot be excluded for any reason (and especially not under the Rule 403 discretion to disallow evidence of an unduly prejudicial or burdensome nature), with the possible exception of irrelevance under Rule 402. However, the proponents of the new rules claim that the term "admissible" should be read as "may be admitted", rather than "must be admitted"; and this does indeed seem necessary to prevent absurd results.[149]

Previous misconduct

B.86 The general rule is stated in rule 404(a): character evidence is not admissible to show propensity. [150] However, listed among the exceptions in Rule 404(a)(3) is evidence of the character of a witness, as provided in Rules 607 to 609.

B.87 Rule 607 provides that "The credibility of a witness may be attacked by any party, including the party calling him". Two methods of directly attacking a witness's credibility involve the use of evidence of previous misconduct: the use of a prior[151] conviction (governed by Rule 609), and the use of prior misconduct *not* resulting in a conviction (Rule 608(b)). Although a party who testifies thereby loses much of the protection given by Rule 404, Rules 608 and 609 are intended to maintain a minimum level of protection.

Prior convictions

B.88 The formulation of the Federal Rules concerned with the admission of evidence of prior convictions engendered more debate than any other proposal. Three broad approaches were mooted: admissibility only of convictions for offences of dishonesty (since what is being assessed by the court is the risk of the accused

[148] The new Rule 415 permits the introduction of evidence of previous sexual offences in civil actions arising from sexual assault or child sex abuse.

[149] See D A Nance, "Foreword: Do We Really Want to Know the Defendant?" (1994) 70 Chicago-Kent LR 3, 9–10.

[150] Although it may be admissible for other purposes: Rule 404(b), para B.79 above.

[151] "Prior" is preferred to "previous" in US parlance. In colloquial American speech, a "prior" means a "previous conviction".

lying on oath), admissibility of *all* prior convictions, and the introduction of a discretionary element into one or both of the other schemes.

B.89 The resulting provision, Rule 609, was a compromise reached by the Conference Committee settling the differences between the House and Senate Committees on the Judiciary. The rule was amended in 1990 to take account of difficulties that had occurred in practice. Originally, the fact of the conviction had to be elicited from the accused in cross-examination; this condition was found to be unworkable in practice. The relationship between Rule 609 and Rule 403[152] was also clarified.

B.90 The amended Rule 609(a) sets out the general rule for the use of prior convictions:

> For the purpose of attacking the credibility of a witness,
>
> (1) evidence that a witness other than an accused has been convicted of a crime shall be admitted, subject to Rule 403, if the crime was punishable by death or imprisonment in excess of one year under the law under which the witness was convicted, and evidence that an accused has been convicted of such a crime shall be admitted if the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the accused; and
>
> (2) evidence that any witness has been convicted of a crime shall be admitted if it involved dishonesty or false statement, regardless of the punishment.

B.91 It will be noted that the first limb of Rule 609(a)(1), which permits the admission of convictions of a witness other than the accused for offences punishable with death or with imprisonment for more than one year, is expressly made subject to the discretion to exclude unfairly prejudicial evidence under Rule 403;[153] such convictions may therefore be excluded, for example, if their admission might cause prejudice because of an association between the witness in question and the accused. However, neither the second limb of Rule 609(a)(1) (which deals with the admissibility of such convictions of an *accused* witness) nor Rule 609(a)(2) (which deals with convictions of *any* witness for dishonesty or false statement) is subject to the discretion under Rule 403. In the former case, the accused's convictions are admissible only if their probative value outweighs their prejudicial effect, so there is no room for that part of Rule 403 which provides for the exclusion of evidence whose probative value is substantially outweighed by the danger of unfair prejudice; but Rule 403 also permits the exclusion of the evidence if its admission would be undesirable on certain other grounds, and this discretion appears not to apply where the requirements of the second limb of Rule 609(a)(1) are satisfied.

B.92 The Advisory Committee identified factors relevant to the balancing exercise required by the second limb of Rule 609(a)(1). These were the nature of the prior convictions, including their similarity to the present charge; their remoteness in

[152] See para B.77 above.

[153] See para B.77 above.

time; the length of the accused's criminal record;[154] the age and circumstances of the defendant;[155] the importance of the issue of credibility;[156] the facts of the prior conviction; the need for the testimony of the defendant; and the likelihood that the defendant would not otherwise testify.

> The goal of a criminal trial is the disposition of the charge in accordance with the truth. The possibility of a rehearsal of the defendant's criminal record in a given case, especially if it means that the jury will be left without one version of the truth, may or may not contribute to that objective.[157]

B.93 Where the accused's prior conviction is for an offence involving dishonesty or false statement, and therefore falls within Rule 609(a)(2), the trial judge has no discretion to exclude it under Rule 403 even if its probative value is substantially outweighed by the danger of unfair prejudice.[158] This was held to be so under the rule in its original form,[159] and the amended version (by including the words "subject to Rule 403" in the first limb of Rule 609(a)(1) but not in subsection (2)) confirms it.

B.94 There has been some confusion surrounding the definition of "dishonesty" for the purposes of Rule 609(a)(2), and in particular whether an intent to deceive or defraud must be an element of the offence. The attempts made to stretch the definition of dishonesty beyond offences requiring an intention to deceive or defraud can be explained by the preference of prosecutors to have the evidence of the prior conviction admitted under Rule 609(a)(2) rather than Rule 609(a)(1), thus avoiding the need to show that its probative value outweighs its prejudicial effect.

B.95 The report of the Conference Committee stated that

> By the phrase "dishonesty or false statement", the Conference means crimes such as perjury, subornation of perjury, false statement, criminal fraud, embezzlement, or false pretense, or any other offense in the nature of *crimen falsi*,[160] the commission of which involves some element of deceit, untruthfulness, or falsification bearing on the accused's propensity to testify truthfully.

[154] *Alexander* 95 Wash 2d 15 (1980), cited in *Fowler* 114 Wash 2d 59 (1990).

[155] *Ibid*.

[156] *Ibid*.

[157] *Luck* 348 F 2d 763, 768 (1965).

[158] Cf para B.91 above.

[159] *Toney* 615 F 2d 277, 279–80 (1980); *Cunningham* 638 F 2d 696, 698 (1981); *Kiendra* 663 F 2d 349, 354 (1981); *Lester* 749 F 2d 1288, 1300 (1984): "No discretion to exclude exists". The Conference Committee said that these convictions were "particularly probative of credibility and, under this rule, are always to be admitted": (1974) Conf Rep No 1597, 93d Cng, 2d Sess, p 9.

[160] This term meant, at common law, any crime which rendered the perpetrator incompetent as a witness, eg perjury, subornation of perjury and other crimes affecting the administration of justice. It now means crimes which are of a similar nature to, and share characteristics with, the crimes of dishonesty and deception listed: see *Black's Law Dictionary* (5th ed 1979).

B.96 The bulk of case law on the point supports the Conference Committee's definition. Offences such as theft,[161] and drugs offences, will not automatically fall within this class; however, if the prosecution can prove that the facts of the particular case rested upon proof of the defendant's deceit or dishonesty, the prior conviction may be used.[162]

B.97 Rule 609(b) provides that if a period of ten years has elapsed between the date of conviction or the end of the period of imprisonment imposed for that conviction (whichever is the later), that conviction is not admissible as evidence unless the court determines that the probative value of the conviction *substantially* outweighs its prejudicial effect. The court must record the facts and considerations which led it to its decision. The rule also imposes a requirement to give notice of an intention to adduce evidence of a prior conviction more than ten years old.

B.98 In its report, the Senate Committee on the Judiciary said that it envisaged that convictions over ten years old would be admitted "very rarely and only in exceptional circumstances".[163] Graham[164] suggests that such convictions, although not usually admitted, are admitted more often than was envisaged by the Committee.

B.99 It is settled law that the only details of the conviction that may be proved are the name of the crime and the time and place of conviction. The prosecution is not entitled to give details of the circumstances, as this is considered too prejudicial. There is conflicting authority as to whether the accused can give evidence in mitigation, denial, or explanation. A substantial number of courts allow the accused the chance to make a brief statement on his or her own behalf: Wigmore describes it as

> a harmless charity to allow the witness to make such protestations on his own behalf as he may feel able to make with a due regard to the penalties of perjury.[165]

If the evidence is received, its admission is subject to Rule 403.

Other misconduct

B.100 Rule 608(b) makes provision for the admission of evidence of previous misconduct:

[161] "[C]rimes of violence, theft crimes, and crimes of stealth do not involve dishonesty or false statement within the meaning of Rule 609(a)(2)"; *US v Givens* 767 F.2d 574, 579, n 1 (9th Cir) (1985). One of the framers of the Federal Rules has commented that this interpretation would please Lewis Carroll; Cleary, "Preliminary Notes on Reading the Rules of Evidence" 57 Nev L Rev 908.

[162] In *Hayes* 553 F 2d 824 (1988) the conviction in issue was for importing cocaine. The court held that if the importation was simply a question of stealth, the conviction would not be admissible; but if the accused had been involved in the production of false documents or statements, it would.

[163] (1974) S Rep No 1277, 93d Cong, 2d Sess, p 15.

[164] M H Graham, *Evidence: Text, Rules, Illustrations and Problems* (1st ed 1983) p 597.

[165] 4 Wigmore (1972) § 1117, p 251.

> Specific instances of the conduct of a witness, for the purpose of attacking or supporting his credibility, other than conviction of crime as provided in Rule 609, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness (1) concerning his character for truthfulness or untruthfulness …

B.101 In considering the exercise of its discretion, the court must consider whether the testimony of the witness under attack is crucial, the relevance of the misconduct to the witness's truthfulness, whether the matter is likely to prove excessively time-consuming, and whether there is likely to be any unnecessary humiliation of the witness. Even if the discretion of the court is exercised in its favour, the prosecution must accept any answer given by the defendant, and must not attempt to rebut any answer given by adducing extrinsic evidence.[166] The prosecution must have a basis for believing in good faith that its suspicions of the accused's previous misconduct are correct.[167]

B.102 At common law, reputation evidence given by a "character" witness was admissible to support or to attack the character of a witness for truthfulness. In accordance with the other provisions of the Federal Rules dealing with character evidence, Rule 608(a) allows opinion evidence to be given:

> The credibility of a witness may be attacked or supported by evidence in the form of opinion or reputation, but subject to these limitations: (1) the evidence may refer only to character for truthfulness or untruthfulness, and (2) evidence of truthful character is admissible only after the character of the witness for truthfulness has been attacked by opinion or reputation evidence or otherwise.

After giving opinion or reputation evidence, the character witness can be asked whether, in the light of his or her evidence, he or she believes that the accused would lie on oath.

B.103 Rule 608(b) gives the court a discretion to permit cross-examination of the character witness about specific instances of the conduct of the witness whose character is in question, if they are probative of truthfulness or untruthfulness. The character witness's answers may not be contradicted by other evidence. The witness is protected by two overriding principles: Rule 403,[168] which permits the exclusion of evidence whose probative value is substantially outweighed by the danger of unfair prejudice, and Rule 611, which prohibits harassment and undue embarrassment of the witness.

CONTINENTAL JURISDICTIONS

B.104 Although the experience of the common law countries of the Commonwealth and the United States is of the most direct relevance to English lawyers, the practice of Continental jurisdictions is of interest for different reasons. First, it is important for

[166] *US v Ling* 581 F 2d 1118, 1121 (4th Cir) (1978).

[167] *Michelson v US* 335 US 469 (1948).

[168] See para B.77 above.

English lawyers to understand the Continental system in order to grasp why Article 6 of the Convention (guaranteeing the right of all to a fair trial) has not been interpreted as forbidding reliance upon the previous convictions of the accused. Second, the issue deserves examination because one of the views most commonly advanced is that we should move towards an ill-defined "Continental approach";[169] even Sir Rupert Cross once cautiously suggested that what he termed "the French solution" might be one way to avoid the difficulties described in this paper.[170] The criminal justice systems of the member states of the European Union fall into two groups: the adversarial system (the jurisdictions of the United Kingdom and Ireland) and the inquisitorial system (the Continental jurisdictions).

B.105 The absence of clear normative guidance on the admissibility of evidence, which is a feature of most Continental legal systems, has resulted in the rejection of rules that call for an advance assessment of the probative value of evidence of previous misconduct. The rejection of such rules is based on the belief that the probative worth of the evidence will be determined by the facts of the case, and that the assessment of probative value should not be prejudiced by inflexible rules.[171] The courts of Continental Europe are more willing to contemplate excluding evidence because of the way in which it was obtained than because it falls within some pre-determined category of evidence considered prejudicial or "unsafe".

B.106 In the absence of substantive evidentiary rules, the use of previous misconduct evidence will be affected by the *procedural* characteristics of a Continental legal system, what Professor Damaška has referred to as a "peculiar procedural ecology".[172] In a "typical" civil law country,[173] criminal proceedings are sharply divided between the pre-trial investigation, which is inquisitorial in nature, and the trial itself, which is often said to be of a more adversarial character. The pre-trial investigation begins with the report of the offence to the public prosecutor, usually made by the police. Van den Wyngaert concisely explains the pre-trial procedure thus:[174]

> It is *secret*, vis à vis both the public … and the accused, who are not informed about the proceedings … .

[169] One author has pointed out the difficulty of identifying *the* Continental approach to the law of evidence; the author suggests instead that only an "historical archetype" of an "'inquest'-based" coercive form of procedure common to Continental systems can be identified: see J F Nijboer, "Common Law Tradition in Evidence Scholarship Observed from a Continental Perspective" (1993) 41 AJIL 299, 303.

[170] R Cross, "The Problem of an Accused with a Record" (1969) 6 Sydney L Rev 173, 175–176; see paras B.111–B.112 below.

[171] The joinder and severance rules of Continental legal systems are similarly unencumbered by any concern that reference may be made to previous convictions or misconduct.

[172] M R Damaška, "Propensity Evidence in Continental Legal Systems" (1994) 70 Chicago-Kent LR 55, 57.

[173] Most of the examples given relate to criminal proceedings in Belgium.

[174] C Van Den Wyngaert, *Criminal Procedures in the European Community* (1993). She is writing here about Belgium, where criminal procedure is little changed since the Napoleonic *Code d'Instruction Criminelle*, promulgated in 1808. Belgium is therefore a useful model for a "typical" West European state. Although Luxembourg also applies the *Code*, it has there been much amended through the 20th century.

It is *written*, in the sense that each investigation act must be recorded in writing, in a *procès-verbal*, which is put in a *dossier*, the dossier of the investigation.[175] For example, when the accused is interrogated, or when witnesses are heard, their declarations are recorded in a *procès-verbal* that is added to the *dossier*. This *dossier*, which at the end of the pre-trial stage will contain all the evidence (theoretically both against and in favour of the accused), will be the basis upon which the trial will be conducted.

Above all, the pre-trial stage is *non-contradictory*. At this stage, the accused does not have the opportunity to participate in the proceedings, to present his evidence, to present arguments in his favour, etc.

The preliminary investigation

B.107 The preliminary investigation takes place under the direction of the public prosecutor or of an investigating judge.[176] Classically, investigation by either is possible, as in Belgium, the Netherlands and France, although investigation by the public prosecutor[177] is overwhelmingly more common; elsewhere, the investigation may be conducted by the public prosecutor in all cases, or by the police. Where investigation by a judge is permitted, it is usually reserved for the most serious cases (although according to the Napoleonic *Code* this should be the usual method).

The structure of the courts and the trial process

B.108 The unitary character of the Continental courts may affect the influence that evidence of previous misconduct has upon the criminal trial process. In most Continental jurisdictions there is no division of labour between the fact-finder and the decision-maker on questions of law,[178] and there is therefore no separate jury to exclude from the proceedings when questions of law are being considered. The trial itself is supposed to be the exact opposite of the preliminary investigation, in that it should be *public*, *oral* and *contradictory*.[179] However, Van den Wyngaert points out that the trial is not adversarial in the sense in which a common lawyer would understand that term. For example, there is no cross-examination: questioning is conducted by the judge, who has a general discretion to hear or not to hear evidence, subject to his or her overriding duty to discover the truth.[180]

[175] This dossier will, of course, contain the personal details of the defendant, including his or her previous convictions.

[176] *Juge d'instruction*.

[177] The Netherlands Ministry of Justice describes the Dutch public prosecutor as a "semi-judge": N Osner, A Quinn and G Crown (eds) *Criminal Justice Systems in Other Jurisdictions* (1993). This report was produced for the Royal Commission; it has been of great assistance to us.

[178] In the Dutch courts, for example, the legally qualified judges are both fact-finders and decision-makers in matters of proof.

[179] C Van den Wyngaert, *Criminal Procedures in the European Community* (1993) p 33.

[180] Cf the first duty of the common law judge, to ensure fairness to all parties in the proceedings.

B.109 The "free-flow" style in which oral testimony is presented under the Continental system, with its corresponding relaxation of the controls over what a witness may say, can result in revelations about previous misconduct emerging with the rest of the narrative; one commentator has contrasted the "legato" style of questioning on the continent with the "staccato" style favoured in common law countries.[181]

The dossier system

B.110 The *dossier* system means that the trial is not, in practice, conducted orally. The originators of the 1808 *Code* intended that all the evidence collected during the preliminary investigation should be subjected to a testing debate between the parties, as in common law jurisdictions; but in modern times, convictions are often based upon evidence collected in secret and never subjected to contradiction or tested in oral argument.[182]

B.111 In the French-speaking member states of the European Union[183] the trial judges are informed of the previous convictions of the defendant through the *dossier*, and they may use this information as they may use any other evidence, in whatever manner they wish, to discover the truth.[184] As long ago as 1969 Professor Rupert Cross canvassed the possibility of adopting the "French solution" in common law jurisdictions, so that trials would open with proof of the accused's previous convictions, as background evidence rather than evidence in the case.[185] Cross suggested that in England and Wales the previous convictions could be proved by a police officer, and that the trial judge could counter any resulting prejudice by warning the jury that they must try the accused on the evidence in the case.[186] The advantage of the French solution was that it would

> free an Anglo-Australian trial from the unreality which often attends the suppression of the accused's record; there would be no variations in the exercise of judicial discretion such as those which are the almost

[181] M R Damaška, "Propensity Evidence in Continental Legal Systems" (1994) 70 Chicago-Kent LR 55, 57. Professor Damaška points out that the relaxed attitude taken on the Continent to the use of previous convictions is balanced by a recognition that reasoning from the previous convictions of the accused to the assumption that he or she committed the offence charged is generally to be avoided. Indeed, "in the legal folklore of Continental countries, one even comes across sweeping proclamations that prior convictions have no bearing whatsoever on the finding of criminal liability": *ibid*, at p 58.

[182] Under the Continental system the use of evidence of misconduct which has *not* resulted in a conviction is restricted to corroborating other evidence which directly links an accused to the crime charged. Professor Damaška has identified decisions of the German appellate courts which confirm this restricted use of allegations of past misconduct: *ibid*, at p 62.

[183] France, Belgium and Luxembourg.

[184] The CLRC received evidence about the French practice when compiling its Evidence Report: see para 75.

[185] R Cross, "The Problem of an Accused with a Record" (1969) 6 Sydney L Rev 173, 175–176. A proposal of this kind was rejected by a majority of the CLRC, of which Professor Cross was a member, on the ground that it would be too great a departure from the existing procedure and would have too great a prejudicial effect: Evidence Report, para 90.

[186] When the CLRC discussed this option the following "controls" were suggested: the record should not be referred to unless (i) the defence so wished, (ii) evidence of the conduct involved was admissible under the ordinary law or (iii) the judge thought it right to mention the convictions for some reason in the summing-up: Evidence Report, para 90.

> inevitable consequence of other solutions; the accused could present his case and give his evidence completely free from the shadow of cross-examination on his record.[187]

B.112 However, Cross accepted that the adoption of the French solution would not be a panacea. In addition to the obvious problem of prejudice that arises whenever the accused's previous convictions are referred to, he said that it might cause problems to adopt only one component of the inquisitorial system, while retaining all the other features of the adversarial system. Further, in order to follow French practice it would be necessary to have a firm belief in the uprightness of the police: the certainty that any previous convictions *would* be referred to at trial might provide the police with an unfair leverage over the accused in the early stages of the criminal process. Finally, Cross pointed out the pragmatic considerations that the adoption of his French solution might result in damage to the public image of the criminal justice system, and would be unlikely to attract Parliamentary support.

B.113 Before the Revolution, the French law of evidence was extremely rigid. The precise weight to be accorded to each piece of evidence was laid down in advance by statute. The law is now very different, resting on the principle of the *intime conviction*[188] of the judge:[189]

> The law does not ask judges for an explanation of the means by which they are convinced, it does not set out any particular rules by which they must assess the fullness and adequacy of the evidence; it stipulates that they must search their conscience in good faith and silently and thoughtfully ask themselves what impression the evidence given against the accused and defence's arguments has made upon them. The law asks them only one question that sums up all of their duties "Are you personally convinced?"[190]

B.114 The principle of *intime conviction* applies in all European Union states, with the exception of the United Kingdom, Ireland, the Netherlands and Denmark. In the Netherlands, except in very minor cases, the courts are required to comply with the principle of *conviction raisonée*, which demands an extensive written justification for the finding that the accused is guilty. In Denmark, legally qualified judges have details of the previous convictions before them, but lay judges and jurors are not permitted to have this information.[191] As in England and Wales in the past,[192]

[187] (1969) 6 Sydney L Rev 173, 175.

[188] "Personal conviction".

[189] It should be noted that French and certain other Continental judges are permitted to refuse to hear evidence for "lack of conclusive character" (*défaut de caractère concluant*).

[190] This is the warning given to jurors by the president of the court in the *cour d'assises*: *Code de procédure pénale*, Art 353. The principle also applies in the *tribunal de police* and in the *tribunal correctionnel*.

[191] The most common form of lay participation in criminal trials on the Continent is as a constituent part of a unified tribunal composed of both lay and legally qualified members. As we have said, there is very little division of labour on the tribunal: the lay and legally qualified members sit together and adjudicate together on all the issues.

[192] *DPP v Boardman* [1975] AC 421.

evidence of previous convictions may not be used as evidence of guilt unless there is some "striking similarity" between the facts of the two cases.[193]

B.115 There is no necessary link between the recording of the previous convictions of the accused in a *dossier* and their use as proof of guilt. In Germany and the Netherlands, to take but two examples, trial judges are informed of any previous convictions from the accused's *dossier*, but do not, as a rule, *use* them except in determining the penalty to be imposed after conviction; while in Belgium and France evidence of previous convictions may be (and is) used as the trial judge sees fit. In French jury trials, a list of the accused's previous convictions is read out to the jury at the commencement of proceedings, while in both countries prosecutors may freely refer to the existence of such convictions.

B.116 In Italy, although the *dossier* system was abandoned in 1989 when the new criminal procedure code came into force, evidence of the accused's previous convictions may be used as evidence of guilt.[194] The new code requires all evidence to be presented in open court before the trial judge, who must assess the weight of the evidence introduced in accordance with the outcome of the confrontation between the parties. The prosecution *dossier* may not now be used in court, but only in the preliminary hearing, where the decision whether or not to proceed with the case is made.

The use of previous convictions

B.117 Evidence of previous convictions is used (as in common law countries) to establish mens rea and modus operandi, and can also be used (in contrast to the practice in most common law states) to establish a particular *inclination* of the accused. It is felt that the more unusual the inclination, the greater its probative value: there is little concern on the Continent that previous convictions may be given undue weight, or that Lord Hailsham's "forbidden chain of reasoning" should be avoided.[195] The focus in most Continental countries is upon the use of previous convictions in the process of guilt-adjudication, rather than for the collateral purposes for which it is often used in common law states.

> Since Continental courts are … constantly immersed in data about an accused's past, it is easy to understand their peculiar approach to character and collateral misconduct evidence, an approach that is characterized by a narrow focus on probative worth alone. For if the law adopted the view that judges must also consider the side-effects of

[193] N Osner, A Quinn and G Crown (eds) *Criminal Justice Systems in Other Jurisdictions* (1993) para 5.39.

[194] While the Italians were prepared to replace their French-based system with one resembling a common law system (complete with guilty pleas, an emphasis on oral testimony and witnesses examined by the parties rather than the judge), the adoption of common law rules of evidence was rejected.

[195] *DPP v Boardman* [1975] AC 421, 453F. Lord Hailsham went on to state, at p 454, that the more unusual the proclivity of the accused, as exhibited in both prior conduct and that forming the offence as charged, the more likely it was to have the "striking similarity" necessary for its admission as evidence. *Blackstone* observes, at para F12.5, that: "'striking similarity' really means 'striking peculiarity', and the more bizarre the event, the more striking its repetition will be … . Everything depends on the unlikelihood of repetition being attributable to mere coincidence."

> this evidence, rejecting it whenever prejudice outweighed probative value, it would be very difficult to effectively apply the resulting evidentiary regime.[196]

B.118 However, Continental legal systems do not generally allow the use of previous convictions to impeach the *credibility* of the accused. This is based less on considerations of principle than on the fact that on the Continent the accused's credibility is generally discounted in any event. For example, the accused will not generally give evidence on oath, and he or she is under no *legal* obligation to tell the truth:

> one should remember that criminal defendants are not treated as ordinary witnesses in Continental criminal procedure … . Because their credibility is … automatically discounted, so to speak, any additional attack on their veracity smacks of inappropriate double counting … .[197]

Sentencing

B.119 The effect of these structural and procedural features is aggravated by the rule, common in Continental jurisdictions, that the court receives submissions on the question of sentence, inevitably including any information relating to previous misconduct, *before* retiring to consider its verdict.

[196] M R Damaška, "Propensity Evidence in Continental Legal Systems" (1994) 70 Chicago-Kent LR 55, 65.

[197] *Ibid*, at pp 59–60.

APPENDIX C
THE LSE JURY RESEARCH

W R Cornish and A P Sealy, "Juries and the Rules of Evidence" [1973] Crim LR 208; A P Sealy and W R Cornish, "Jurors and their Verdicts" (1973) 36 MLR 496

C.1 Between 1968 and 1973, research was carried out by lawyers and social psychologists at the London School of Economics on the effect of rules of evidence on jurors. In particular the study aimed to find the effect on jurors of being told of the defendant's criminal history, and of altering the judge's direction on the standard of proof, and to determine whether there was any relationship between jurors' verdicts and their general characteristics, such as age, sex or social class.

C.2 The research was carried out at a time when the rules on juror qualification were being changed in England. Prior to 1972 there was a property requirement for jury service.[1] The Morris Committee on Jury Service recommended the abolition of this property qualification in 1965, and the changes were broadly implemented in the Criminal Justice Act 1972, section 25.[2]

DESIGN AND METHOD

C.3 The participants listened to a tape-recording re-enacted from the transcript of a real trial. They were asked to give their verdicts before discussion. The discussion lasted at most 100 minutes, and at the end the participants were asked for a final verdict, their reasons for it, their views on the conduct of the case, and other matters.

[1] The qualification requirements for jurors before the Criminal Justice Act 1974 was set out in s 1 of the Juries Act 1825, which provided:

> Every man, except as hereinafter excepted, between the ages of twenty-one years and sixty years, residing in any county in England, who shall have in his own name or in trust for him, within the same county, ten pounds by the year above reprizes in lands or tenements, whether of freehold, copyhold or customary tenure, or of ancient demesne, or in rents issuing out of any such lands or tenements, or in such lands, tenements and rents taken together, in fee simple, fee tail, or for the life of himself or for some other person, or who shall have within the same county twenty pounds by the year above reprizes, in lands or tenements, held by lease or leases for the absolute term of twenty-one years, or some longer term, or for any term of years determinable on any life or lives, or who being a householder shall be rated or assessed to the poor rate, or to the inhabited house duty in [Greater London other than the City], on a value of not less than thirty pounds, or in any other county on a value of not less than twenty pounds, or who shall occupy a house containing not less than fifteen windows, shall be qualified and shall be liable to serve on juries for the trial of all issues joined in any of the King's courts of record at Westminster, and in the superior courts, both civil and criminal, of the three counties Palatine, and in all courts of assize …

[2] The present law on jury qualification appears in the Juries Act 1974.

Offences charged

C.4 Two trials were used. One was for an alleged theft. In this case the defendant, a porter at a meat market, was suspected of having a quantity of stolen meat on his barrow. He was stopped by the police. At a crucial moment in the unloading of the barrow the police failed to keep an eye on the meat and it "re-appeared" on a shelf by the barrow. The prosecution claimed that the defendant had put it there, which he denied.

C.5 The other trial involved a rape charge and two defendants. It was alleged that the two defendants chased the victim and that each raped her. D1 denied that he achieved penetration, and claimed that the victim consented to what had occurred; D2 claimed that he had only spoken to the victim, after D1 had left. In this case the jury were also given the chance to vote for a verdict of guilty of *attempted* rape, as well as guilty of rape or not guilty.

Variations

C.6 For each case variations were created by altering the evidence given of the defendant's previous criminal history, and by altering the judge's direction on the standard of proof.[3] In the rape case, further variations were created by altering the direction and evidence about the corroboration of the complaint.

Variations in the criminal history evidence and directions

C.7 Four different combinations of present charge and criminal history were created, as follows:

(1) The participants were told that the defendant[4] had a *similar*[5] *previous conviction*. In the theft case, the previous conviction was admitted by the defendant in cross-examination by the prosecution, either (a) after the defence had asked a prosecution witness about his criminal record or (b) after the defendant had given evidence of his own good character. In the rape case, mention of the previous conviction was let slip by the co-defendant. In neither case did the judge direct the jury to disregard the evidence.

(2) The participants were told that the defendant had a *dissimilar*[6] *previous conviction*. In the theft case, the previous conviction was admitted by the defendant in cross-examination by the prosecution after the defendant had given evidence of his own good character. In the rape case, mention of the previous conviction was let slip by the co-defendant.

[3] The participants were directed that, in order to convict, they had to (1) be sure "beyond reasonable doubt", (2) be "sure and certain", or (3) think it was "more likely than not" that the defendant was guilty.

[4] In the rape case it was D2 who had the previous conviction.

[5] In the theft case this was a previous conviction for stealing meat; in the rape case, a conviction for indecent assault on girls.

[6] In the theft case this was a previous conviction for indecency; in the rape case, a conviction for dishonesty.

(3) The participants were told that the defendant had a *similar previous conviction* (as in (1) above), but the judge instructed the jury to disregard this evidence. In the theft case the previous conviction was introduced by a prosecution witness (a policeman) letting the fact slip. In the rape case mention of the previous conviction was let slip by the co-defendant.

(4) *No mention* was made of the defendants' criminal history. This will be termed the "control condition".

Sample

C.8 Participants were selected to make up 56 juries. They were selected in two different ways. Half were selected from those who answered an invitation sent to government and commercial offices in central London. This group contained a higher proportion of professionally qualified persons than had been the norm even under the former rules for jury selection. The other half of the participants were recruited, after interviews, in an attempt to produce a sample that represented the likely jury composition under the Morris recommendations.

RESULTS

C.9 The individual final verdicts of the participants were analysed.

The theft cases

C.10 Participants told of a *similar* previous conviction, *without* a judicial instruction to ignore it, were significantly more likely to vote for a guilty verdict than under any of the other variations. There was a higher percentage of guilty verdicts when the participants were told that the defendant had a *dissimilar* conviction, or a similar conviction *with* a judicial instruction to ignore it, than under the control condition; but the differences were not great.

The rape cases

C.11 ***D2***. Participants told of a *similar* previous conviction, *without* a judicial instruction to ignore it, were again significantly more likely to vote for a guilty verdict[7] than under any of the other variations. There was no significant difference between the number of guilty verdicts voted for by participants told of a similar previous conviction *with* a judicial instruction to ignore it, and those in the control condition. Participants told of a *dissimilar* previous conviction were significantly *less* likely to vote for a guilty verdict than under any other variation.

C.12 ***D1***. Where the participants were told of D2's *similar* previous conviction, the number voting guilty for D1 was significantly higher. This effect disappeared where an instruction was given to ignore the evidence. Hearing of D2's previous *dissimilar* conviction produced roughly the same percentage of guilty verdicts as under the control condition.

[7] A "guilty verdict" means a verdict of guilty either of rape or of attempted rape.

CONCLUSIONS

C.13 The study suggests that a judge's direction to disregard the defendant's previous conviction averts any prejudicial effect.

C.14 The LSE research supports the Oxford Report in its finding that a *similar* previous conviction consistently produced significantly more guilty verdicts.[8]

C.15 The findings in the rape case suggest that where there are two defendants, the previous conviction of one will prejudice the other. This suggests "an element of guilt by association."[9]

C.16 *Dissimilar* previous convictions produced no effect in the theft case, but reduced the number of guilty verdicts in the rape case. If we are to assume that the finding in the Oxford Report, that the disclosure of a dissimilar previous conviction makes a conviction less likely,[10] is a universal one, we need to explain why this effect did not appear in the theft case. A possible reason could be that, as the dissimilar previous conviction used in the theft case was for indecency, the moral repulsiveness of the crime made the participants *more* inclined to convict, while the dissimilarity of the previous conviction made them *less* inclined, thus cancelling out any overall effect.

LIMITATIONS OF THE STUDY

C.17 Many of the limitations of the Oxford study[11] are shared by the LSE research. These include the problems of the researcher's inability to control all the variables, the fact that the participants know that their verdict has no real effect on the defendant, and the fact that only a limited number of different crimes could be considered.

C.18 There are a number of other important limitations from which the LSE research suffers.

(1) The LSE research used tape recordings; this makes them less close to real life than videos. Hearing of a previous conviction would form a higher proportion of the total information given to participants. The participants were "deprived of the myriad impressions made up of things seen in the court room".[12]

(2) The previous convictions were not introduced in a neutral and consistent way in the study: they were either let slip by one of the defendants, or by a policeman, or revealed in the cross-examination of a defendant who had lost his shield. This could create further complexity in analysing the results.

(3) The LSE research had a large number of different variables, combining previous conviction with different directions on the standard of proof and

[8] See Appendix D, para D.21 below.

[9] Cornish and Sealy, "Juries and the Rules of Evidence" [1973] Crim LR 208, 218.

[10] See Appendix D, para D.22 below.

[11] See Appendix D, paras D.55 – D.62 below.

[12] Cornish and Sealy, "Juries and the Rules of Evidence" [1973] Crim LR 208, 210.

corroboration. In the rape case, for example, the similar previous conviction *with* a direction to ignore the evidence was coupled with only the first of the three directions on the standard of proof; so it is hard to compare this with the similar previous conviction *without* judicial direction, which was coupled with all three directions.

APPENDIX D
THE OXFORD STUDY

D.1 In 1995 the Home Office commissioned the Centre for Socio-Legal Studies of the University of Oxford to conduct research into the effect on mock juries of knowing that the defendant has a previous conviction. The research was conducted by Dr Sally Lloyd-Bostock, Research Fellow of the Centre for Socio-Legal Studies and of Wolfson College, Oxford. It was carried out with mock trials, as research cannot be carried out on real jurors.[1] Using mock juries also gives control over variables which research on real trials would not allow.[2]

OUTLINE OF THE STUDY

D.2 The research was aimed at studying the effects on juries of being given information about a defendant's previous criminal convictions, and in particular:

(a) what weight is given to previous convictions for (i) similar offences and (ii) dissimilar offences;

(b) the materiality of the length of time between the previous conviction and the trial;

(c) whether a previous conviction for an offence of dishonesty affects jurors' view of the *credibility* of the defendant, as distinct from their view of his or her propensity to commit the crime charged;

(d) whether a previous conviction for a distasteful offence, such as an indecent assault on a child, creates undue prejudice in the minds of a jury dealing with a different kind of offence.

D.3 It was decided to examine experimentally the effects of jurors being told of one previous conviction, the only information given being the nature and date of the offence. It is likely that the effect of telling jurors of multiple previous convictions would be greater than the effect of telling them of one.

D.4 It was expected that participants told of a similar conviction would be more likely to believe that the defendant had committed the offence for which he was charged. It was also expected that a defendant with a previous conviction for a dishonesty offence would be viewed as a less credible witness, and that participants told that the defendant had a previous conviction for indecent assault on a child would form a negative evaluation of the defendant.

[1] Research cannot be carried out on real juries because of s 8 of the Contempt of Court Act 1981, which provides:

> it is a contempt of court to obtain, disclose or solicit any particulars of statements made, opinions expressed, arguments advanced or votes cast by members of a jury in the course of their deliberations in any legal proceedings.

[2] See paras D.52 – D.54 below.

Contents of the experiment

D.5 The participants were shown condensed versions of trials on video.[3] Three different offences were used. For each offence eight different permutations were created by altering the information given to the participants about the defendant's criminal history.

The three offences charged

D.6 The three offences charged were as follows:

(1) **Causing grievous bodily harm with intent**, contrary to section 18 of the Offences Against the Person Act 1861.[4]

In this case the defence accepted that the defendant had stabbed the victim during a fight, but claimed that it was an accident or an act of self-defence.

(2) **Handling stolen goods**, contrary to section 22(1) of the Theft Act 1968.[5]

In this case the defence accepted that the defendant was storing stolen goods in his garage, but alleged that he did not know or believe them to be stolen.

(3) **Indecent assault on a woman**, contrary to section 14(1) of the Sexual Offences Act 1956.[6]

In this case the defence accepted that the defendant had touched the woman's breast, but claimed that she had consented.

These offences were chosen because they were very common instances of the types of offence which come regularly before the courts, namely a physical assault, an offence of dishonesty and an indecent assault. The defences put forward in each case are also extremely common. The defendant's credibility was in issue in all three cases.

[3] See paras D.9 – D.12 below for the way in which the videos were produced.

[4] Section 18 of the Offences Against the Person Act 1861 provides, as amended:

> Whosoever shall unlawfully and maliciously by any means whatsoever wound or cause any grievous bodily harm to any person, with intent to do some grievous bodily harm to any person, or with intent to resist or prevent the lawful apprehension or detainer of any person, shall be guilty of [an offence].

[5] Section 22(1) of the Theft Act 1968 provides:

> A person handles stolen goods if (otherwise than in the course of the stealing) knowing or believing them to be stolen goods he dishonestly receives the goods, or dishonestly undertakes or assists in their retention, removal, disposal or realisation by or for the benefit of another person, or if he arranges to do so.

[6] Section 14(1) of the Sexual Offences Act 1956 provides:

> It is an offence … for a person to make an indecent assault on a woman.

The previous conviction

D.7 For each offence eight versions of the video were prepared. The versions were as follows:

- **No previous conviction**: mention that the defendant had no previous convictions.
- **Base condition**: no mention of previous conviction or of good character.[7]
- **Dissimilar / old conviction**: mention that 5 years previously the defendant had been convicted of a dissimilar offence[8] to the one charged.
- **Similar / old conviction**: mention that 5 years previously the defendant had been convicted of an identical offence[9] to the one charged.
- **Dissimilar / recent conviction**: mention that 13 months previously the defendant had been convicted of a dissimilar offence to the one charged.
- **Similar / recent conviction**: mention that 13 months previously the defendant had been convicted of an identical offence to the one charged.
- **Indecent assault on a child / recent**: mention that the defendant had a conviction 13 months previously for an indecent assault on a child.
- **Indecent assault on a child / old**: mention that the defendant had a conviction 5 years previously for an indecent assault on a child.

D.8 The "dissimilar" convictions used were as follows:

- For the section 18 assault: handling stolen goods.
- For the handling offence: causing grievous bodily harm, contrary to section 18 of the Offences Against the Person Act 1861.
- For the indecent assault on a woman: handling stolen goods.

Materials

D.9 Three basic videos were made for the three offences, and eight permutations were created for each by adding the information on the previous conviction. Each video

[7] This was included to enable us to see how the participants would deal with the position neutrally. It frequently arises in practice that the defendant has previous convictions that are not revealed.

[8] See below para D.8 below for the dissimilar convictions used for each offence.

[9] When the participants were told that the defendant had a previous conviction for indecent assault on a child this was taken to be "similar" to the indecent assault on a woman. Initially the effect of a previous conviction for indecent assault on a child was analysed separately, because it was seen as being particularly prejudicial. It was found after preliminary analysis that the two offences were perceived to be similar in degree of dishonesty, violence and repugnance. It was found that there was little difference in the analysis of the effect of similar and dissimilar previous convictions if indecent assault on a child was taken to be "similar" to indecent assault on a woman, rather than excluded.

dealt with a sole defendant charged with one count in the indictment. It lasted 30 minutes and contained only the controversial and central prosecution and defence evidence. The videos portrayed a condensed version of a trial, consisting of an introduction, the opening by the prosecution, examination in chief and cross-examination of two prosecution witnesses and the defendant, closing speeches by both counsel, and the judge's summing up.

D.10 The videos were created by an experienced film producer.[10] They were filmed in a real court room using experienced, professional actors. The same actors, all of whom were white, were used in the three films to portray the defendant, the judge, counsel, and the witnesses. The actor playing the defendant dressed the same and attempted to portray the same character for all three charges. Scripts for the three trials were adapted from transcripts of real trials. Two practising barristers,[11] a practising solicitor[12] and a judge[13] acted as consultants to the Oxford Centre for Socio-Legal Studies.

D.11 Where mentioned, the defendant's previous conviction was introduced as neutrally as possible. It was mentioned in a voice-over when the defendant was called to the witness box,[14] and also by the judge in his summing up.[15] Although it was obviously unrealistic for the previous conviction to be mentioned in a voice-over,[16] this was done to ensure that the information was communicated neutrally in each case.

D.12 Where the defendant had no previous convictions the judge gave the participants this standard direction:[17]

> In deciding whether the prosecution has made you sure of the defendant's guilt you should have regard to the fact that he is a man of good character. That is to say, he has not previously been convicted of any criminal offence. You should take this into account in his favour in two ways.
>
> In the first place, the defendant has given evidence. And as with any man of good character, his good character supports his credibility. Credibility simply means whether you can believe him.

[10] Cheryl Thomas.

[11] Anne Cranfield and Christopher Frazer.

[12] Julian Walters.

[13] The Hon Mr Justice Thomas (NZ).

[14] The voice-over said either "The first witness for the defence is the defendant Robert Palmer. Robert Palmer has no previous convictions" or "The first witness for the defence is the defendant Robert Palmer. Robert Palmer has one previous conviction which was for [causing grievous bodily harm with intent / handling stolen goods / indecently assaulting a child / indecently assaulting a woman]. That conviction was [13 months / 5 years] ago."

[15] See para D.12 below.

[16] Where, as in these cases, it does not form part of the prosecution evidence, a previous conviction will normally be elicited from the defendant during examination in chief or cross-examination.

[17] This accorded with the JSB specimen direction when the experiment was conducted. New specimen directions have subsequently been issued, but they do not alter the substance of the directions.

> In the second place, the fact that he has not previously committed any offence may mean that he is less likely than might otherwise be the case to commit this crime now.

In the cases where a previous conviction was mentioned, the judge gave the participants this standard direction:[18]

> You have heard about the defendant's previous conviction for …
>
> You must not assume that the defendant is guilty or that he is not telling the truth because he has been convicted on a previous occasion. It is for you to decide the extent to which his previous conviction assists you.

In the base condition the judge said nothing about the defendant's criminal history.

The sample

D.13 The 286[19] participants were recruited through the subject panel of the Department of Experimental Psychology at Oxford University. Oxford is in the Midland and Oxford Circuit, and has an acquittal rate which is the same as the national rate. The sample was a reasonable spread in terms of age, gender and marital status. It was, however, slanted towards current or ex-professionals in terms of occupational status, and was overwhelmingly white.[20]

Experimental procedure and gathering the data

D.14 Each group[21] of participants was shown one of the 24 videos. After watching the video, but before deliberation, the participants were asked for an initial individual verdict and for ratings of the likelihood that the defendant committed the offence on a scale of 0–100, which we will refer to as "likelihood scores"[22] (Questionnaire 1).

D.15 The participants were then given 30 minutes to discuss the case. This discussion was tape-recorded, with the participants' knowledge, and the number of times and ways in which previous convictions were mentioned was analysed.

D.16 After deliberation the participants filled in Questionnaire 2, in which they were asked the same questions as in Questionnaire 1. In addition they were asked questions designed to elicit the impressions they had formed of various tendencies

[18] This accorded with the JSB specimen direction when the experiment was conducted. New specimen directions have subsequently been issued, but they do not alter the substance of the directions.

[19] One of the juries had only 10 members; the others all had 12.

[20] Of the 286 jurors 229 were described as white, 2 as Asian, 1 as Afro-Caribbean and 2 as "other". 52 are listed as "missing cases".

[21] The videos were shown to groups of between 12 and 14 in all but one case, where there were only 10 participants. If there were more than 12 in a group, a group of 12 was randomly selected to deliberate, and data from those who did not deliberate was removed from the analysis.

[22] They were also asked for a second rating of this likelihood on a 5-point scale.

in the defendant (for example, did they think he was likely to tell the truth on oath; how likely would he be to molest a neighbour's child). They were also asked for their views on whether juries should be told of previous convictions, whether it was useful to know about the plea the defendant had entered when he was previously convicted, and what to them was the relevance of the age and number of the defendant's previous convictions. Finally, the participants were asked about their beliefs as to the propensity of people with certain previous convictions to lie on oath in court, and to commit other offences.

Statistical analysis

D.17 The results obtained were tested for statistical significance. The statistical significance of a result is an estimate of how often such a result would come up even in random data, purely by chance. A "significance level" of less than 0.001 means that there is a probability of less than one in a thousand that it is a chance result. In this Appendix, a level of less than 0.05 (a less than one in twenty probability of occurring by chance) is described as "significant". It is unusual to describe a result as statistically significant unless it reaches at least this level. The level chosen is, however, a matter of convention, and there is no sudden change in the confidence we can have in a result depending on whether or not it reaches a given level of statistical significance.

D.18 Statistical significance tells us how sure we can be that an effect exists. It does not tell us how large the effect is. Statistical significance is related also to the amount of variation in the sample and the size of the sample. In a large enough sample, a very small effect indeed can be highly significant. The sample size of the present study was not large, for practical reasons; and there is considerable variation in the data from sources other than differences in information about previous conviction.

D.19 As well as the significance level of particular results, confidence in the reliability of findings is increased where analyses of different variables show a similar result or pattern of results. In the results described below, for example, it will be seen that evaluations of the defendant across a series of ratings were considerably more negative where he had a previous conviction for indecently assaulting a child. Although not every finding taken individually reaches significance, they formed a consistent pattern. Again, results obtained with verdicts were statistically significantly less often than results obtained with likelihood scores. However, since the non-significant trends obtained with verdicts fell into the same pattern as significant results obtained with likelihood scores, we can attach additional confidence to the underlying pattern.

D.20 It is also important to bear in mind that where a large number of statistical tests is carried out, the chance of one of them reaching significance by chance increases. If we carry out 20 tests of significance on random data, we theoretically expect one to appear significant at the 0.05 level. This would lead us to be cautious of a "significant finding" that does not fit the overall pattern of results or is difficult to make sense of in theoretical terms.

SUMMARY OF MAIN RESULTS

Similarity and recency of the previous conviction

D.21 As expected, the strongest and most statistically significant effect was for information about a recent *similar* conviction. After deliberation, participants who were told of a recent similar conviction rated the defendant as significantly more likely to have committed the crime with which he was charged than when they were told that he had a dissimilar conviction or no convictions.

D.22 Being told of a *dissimilar* conviction produced unexpected results. After deliberation, the participants rated the defendant as significantly *less* likely to have committed the crime with which he was charged if they were told that he had a recent dissimilar conviction than under the base condition. A possible explanation for this finding is that a previous conviction for a specific offence evokes a stereotype of a person who commits that type of offence *rather than* the different one charged. Another possible explanation, given by Cornish and Sealy for similar findings in the LSE jury project,[23] was that participants felt it was unfair on the defendant to introduce potentially prejudicial evidence of marginal relevance. As this result was unexpected, this remains speculative.

D.23 These results broadly follow the findings of the LSE project.[24] In that project the researchers found that there was a significantly higher proportion of convictions if participants were told that the defendant had a similar previous conviction, though some of this effect disappeared with judicial instructions.[25] In one of the scenarios it was found that a *dissimilar* previous conviction produced a significantly *lower* number of convictions; but as this scenario was one that involved two co-accused, it may not be strictly comparable to the Oxford study.[26]

D.24 Before and after deliberation, being told of an *old* conviction (similar or dissimilar) did not produce significantly different likelihood scores, when compared to the base condition.

D.25 Participants were also asked to estimate the likelihood that the defendant would commit different kinds of offences in the future. When defendants had a previous conviction they were seen as significantly more likely to commit similar offences, and significantly less likely to commit dissimilar offences, than under the base condition. The generally negative evaluation[27] of a person with a previous conviction for indecent assault on a child, however, meant that the defendant with such a conviction was often seen as more likely to commit *dissimilar* offences (such as a section 18 assault, handling or robbery) than those about whose criminal history nothing was known.

[23] Sealy and Cornish, "Juries and the Rules of Evidence" [1973] Crim LR 208, 218. See Appendix C above.

[24] Sealy and Cornish, *op cit*.

[25] *Ibid*, at p 217.

[26] *Ibid*, at p 218.

[27] See para D.43 below.

Type of offence for which the defendant was previously convicted

D.26 There was a consistent trend for a previous conviction for indecently assaulting a child to produce a markedly and statistically significant adverse evaluation of the defendant. Participants told of such a conviction were less likely to say that they believed the defendant's testimony, and believed that he was most likely to have got away with criminal offences in the past. The defendant was also viewed as being least trustworthy, most deserving of punishment and most likely to lie to the court. Previous convictions that produce highly negative evaluations of a defendant's character could have a significant effect on the verdict, where the offence charged is unrelated to indecent assault.

D.27 Although handling stolen goods is an offence of dishonesty, a defendant with a conviction for handling was not seen as significantly less trustworthy, or less credible as a witness, than a defendant about whom no previous conviction information was given.

Relationship between type of previous conviction and similarity to current charge

D.28 It is possible that the effect of (a) being told that the defendant has a similar previous conviction, and (b) the negative evaluation of a previous conviction for indecently assaulting a child, could simultaneously operate in the same direction, both increasing the perceived likelihood of guilt. It would therefore be expected that, if both appear in the same case, the likelihood of conviction will greatly increase. Such a hypothesis is supported by the finding that the only jury containing a majority of guilty verdicts was that told of a recent previous conviction for an indecent assault on a child, when trying a defendant for indecent assault on a woman. This jury voted for a guilty verdict by a majority of 8 to 4. In the case of a defendant with a previous conviction for indecent assault on a child charged with a *dissimilar* offence, the two effects could work simultaneously in *opposite* directions. For a defendant charged with handling, for example, with a previous conviction for indecent assault on a child, we would expect that the negative evaluation of the defendant would incline the jury to convict, whereas the fact that the present charge and the previous conviction are for different types of offences would incline the jury to acquit. It seems that when this occurs the negative evaluation is strong enough to outweigh the dissimilarity effect, with the result that those with a previous conviction for indecently assaulting a child were seen as significantly more likely to handle stolen property in the future than those of good character, though significantly less likely to do so than those with a previous conviction for handling.[28]

[28] These results refer not to scores of the likelihood that the defendant committed the offence charged, but to the analysis of the questions in Questionnaire 2 on the defendant's propensity to commit various offences in the future. See para D.16 above.

RESULTS AND ANALYSIS[29]

Effects of giving information about a previous conviction in terms of recency and similarity to offence charged

D.29 The effect of giving the participants information about a previous conviction was analysed in terms of the verdicts and the likelihood scores. Tests were done to see if participants given different information about a previous conviction gave significantly different verdicts and scores from one another, and whether verdicts and likelihood scores as a whole were significantly related to information about a previous conviction.

D.30 There were 6 combinations[30] of relationship between the offence charged and the information the jury was given about the defendant's criminal history. The participants could be told that the defendant had a recent similar conviction, a recent dissimilar conviction, an old similar conviction, an old dissimilar conviction or no previous conviction, or they could be told nothing about the defendant's criminal record. These 6 will be referred to as the categories of age/similarity information. Different numbers of participants were given different categories of age/similarity information.[31] The 6 will be abbreviated as follows:

(1)	NPC	No previous convictions
(2)	B	Base condition
(3)	OD	Old dissimilar
(4)	OS	Old similar
(5)	RD	Recent dissimilar
(6)	RS	Recent similar.[32]

Analysis of verdicts

D.31 Analysis of verdicts provided less clear results than analysis of likelihood scores. However, it was found that guilty verdicts as a whole were significantly related to categories of age/similarity information, and there were significantly more guilty verdicts for defendants with a recent similar conviction than for those with a dissimilar or old conviction. Figure 1 below shows the percentage of the participants voting guilty, given different categories of age/similarity information.[33]

[29] All the analysis presented below is of responses given after deliberation.

[30] Rather than the 8 that appear in para D.6 above. The recent and old convictions for indecent assault on a child are taken to be similar to the current charge of indecent assault on a woman (see n 9 above) and thus appear within the 6 categories.

[31] 48 participants were told that the defendant had a recent similar conviction, 58 that he had a recent dissimilar conviction, 48 that he had an old similar conviction, 60 that he had an old dissimilar conviction and 36 that he had no previous convictions; 36 were told nothing about his criminal record

[32] See para D.7 above for an explanation of the combinations of previous conviction and current charge.

[33] For the abbreviations used, see para D.30 above.

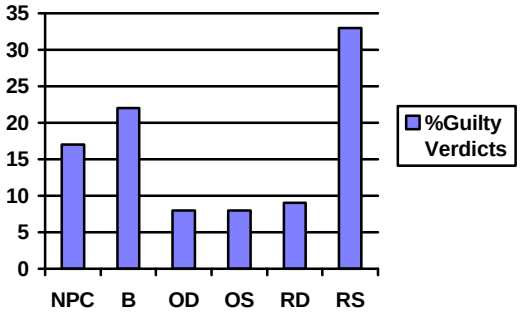

Figure 1: Percentage of participants voting guilty, given different categories of age/similarity information

Analysis of likelihood scores

D.32 It was found that the category of age/similarity information was significantly related to the likelihood scores.

D.33 The average likelihood scores for the different categories of previous conviction information ranked as follows, in ascending order:

(1) Recent dissimilar

(2) No previous convictions

(3) Old dissimilar

(4) Base

(5) Old similar

(6) Recent similar.[34]

D.34 Comparing the likelihood scores of participants given different categories of age/similarity information, it was found that

(a) RS scores were significantly higher than RD, OD and NPC scores; and

(b) RD scores were significantly lower than RS, OS and B scores.

The average likelihood scores of the participants, given different categories of age/similarity information, appear in Figure 2 below.[35]

[34] When a previous conviction for an indecent assault on a child was excluded, the order was roughly the same, with only "old dissimilar" and "no previous convictions" swapping places.

[35] For the abbreviations used, see para D.30 above.

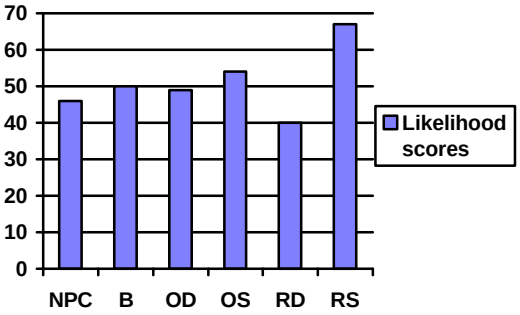

Figure 2: Average likelihood scores of participants, given different categories of age/similarity information

Effects of type of previous conviction on votes for guilty verdicts

D.35 In the following sections, different previous conviction information given to the participants will be abbreviated as follows:

IAC A previous conviction for indecent assault on a child

IAW A previous conviction for indecent assault on a woman

S18 A previous conviction for a section 18 assault

HSG A previous conviction for handling stolen goods

GC The defendant was of good character

B No information was given about the defendant's criminal history or lack of it.

D.36 Analysis of verdict patterns depending on the nature of the previous conviction must be approached with care, as different previous convictions appeared with different frequency and in different combinations with the crime charged. Nonetheless, a clear trend emerges, with previous convictions for an indecent assault on a child producing more guilty verdicts than any other type of previous conviction, and more than the base and good character conditions. 25 per cent of all the participants were told that the defendant had a previous conviction for an indecent assault on a child, while 41 per cent of the participants voting for a guilty verdict after deliberation were told that the defendant had a previous conviction for an indecent assault on a child. Figure 3 below shows the percentage of participants voting for guilty verdicts, given different categories of age/similarity information.[36]

[36] For the abbreviations used, see para D.35 above.

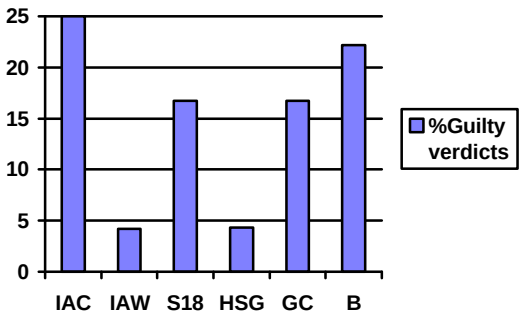

Figure 3: Percentage of participants voting guilty, given different types of previous conviction

Effects of type of previous conviction on the participants' impression of the defendant

D.37 Participants were asked various questions about their impressions of the defendant. The answers were analysed in relation to the defendant's criminal history irrespective of the charge, rather than in terms of similarity to the current charge.

The credibility of the defendant

D.38 The participants were asked to give a score for how inclined they were to *believe the defendant's evidence in the witness box*. The average ratings ranked as follows (least believed first) :

IAC IAW B GC S18 HSG.[37]

When comparing the ratings of participants told of different previous convictions it was found that IAC ratings were significantly lower than GC, S18, and HSG ratings. We now set out the average ratings given by the participants (0 = not believed at all, 5 = fully believed).[38]

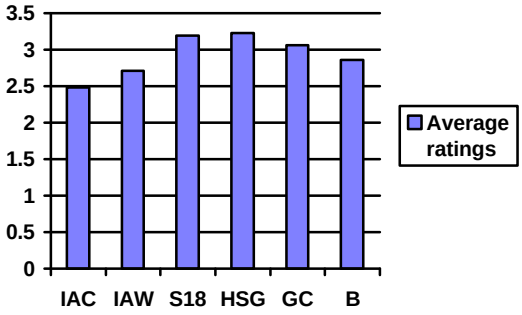

Figure 4: Average ratings given by participants of how inclined they were to believe the defendant's evidence in the witness box, given different types of previous conviction

D.39 The participants were asked to give a score for *how trustworthy* they believed the defendant was. The average ratings ranked as follows (least trustworthy first):

[37] For the abbreviations used, see para D.35 above.

[38] For the abbreviations used, see para D.35 above.

IAC IAW HSG S18 GC B.[39]

Comparing the scores of participants told of different previous convictions, it was found that IAC ratings were significantly lower than HSG, S18, GC and B ratings.

D.40 We now set out the average ratings given by the participants (0 = believe not trustworthy at all, 5 = believe fully trustworthy).[40]

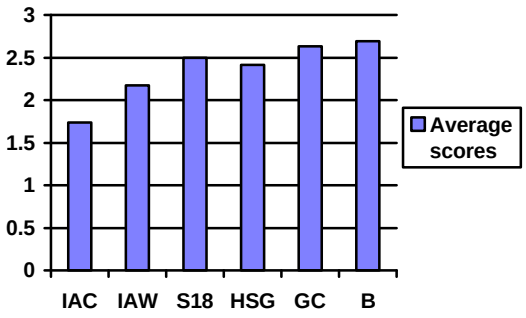

Figure 5: Average ratings given by participants of how trustworthy they believed the defendant was, given different types of previous conviction

D.41 The participants were asked to give a score for whether the defendant was more or less likely than other men of his age and background to *lie on oath to a court of law*. The average ratings ranked as follows (much more likely first):

IAC IAW HSG B GC S18.[41]

Comparing the ratings of participants told of different previous convictions, it was found that

(1) IAC ratings were significantly higher than HSG, B, GC and S18 ratings; and

(2) IAW ratings were significantly higher than HSG and S18 ratings.

We now set out the average ratings given by the participants (1 = much less likely to lie on oath, 5 = much more likely to lie on oath).

[39] For the abbreviations used, see para D.35 above.

[40] For the abbreviations used, see para D.35 above.

[41] For the abbreviations used, see para D.35 above.

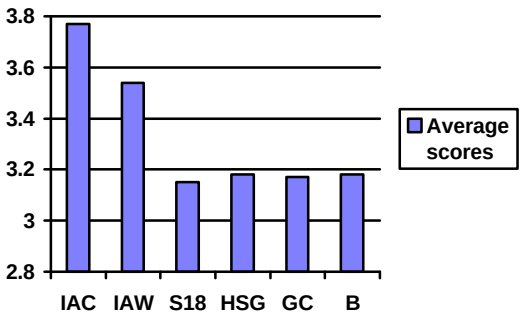

Figure 6: Average ratings given by participants of whether they believed the defendant was more or less likely than other men of his age and background to lie on oath in court, given different types of previous conviction

Other aspects of the participants' impression of the defendant

D.42 In response to other questions it was found that defendants with a previous conviction for indecent assault on a child were seen as significantly more likely to have a tendency to commit the crime they were on trial for, more deserving of punishment, more likely to have got away with criminal offences in the past, and more likely to lie in court than almost all the other categories. Indeed, only in the category of not letting the defendant take a job looking after money does a previous conviction for indecent assault on a child come marginally second to another category – that of a previous conviction for handling.

D.43 Hearing that the defendant had a previous conviction for an indecent assault on a child consistently produced a generally negative view of the defendant. The reason for this strong effect, compared to the lack of significant general effect for hearing of a previous conviction for one of the other offences, may be the contrasting ways in which offences are viewed. Some crimes, such as indecent assault on a child and (to a lesser extent) indecent assault on a woman, are viewed as faults that reflect adversely on all aspects of a person's likely behaviour. In the case of other offences, such as section 18 assault and handling stolen goods, the predictions that the defendant would behave in a discreditable way were confined to a limited number of character traits, and did not extend to the overall view that was formed of the defendant.

D.44 Participants were also asked to assess the likelihood that the defendant would commit various different offences in the future. It was found that those with a previous conviction for indecent assault on a child were seen as generally more likely to commit a whole range of offences, including dissimilar offences such as assault or robbery, than most of the other categories, though not all these findings were significant.

The deliberation of the participants

D.45 The participants' 30-minute discussions on each video were tape-recorded. The number of times and ways in which previous convictions were mentioned was analysed.

D.46 Previous convictions were mentioned most frequently where the participants were told of a previous conviction that was similar to the current charge, or were told that the defendant had a previous conviction for indecent assault on a child.

Excluding the indecent assault on a child cases, there were 3 cases where the relationship between the present charge and the previous conviction was old and similar, 3 old and dissimilar, 3 recent and similar, and 3 recent and dissimilar. There were also 3 base cases and 3 good character cases. The number of times previous convictions were mentioned in each of these categories of case appears in figure 7 below.[42] In the 6 cases where the participants were told that the defendant had a previous conviction for indecent assault on a child, this was mentioned 15 times.

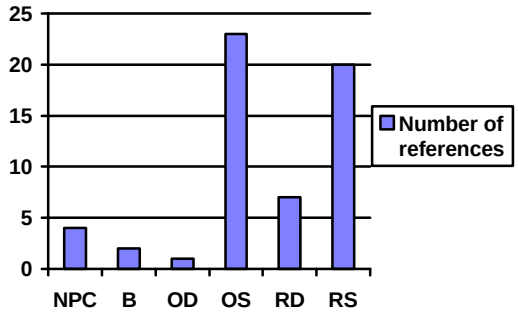

Figure 7: Number of times previous convictions referred to, given different categories of age/similarity information

Beliefs about previous conviction information

D.47 The participants were asked for their views on the usefulness and appropriateness of juries knowing about previous convictions before the verdict. Below are the participants' responses to the question of whether juries should be told about previous convictions.

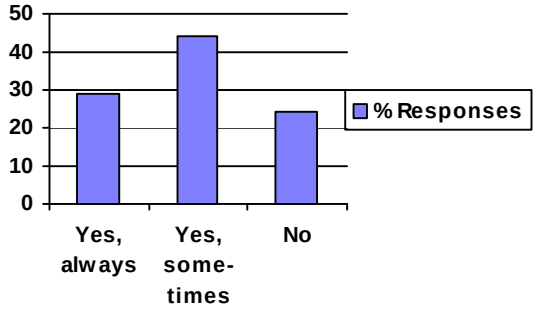

Figure 8: Percentage responding to question of whether jurors should be told about a defendant's criminal history

D.48 25 per cent believed juries should never be told of a defendant's previous convictions, while 29 per cent believed they should always be told. Of those who believed that juries should not be told, the great majority believed that such information was irrelevant or dangerously biasing. This view could be related to awareness of the state of the law at the moment, with some of the participants perhaps believing that, because previous convictions are not revealed at present, this must be a good thing.

[42] For the abbreviations used, see para D.30 above.

D.49 The majority (63 per cent) of participants who were told of a previous conviction said this information had helped them "not at all" to arrive at their verdicts. A further 25 per cent said that it had helped them "a little". Only 11 per cent said it helped them "very much" or "quite a lot".[43] In conjunction with the finding that being told of a previous conviction was significantly linked to likelihood scores, this suggests that participants either were not aware of the effect that hearing of a previous conviction had on them, or felt that it somehow placed them in a more favourable light to deny being influenced by such information.

D.50 Participants told of a similar conviction, or that the defendant was of good character, were less likely to say that the information had helped them "not at all" to arrive at their verdicts, and more likely to say that it had been "very much" or "quite a lot" of help, as compared to participants told of a dissimilar conviction. 20 per cent of those told of a similar previous conviction, and 46 per cent told that the defendant was of good character, said that the information had been "very much" or "quite a lot" of help, compared to 5 per cent of those told of a dissimilar conviction. 51 per cent of those told of a similar previous conviction, and 54 per cent told that the defendant was of good character, said that the information had helped them "not at all" to arrive at their verdicts, as compared to 72 per cent of those told of a dissimilar conviction.

D.51 It seems likely that hearing of several previous convictions would have had a far greater effect on the participants than hearing of just the one. Only 19 per cent believed that hearing of several previous convictions would have had no effect on their verdict, compared to the 63 per cent who believed that hearing of the one conviction had no effect. The participants were asked how many convictions a person would need to have before they could be described as a persistent offender. 80 per cent believed that a person could be described as a persistent offender once they had 5 previous convictions, and 88 per cent once they had 6.

NOTES ON METHOD AND LIMITATIONS OF THE STUDY

D.52 The method chosen for the study was an experiment in which the participants were asked to adopt the role of a juror. Experiments have powerful advantages as a research method. They are the method by far the most frequently chosen by psychologists. The methodological advantages and disadvantages of "mock jury" experiments, and indeed of experiments more generally, are well recognised and have been widely rehearsed in the social science literature.[44]

D.53 The method permits systematic study of effects which could not be studied in any other way. Sealy and Thomas, explaining their choice of method for the LSE jury project, write:

> We decided to use [experiments with] simulated juries because we, as experimenters, could exercise control over the case: we could control

[43] The 12 who did not respond to this question are omitted from the percentages.

[44] Eg J Baldwin and M McConville, *Jury Trials* (1979); N Vidmar, "The Other Issues in Jury Simulation Research: A commentary with special reference to defendant character studies" [1969] Law and Human Behavior 3 Special Issue: Simulation Research and the law, 95; J Monahan and E Loftus, "The Psychology of Law" (1982) 33 Annual Review of Psychology 441; S Lloyd-Bostock, *Law in Practice* (1988).

> the length, and content, of the case; we could arrange for each case to be heard by many juries and, above all, we could systematically vary any feature of the trial we chose to. None of these things are possible by other methods.[45]

D.54 The value of experimental research may be limited by the degree to which the results obtained in an artificial setting can be generalised to "real life", as well as by problems associated with social science research generally. Examples of the latter are the inability of researchers to control all the variables that may affect the results, and the problems associated with different people ascribing different meanings to concepts used such as "guilt", "trustworthiness" or "likelihood". There were also a number of areas of interest which the research, partly because of constraints on time and resources, could not tell us about. Limitations in the general application and scope of the study are considered below.

General application

D.55 Where one wishes to base practical recommendations on the results of experimental work, it is necessary to examine carefully the general application of the findings. These include the extent to which the experimental materials and the task were "realistic", and whether the sample is adequately representative of the population to which one wishes to generalise.

D.56 The extent to which the mock trial were "realistic" is limited in a number of ways:

(a) The materials inevitably consisted of an extremely condensed version of a trial. The mock trials lasted only 30 minutes. Most jury trials last longer, and jurors are given a great deal more information about the defendant and the "crime" than it was possible to show in the video. Even if the defendant does not give evidence, the jury has ample opportunity to look at him or her, and often his or her relatives, in the course of the trial. The information given to the participants about the defendant's previous convictions in the mock trial thus formed a much higher proportion of the total information that they were given than it would in a real trial. This may be particularly important for a study examining the impressions the participants formed of the defendant, since we may expect on theoretical grounds that the process of impression formation over a longer trial could be different. Where information is scant and the defendant is seen for only a few minutes, impressions may be based on stereotypes which are displaced if other, more specific information is available. Further research would need to explore this point.

(b) The present study was made as authentic and realistic as was feasible by using carefully prepared video materials, and including matter beyond the presentation of the evidence, such as argument by counsel and appropriate directions from the judge. As is usual with simulation research, participants in the study did become caught up in it, entering into vigorous debate. Sealy and Thomas made similar observations of the participants in the LSE study.[46] Nonetheless, the participants were obviously aware that they

[45] Sealy and Thomas (1971) *Report on the LSE Study Lodged with the SSRC*.

[46] *Ibid.*

were not a real jury. In the mock trials, certain facts were communicated by voice-overs, which does not occur in a real trial. The environment in which the experiment was conducted was a unique social setting; whether it affected the participants in the same ways as the social setting of a trial is impossible to determine.

(c) Jurors in a real trial know that their verdict will have a real and significant effect on a defendant; this was not true of the participants in the study.

(d) Being aware that they were being monitored may have altered the behaviour of the participants. It has often been noted that the subjects of research try to show themselves in a positive light to the researchers, or try to guess the purpose of the experiment so as to please the experimenters. We cannot tell how far the participants tried to guess the purpose of the research, or attempted to repress "unpopular" views and prejudices because they were aware that their conversation was being recorded.

D.57 Many of the findings of the research are based on the analysis of likelihood scores rather than verdicts: the latter provide less clear results than the former. The likelihood scores run along a continuum, while verdicts can only be either "guilty" or "not guilty". The likelihood scores therefore show greater variance, and can detect changes that analysis of verdicts cannot. While likelihood scores and guilty verdicts are highly correlated, they are not the same thing. In the end it is the verdicts themselves that are of relevance in a criminal trial, and we should not assume that all the findings in relation to likelihood scores will necessarily be replicated in the verdicts of a real trial.

D.58 A limitation to the general application of the research is also the representative nature of the sample. Clearly, the type of people who volunteer for such research may share characteristics that differentiate them from the general population. While the sample was spread across a wide age range and varied in other demographic characteristics, it was almost exclusively white European, as were the defendant and all the actors in the trial. The participants tended to be biased towards professional occupations.

Scope of the study

D.59 The scope of the study was limited by constraints of both time and resources. Only a limited number of factors could be varied in the experiment. Perhaps the most important limitation for present purposes is that the defendant's prior record consisted of only one conviction, and the information about the conviction was limited to the nature and date of the offence. Further research is needed to investigate how the effects found in relation to similarity, recency and abhorrence operate where there is a prior record of multiple, and perhaps mixed, convictions, as is in practice more typical.

D.60 It was necessary for the experiment as designed that the evidence in all three cases was weak. The effect of information about previous convictions may depend on the strength and nature of the other evidence. It is also important to remember that the results relate to the particular three offences studied. For example, the man who handles stolen goods may have a particular image, which contrasts him with the man who commits a violent assault. It could be these particular images

that produce the result found in the present study, and that those who commit other offences of violence or dishonesty are seen differently.

D.61 In answer to those who criticised the CLRC for not referring to empirical evidence before it produced its Evidence Report in 1972, Cross wrote:

> But would [the CLRC] have been any wiser with regard to the crucial question whether the disclosure of the record increases the risk of the conviction of an innocent man?[47]

The study does however suggest that hearing of a previous conviction, for example for an indecent assault of a child, may render jurors more likely to convict because they form a negative evaluation of the defendant. This probably increases the risk of the conviction of an innocent man, though we cannot of course be sure. The study also suggests that, when convicting, jurors use logic we may wish to discourage – namely that defendants who have a conviction for a recent similar offence are more likely to be guilty of the current charge.

D.62 Rather little previous research on the effects of different kinds of previous conviction information had been conducted on which the study could build. The study was therefore to a large degree exploratory. Research of this kind is cumulative, and a single study rarely provides the answer to a practical question. The results indicate a number of directions in which further research would be valuable, to strengthen and extend the research. Some of the findings would also be greatly strengthened by data from other sources: interviews with actual jurors would be especially useful.

CONCLUSIONS

D.63 The results as a whole show that previous convictions can affect the jury in two ways, which can work in the same or opposite directions. First, particular types of conviction, such as indecent assault on a child, can be particularly prejudicial whatever the offence charged. Secondly, recent similar convictions increase the perceived probability of guilt. The research also illustrates that knowledge of a previous conviction for a dishonesty offence does not decrease the defendant's credibility as a witness in the eyes of jurors; but that a previous conviction for indecent assault on a child, because of the all-round negative evaluation of such a person, will have a significant impact on the jurors' perception of the defendant's credibility as a witness.

[47] Cross, "Clause 3 of the Draft Criminal Evidence Bill, Research and Codification" [1973] Crim LR 400, 403.