



# **Law Commission**

## **EVIDENCE OF BAD CHARACTER IN CRIMINAL PROCEEDINGS A Summary**

**Law Com No 273 (Summary)  
9 October 2001**

# EVIDENCE OF BAD CHARACTER IN CRIMINAL PROCEEDINGS

## A Summary

1. “Bad character” may arise in a criminal trial where a defendant or a witness has a criminal record, or where some past misconduct is brought up even though it never resulted in a conviction. Presently, evidence of misconduct of the defendant on an occasion other than that leading to the charge may be introduced by the prosecution as part of its evidence in chief against the defendant or in the course of cross-examination of the defendant as provided for by section 1 of the Criminal Evidence Act 1898, or by a co-defendant.
2. In April 1994, the Home Secretary asked us “to consider the law of England and Wales relating to hearsay evidence 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”. We published our recommendations on hearsay evidence in 1997; the present report deals with “evidence of previous misconduct”.

### OUR MAIN RECOMMENDATIONS

3. Fundamental to the scheme we recommend is the idea that, in any given trial, there is a *central set of facts* about which any party should be free to adduce relevant evidence without constraint – even evidence of bad character. Evidence falls within this central set of facts if it has to do with the offence charged, or is evidence of misconduct connected with the investigation or prosecution of that offence. We recommend that evidence of bad character which falls outside this category should only be admissible if the court gives leave for it to be adduced, or all parties agree to its admission, or it is evidence of a *defendant’s* bad character and it is that defendant who wishes to adduce it.
4. An important feature of our scheme is that this basic rule applies equally whether the evidence is of the bad character of a defendant or of anyone else. Thus witnesses, no less than the defendant, will be protected against allegations of misconduct extraneous to the events which are the subject of the trial, and which have only marginal relevance to the facts of the case. For the purpose of deciding whether the evidence has sufficient relevance for leave to be granted, the same criteria will apply to defendants and non-defendants. Defendants, however, will have additional protection from the prejudicial impact of such evidence, to reflect the fact that it is their liability to criminal sanction which is at stake.
5. Under our scheme, leave may be given to adduce evidence of the bad character of a *non-defendant* if
  - (1) it has substantial explanatory value, or

- (2) it has substantial probative value in relation to a matter in issue in the proceedings which is of substantial importance in the context of the case as a whole.
6. Leave may be given to adduce evidence of the bad character of a *defendant* in four situations, the first two of which correspond to those in which evidence of the bad character of a non-defendant may be admitted.
  7. First, leave may be given to any party if the evidence has the same degree of explanatory value as would be required in the case of a non-defendant, and, *in addition*, the interests of justice *require* it to be admissible, even taking account of its potentially prejudicial effect.
  8. Secondly, leave may be given *to the prosecution* if
    - (1) the evidence has substantial probative value in relation to a matter in issue which is itself of substantial importance, and
    - (2) the interests of justice require it to be admissible, even taking account of its potentially prejudicial effect.

If it has probative value only in showing that the defendant has a propensity to be untruthful, leave may not be given unless, *in addition*,

- (3) the defendant has suggested that another person has a propensity to be untruthful, and
  - (4) in support of that suggestion the defendant adduces evidence of that person's bad character which falls outside the central set of facts, and
  - (5) without the evidence of the defendant's bad character the fact-finders would get a misleading impression of the defendant's propensity to be untruthful in comparison with that of the other person.
9. Thirdly, leave may be given *to the prosecution* if
    - (1) the defendant is responsible for an assertion which creates a false or misleading impression about the defendant,
    - (2) the evidence has substantial probative value in correcting that impression, and
    - (3) the interests of justice require it to be admissible, even taking account of its potentially prejudicial effect.
  10. Fourthly, leave may be given *to a co-defendant (D2)* to adduce evidence of the bad character of a defendant (D1) if the evidence has substantial probative value in relation to a matter in issue between D2 and D1 which is itself of substantial importance in the context of the case as a whole. If it has probative value only in showing that D1 has a propensity to be untruthful, leave may not be given unless, *in addition*, D1's case is such as to undermine that of D2.
  11. Where the court is required, for the purpose of any of the above rules, to assess either the probative value of evidence of a person's bad character, or whether the

interests of justice require the evidence to be admissible even taking account of the risk of prejudice, it will be required to have regard to factors which are set out in the draft Bill.

12. In assessing the probative value of such evidence the court must assume its truth – *unless* it appears, on the basis of any material before the court, that no court or jury could reasonably find it to be true.
13. We recommend a number of procedural safeguards, designed to ensure a fair trial:
  - (1) Where a party is required to seek permission to adduce evidence of the defendant’s bad character, rules of court may require notice to be given of their intention to do so, but the court may have a discretion to dispense with that requirement.
  - (2) In a trial on indictment, where evidence of the defendant’s bad character has been admitted with leave and the judge is satisfied that the evidence is contaminated such that, considering the importance of the evidence to the case against the defendant, a conviction would be unsafe, the judge would be required to discharge the jury or direct the jury to acquit.
  - (3) Where a court gives a ruling on the admissibility of bad character evidence, or on whether the case should be stopped under safeguard (2) above, it must give the reasons for the ruling in open court and those reasons must be recorded.
  - (4) Where a defendant is charged with more than one offence, and evidence of the defendant’s bad character is admissible on one of the offences charged but not on another, the court should grant any defence application for severance of the charges unless satisfied that the defendant can receive a fair trial.
14. We also conclude that the jury may need to be given warnings by the judge in two situations: first, where no evidence has been adduced about the defendant’s character and there is a danger of speculation about it, and second, where there is a danger that the jury will give undue weight to bad character evidence which is admitted.

#### **OUR APPROACH**

15. We are aware that some of those who are interested in this report may approach it by focusing on the question: “Will this report, if carried into effect, result in a significant increase in the number of occasions when fact-finders will be told about a defendant’s previous convictions?” If we had taken the approach of recommending that previous convictions should, as a rule, be presented to the fact-finders, however marginally relevant they might be and regardless of how prejudicial they might be, or, conversely, of recommending that they should never be adduced save where it would be an affront to common sense to exclude them, then we might have been able to answer such a question with confidence.
16. In our view we would have been mistaken to take either of these approaches. Their apparently attractive simplicity ignores the complexity and variety of factual situations to which they would have to apply. Each of them would run the

risk of endangering the vital interests of the individuals involved: whether defendant, complainant, witness, or investigator. The former would run the risk of wrongful convictions based on prejudice rather than evidence, which would be liable to being overturned on appeal, with consequential damage to the reputation of the criminal justice system.

17. In our judgment, the question: “Should the fact-finders hear or not hear about the previous convictions of a defendant or a witness?” is not, in practice, sensibly addressed as one of a priori principle. Questions of admissibility of bad character arise in criminal trials daily, case by case, affecting the interests of those involved. It is our view that those individuals deserve that these important questions be decided by the careful and consistent application by the court of a structured process to each case, and that the process reflects the fact that often a person’s misconduct will have significance for determining the matters in issue, but also recognises that fact-finders, whether lay or professional, are susceptible, however much they may try to avoid it, to having their good judgment either overborne or distorted by prejudice. Such a process requires that the court, performing the exercise of balancing countervailing considerations, should be given sufficient guidance to enable it to reach decisions which are consistent and, to an extent, predictable but which focus on the judgment of the individual decision-taker who is in the best position to make a sound judgment as to where the interests of justice lie.
18. The present law suffers from a number of defects which we identify in the report. In summary, however, they constitute a haphazard mixture of statute and common law rules which produce inconsistent and unpredictable results, distort the trial process in crucial respects, make tactical considerations paramount and inhibit the defence in presenting its true case to the fact-finders whilst often exposing witnesses to gratuitous and humiliating exposure of long-forgotten misconduct.
19. In constructing a process which we believe meets the requirements we have set ourselves, we have placed a number of key principles at the centre of our scheme and we summarise them here:
  - (1) All parties to the trial should feel free to present their case on the central facts in issue free from the fear that this will automatically result in previous misconduct being exposed.
  - (2) Insofar as the context permits, defendants and non-defendants should be equally protected from having their bad character revealed for no good reason.
  - (3) Evidence of a person’s bad character extraneous to the central set of facts should only be presented to the fact-finders if the court gives permission; and if the evidence is within the central set of facts, the court’s permission is not needed.
  - (4) In considering whether to give permission the court must be satisfied that a test has been met, having regard to identified factors.
  - (5) No such evidence may be adduced unless it is of substantial value for determination of the case (the enhanced relevance test).

- (6) A person's character should not be regarded as indivisible. If certain parts of it are sufficiently relevant to be revealed to the fact-finders then so be it but no more should be revealed than is necessary for the interests of justice to be served.
  - (7) If it is to be revealed it will be for the fact-finders to make of it what they will, with appropriate guidance on the risks inherent in such evidence.
  - (8) If a defendant's character should be revealed to the fact-finders he or she should not be able to avoid it by taking tactical steps such as not giving evidence.
20. We intend that our recommendations will contribute to making the law fairer in a number of ways:
- (1) All the rules will be in one statute and will therefore be accessible.
  - (2) They will give greater protection for non-defendants.
  - (3) They will result in the elimination of "tit-for-tat" unfairness thereby giving greater protection for defendants. (Under the current law, a defendant's criminal record can be admitted on a "tit-for-tat" basis where the defendant has attacked the character of a prosecution witness.)
  - (4) A co-defendant with a criminal record is less likely to suffer the admission of that record where it is not warranted.
  - (5) Judges will have to give and juries seek to comply with fewer nonsensical directions drawing bizarre and unreal distinctions between credibility and propensity.
  - (6) The establishment of consistent statutory tests coupled with guidance for courts when ruling on admissibility will result in greater consistency of decisions.
21. We are unable to say whether, if our scheme were carried into effect, more or less bad character evidence would be presented to fact-finders. We can see aspects of the scheme which might lead to less call for such evidence to be admitted on a "tit-for-tat" basis because witnesses are given greater protection from gratuitous attack and, under our scheme, the whole of a defendant's bad character is not automatically admissible if the defence attack a witness's character. On the other hand, we can also see that making a final break from formulae such as those requiring that bad character evidence be "strikingly similar" may mean that more evidence of bad character would become potentially admissible, subject always to the court's judgment on the impact of its potentially prejudicial effect.
22. Our inability to make such a prediction does not trouble us because, as we have said, we have not started from a position that the admittance of more or less bad character evidence should be the outcome of our recommendations. We have sought, rather, to construct a consistent and balanced process under which the conflicting interests of the various parties may best be advanced and protected, and the fairness of criminal trials generally enhanced.

**9 October 2001**