

The Criminal Justice Act 2003 – Do the Bad Character Provisions Represent a Move Towards an Authoritarian Model of Criminal Justice?

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The Criminal Justice Act (CJA) 2003 represents a seismic change to the criminal justice process. The 339 sections and 38 schedules of the CJA make extensive changes to the law of procedure, evidence and sentencing. It is a product of the White Paper, *Justice for All*, in which the Government stated that it aimed to rebalance the criminal justice process in favour of victims to achieve the goal of 'Strong, safe communities'.¹ This article will consider the resultant restructuring of the law of bad character with particular reference to the admission of defendants' bad character. Consideration will also be given as to how this restructuring has helped to achieve the Government's desire to rebalance and whether the changes represent a move towards an authoritarian model of criminal justice.

The Law of Bad Character

Most crime is committed by recidivists, that is to say, those who have a criminal record have a tendency to re-offend. This means that such persons have a propensity to commit crime and are likely to have many criminal convictions. Such persons are of bad character. Bad character can also include other discreditable conduct, for example evidence that a defendant is a liar could show that he is dishonest. The courts have been very reluctant to admit bad character evidence as a matter of course because of the fear that, if a jury knew of a defendant's bad character, it may prejudice them against him so as to convict him because of his past misconduct even where the *prima facie* evidence before the court is weak.

¹ Cm 5563 (2003) p 26.

Prior to the CJA the law of bad character was a haphazard mixture of statute and common law rules and was in need of reform. Parliament, thus, enacted the CJA, Part II, Chapter 1, which reformed the law, producing a scheme that the Government hoped would result in more evidence of bad character going before magistrates and juries than had been the case under the previous law.

The CJA restructures the law of bad character² by defining bad character³ and by abolishing, with one exception, the common law rules of admissibility⁴ and by repealing the residue of the Criminal Evidence Act 1898.⁵ The key word in the definition of bad character is ‘misconduct’, which is interpreted as meaning ‘the commission of an offence or other reprehensible behaviour’.⁶ The first part of the meaning is clear as, when lawyers refer to a person of bad character, they normally mean someone with a criminal record. But ‘other reprehensible behaviour’ may be interpreted widely because it is not defined in the CJA, which could be *carte blanche* to prosecutors and judges to develop bad character evidence beyond its current limits. Munday explains:

² The CJA 2003 (Commencement No 6 and Transitional Provisions) Order 2003 brought the bad character provisions in Part 11, Chapter 1 of the CJA into force on 15 December 2004.

³ Section 98. References in this Chapter to evidence of a person’s ‘bad character’ are to evidence of, or of a disposition towards, misconduct on his part, other than evidence which:

(a) has to do with the alleged facts of the offence with which the defendant is charged, or
 (b) is evidence of misconduct in connection with the investigation or prosecution of that offence.

If the bad character evidence amounts to evidence which falls into (a) or (b), then the bad character provisions need not be considered. In *Edwards and Rowlands* [2005] EWCA Crim 3244 the Court of Appeal stated at [1(i)] ‘Where the exclusions in s98 are applicable the evidence will be admissible without more ado’. If bad character evidence does not fall within (a) or (b), then the prosecution must serve, on the defence, a notice of an intention to adduce evidence of bad character and establish admissibility through one of the gateways discussed below.

⁴ Section 99 (1). The one exception which is retained by s118 (1) is the rule that in criminal proceedings a defendant’s or witnesses’ reputation is admissible for the purposes of proving his good or bad character.

⁵ Schedule 37 Part 5.

⁶ Section 112.

Is it reprehensible for parents to condone their children's truancy? What of wife-swappers, breadwinners who gamble away the family income on scratchcards, officers in military intelligence who indulge in secret bondage sessions with 'Miss Whiplash', or professional sportsmen who engage in a spot of recreational 'dogging'... it is notorious that the 2003 Act was intended to facilitate the admission of an accused's 'bad character': the tribunal was to be made aware of it in the widest possible range of circumstances. The underlying idea is that knowledge of their disreputable past will encourage juries to convict defendants in circumstances where presently they seem reluctant to do so. Such an objective is entirely consistent with an intention that prosecutors ought to be entitled to invoke defendants' entire discreditable past, and not simply their previous convictions, as has been more or less routine hitherto.⁷

If such an interpretation is accepted by the courts, it will mean that the law of bad character will be more extensive to the disadvantage of defendants. The Court of Appeal has given some guidance as to the meaning of reprehensible behaviour. In the conjoined appeal of *Weir and other appeals*⁸ examples are given. In *Manister* (where there was an appeal by the appellant against indecent assault convictions) the Court of Appeal stated that the 39-year-old appellant's lawful sexual relationship with a 16-year-old girl did not amount to reprehensible behaviour nor did his implied assertion of sexual attraction to a 15-year-old girl ('If only you were a bit older and I a bit younger'). Whilst the former is unattractive but probably not reprehensible, it is difficult to see why an implied assertion of sexual attraction to an under-age girl could fail to qualify as reprehensible behaviour and be admitted as evidence through one of the pathways discussed below. In *Hong He and De He* the court held that the trial judge was correct to

⁷ Roderick Munday, 'What Constitutes "Other Reprehensible Behaviour" Under the Bad Character Provisions of the Criminal Justice Act 2003', [2005] *Crim LR* 24 at 38 and 41.

⁸ [2005] EWCA Crim 2866.

reject prosecution counsel's submission that failing to make a statement to the police or being arrested and subsequently released without charge were reprehensible behaviour. In the conjoined appeal of *Renda and others*⁹ the court held that reprehensible behaviour required an element of blameworthiness or culpability so that hitting someone with a chair leg amounted to reprehensible behaviour. This formulation does at least put some limit on the meaning of 'other reprehensible behaviour'.

If a defendant's conduct fails to satisfy the test of misconduct, then its admissibility is governed by the common law test of relevance to the facts in issue, subject to the common law¹⁰ and statutory discretions¹¹ to exclude such evidence if the prejudicial effect of its admittance would outweigh its probative value. In *Manister* the court held that evidence of the appellant's lawful sexual relationship with a 16-year-old girl was admissible because it was relevant to the issue of whether the appellant had a sexual appetite for young girls. The Court of Appeal also decided that the prejudicial effect of the admission of such evidence would not outweigh its probative value.

But, if a defendant's conduct does satisfy the test of misconduct so as to be bad character, how does this bad character become admissible after the CJA?

Admission of the Defendant's Bad Character

Only the common law rules of admissibility of bad character evidence are abolished by the CJA; so, the common law general exclusionary discretion, that bad character evidence should be excluded because it is unfairly prejudicial, is retained.¹² This means that the common law relating to similar fact evidence is abolished, as is the rule of

⁹ [2005] EWCA Crim 2826.

¹⁰ *Sang* [1980] AC 492.

¹¹ Section 78 of PACE.

¹² See Colin Tapper, 'Criminal Justice Act 2003: Part 3: Evidence of Bad Character, [2004] *Crim LR* 533 at 540.

evidence, formerly contained in section s1(3) (formerly (f)) of the Criminal Evidence Act 1898, that a defendant had a shield against cross-examination of his bad character right up until he attacked another person's character when he gave evidence at trial. Instead the CJA provides for seven gateways by which a defendant's bad character may become admissible.¹³

Gateways (c) and (d) replace the old law relating to similar fact evidence, with the most important gateway being (d), 'it is relevant to an important matter in issue between the defendant and the prosecution'. No leave is required to adduce the bad character evidence (although notice to the defendant must be given) nor need the evidence have substantial probative value.¹⁴ However, there is an important restriction on the admission of prior convictions as evidence of propensity (to commit offences of the kind with which he is charged or to be untruthful) through gateway (d), which is found in s101(3). This section provides that, if, on an application *by the defendant* to exclude the evidence of bad character, it appears that its admission would have such an adverse effect on the fairness of the proceedings that the court ought not to admit it, the court must not admit it. In particular, the court must have regard to the length of time between the previous crime and crime under consideration.¹⁵

¹³ Section 101(1). In criminal proceedings evidence of the defendant's bad character is admissible if, but only if:

- (a) all parties to the proceedings agree to the evidence being admissible,
- (b) the evidence is adduced by the defendant himself or is given in answer to a question asked by him in cross-examination and intended to elicit it,
- (c) it is important explanatory evidence,
- (d) it is relevant to an important matter in issue between the defendant and the prosecution,
- (e) it has substantial probative value in relation to an important matter in issue between the defendant and a co-defendant,
- (f) it is evidence to correct a false impression given by the defendant, or
- (g) the defendant has made an attack on another person's character.

¹⁴ Contrast non-defendant's bad character: see subsections 100 (1) and (4).

¹⁵ Section 101 (4).

The Explanatory Notes to the CJA state:

The test to be applied [in s101(3)] is designed to reflect the existing position under the common law, as section 78 of the Police and Criminal Evidence Act 1984 does, under which the judge assesses the probative value of the evidence to an issue in the case and the prejudicial effect of admitting it, and excludes the evidence where it would be unfair to admit it. The intention is for the courts to apply the fairness test set out here in the same way.¹⁶

To enable the defendant to make the application, the rules of court¹⁷ require the prosecution to give notice of an intention to adduce evidence of bad character. The Law Society has criticised the unrealistic time frames for the notification of bad character applications and the fact that the rules fail to take account of the reality of proceedings in the magistrates' courts, where large numbers of defendants are unrepresented so that they will be unlikely to be able to make a complicated application to exclude the bad character evidence.¹⁸

Section 103(1) (a) gives the first purpose of gateway (d). By s103(1)(a) the court may treat as matters in issue evidence of bad character that shows the defendant has a propensity to commit the kind of offence charged. The section deals with bad character evidence going to the issue of guilt although s103(1) (a) is qualified by 'except where his having such a propensity makes it no more

¹⁶ Explanatory Notes to the Criminal Justice Act 2003, paragraph 368.

¹⁷ Section 111 confers powers to make rules of court.

¹⁸ Janet Arkinstall, Secretary to The Law Society's Criminal Law Committee, (2004) *L Ex*, December, pp 4-5. See also Sally Lloyd-Bostock, 'The Effects on Lay Magistrates of Hearing that the defendant is of "Good Character"', [2006] *Crim LR* 189, where she suggests that magistrates assume a defendant to be of bad character unless they hear evidence of his good character; contrast juries. Hence the CJA has in fact changed nothing in the magistrates' court.

likely that he is guilty of the offence'.¹⁹ If the prosecution wishes to use s103(1) (a), then s103(2) enables it to introduce evidence that the defendant has convictions for identical offences or for offences of the same category. However section 103(3) provides that section 103(2) does not apply in the case of a particular defendant if the court is satisfied, by reason of the length of time since the conviction or for any other reason, that it would be unjust for it to apply in his case.

Under section 103(4)(b) the Home Secretary may make an order setting out offences of the same category and on 15 December 2004 an order was made creating categories of offences for child sex offences and theft-related offences.²⁰ The CJA puts no limit on which offences the Home Secretary can include in the same category; so, offences against the person could in theory be placed in the same category as dishonesty offences. This would be wider than the old law of similar fact evidence unless the qualification in s103(1)(a) can be interpreted to the effect that previous convictions of the same category cannot be given in evidence where they fail to show the defendant had a propensity to commit the offences of the kind with which he is charged. But, it has been suggested that this interpretation is contradicted by the Explanatory Notes that were issued with the CJA, which explain the qualification in s103(1)(a) as applying only 'where there is no dispute about the facts of the case and the question is whether those facts constitute the offence (for example, in a homicide case, whether the defendant's actions caused death)'.²¹

The second purpose of gateway (d) is found in s103(1)(b) – the court may treat as matters in issue evidence that the defendant has a

¹⁹ This qualification has been described as: 'so far from being a safeguard is so stringent in its exemption that it will hardly ever be capable of establishment, given minimal ingenuity by the prosecution'; see Colin Tapper, 'Criminal Justice Act 2003: Part 3: Evidence of Bad Character', [2004] *Crim LR* 533 at 543.

²⁰ The Criminal Justice Act 2003 (Categories of Offences) Order 2004 (SI 2004/ 3346) which came into force on 29 December 2004.

²¹ Explanatory Notes to the Criminal Justice Act 2003, paragraph 371; see Roderick Munday, 'Bad Character Rules and Riddles "Explanatory Notes" and the True Meaning of s103 (1) of the Criminal Justice Act 2003', [2005] *Crim LR* 337 at 339.

tendency to be untruthful. This relates to evidence of bad character going to credibility – whether the defendant can be believed. In contrast to s103(1)(a), here the Explanatory Notes suggest that ‘a limited range of evidence such as convictions for perjury or other offences involving deception’²² should be used to show the defendant has a tendency to be untruthful. But, as Munday says: ‘Obviously, the \$64,000 question is: are the courts entitled to refer to the Explanatory Notes when wrestling with the covert meanings possibly underlying some of the bad character provisions of the statute?’²³

If the courts follow the explanation of s103(1)(a), it could lead to more convictions as offences of same category will be widely interpreted. In contrast, the explanation of s103(1) (b) is more limited than the previous law and, therefore, is advantageous to defendants.

Gateways (e) to (g) are to replace s1(3) (formerly (f)) of the Criminal Evidence Act 1898 as the gateways largely follow s1(3)(i)-(iii) but with one very important change since these gateways are *not* confined only to cross-examination of the defendant because they may be initiated even though the defendant does *not* give evidence in his own defence.²⁴ For example gateway (f) will apply where the defendant makes a false impression (express or implied²⁵) as to credibility when being questioned under caution at a police station. The defendant’s shield will be lost at that point so that his bad character can form part of the prosecution evidence.²⁶ But more importantly gateway (g) will apply where the defendant attacks another person’s character when being questioned under caution at a police station. The defendant’s

²² Explanatory Notes to the Criminal Justice Act 2003, paragraph 374.

²³ Roderick Munday, *op cit*, p 340 *et seqq.*

²⁴ Paul Roberts and Adrian Zuckerman, *Criminal Evidence* (OUP, 2004), chap 11, pp514-15.

²⁵ Such as being dressed as a clergyman when being questioned about an offence of dishonesty.

²⁶ Section 105, which is not subject to s101(3). But such evidence need not be given if the defendant withdraws the false impression: s105(3).

shield will be again lost at that point.²⁷ This may in fact be a hindrance to the police as the purpose of the police interview post PACE is to construct cases against defendants by getting them to confess. But, if there is a possibility the defendant, when interviewed, will attack the character of another, the legal advice may be to remain silent or risk having his bad character before the court.

Interpretation of the CJA Bad Character Provisions

These changes to the law of bad character represent an escalation of the criminal justice process in that the Government is indicating that it wants more bad character evidence before the courts so that more defendants will be convicted, with many of them being sent to prison. Has the Court of Appeal intervened to restrain the Government's desire to escalate? It is not the first time the court has had to step in.²⁸ There have been a number cases, all of which were conjoined appeals.²⁹ In *Hanson and others*³⁰ the Court of Appeal (with Rose LJ presiding) gave general guidance on the operation of the CJA bad character provisions themselves and, in particular, gateways (d) and (g). As to general guidance the court stated that Parliament's purpose in the legislation was to assist in the evidence-based conviction of the guilty and not putting those who were not guilty at risk of conviction by prejudice and judges, when summing up, should warn juries

²⁷ Section 106, which is subject to section 101(3).

²⁸ In the past the Court of Appeal has had an important role in curbing the Government's desire to escalate the criminal justice process, for example, in *Offen*²⁸(No 2) [2001] 1 WLR 253. It was able to neutralise the automatic life sentence contained in section 109 of the Powers of the Criminal Courts Act 2000 by its interpretation of 'exceptional circumstances', contained in that section, so that an offender convicted of a second 'serious offence' who would otherwise be liable to an automatic life sentence could avoid that sentence by persuading the court that he did not represent an unacceptable risk to the public. Section 109 was repealed by section 303(d)(iv), CJA.

²⁹ *Hanson and others* [2005] EWCA Crim 824, *Renda and others* [2005] EWCA Crim 2826, *Highton, Dong Van Nguyen and Carp* [2005] EWCA Crim 1985, *Weir and other appeals* [2005] EWCA Crim 2866 and *Edwards and other appeals* [2005] EWCA Crim 3244.

³⁰ *Ibid.* The full court heard three applications for leave to appeal against conviction.

against placing undue reliance on previous convictions.³¹ In respect of gateway (d) regarding reliance upon propensity to commit the offence, the court made it clear that:

There is no minimum number of events necessary to demonstrate such a propensity. The fewer the number of convictions the weaker is likely to be the evidence of propensity. A single previous conviction for an offence of the same description or category will often not show propensity. But it may do so where, for example, it shows a tendency to unusual behaviour or where its circumstances demonstrate probative force in relation to the offence charged (compare *Director of Public Prosecutions v P* (1991) 93 Cr App R 267 at 279, [1991] 2 AC 447 at 460E to 461A). Child sexual abuse or fire settings are comparatively clear examples of such unusual behaviour but we attempt no exhaustive list. Circumstances demonstrating probative force are not confined to those sharing striking similarity. So, a single conviction for shoplifting, will not, without more, be admissible to show propensity to steal. But if the modus operandi has significant features shared by the offence charged it may show propensity.³²

The citing of *DPP v P*³³ indicates that the Court in *Hanson* was of the view that pre-CJA case law relating to similar fact evidence would still apply to the CJA provisions. In addition, the court noted that s101(3) used the words, ‘must not admit’, in contrast to ‘may refuse to allow’ in s78 of PACE³⁴ and concluded, in contrast to the

³¹ *Ibid*, at [4] and [18].

³² *Ibid*, at [9].

³³ [1991] 2 AC 447.

³⁴ (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

explanatory notes to the CJA, that it was a stronger provision³⁵. In respect of gateway (d) the court stated:

When considering what is just under s103(3), and the fairness of the proceedings under s101(3), the judge may, among other factors, take into consideration the degree of similarity between the previous conviction and the offence charged, albeit they are both within the same description or prescribed category. For example, theft and assault occasioning actual bodily harm may each embrace a wide spectrum of conduct. This does not however mean that what used to be referred to as striking similarity must be shown before convictions become admissible. The judge may also take into consideration the respective gravity of the past and present offences. He or she must always consider the strength of the prosecution case. If there is no or very little other evidence against a defendant, it is unlikely to be just to admit his previous convictions, whatever they are.³⁶

In respect of gateway (g) the court expressly stated that ‘pre-2003 Act authorities will continue to apply when assessing whether an attack has been made on another person's character’.³⁷

On the face of it this was a conservative judgment as it was giving a message that, despite the change to the law of bad character, made by the CJA, the approach of the courts should be that a defendant's bad character should not be admitted as a matter of routine. Ostensibly, the judgment was a rebuff to the Government's desire to escalate the criminal justice process.

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

³⁵ No 29 at [10].

³⁶ No 29 at [10].

³⁷ No 29 at [14].

However, it should be noted that in the same judgment the court upheld the conviction in *Gilmore*,³⁸ where the trial judge had admitted through gateway (d) the appellant's three previous shoplifting convictions for the following reason:

... [i]n our judgment, the previous convictions were plainly relevant to the issue of whether his possession of the goods, in those circumstances, was innocent or criminal. They established propensity to steal, and that propensity increased the likelihood of guilt.³⁹

But, the court relied merely upon the fact of the shoplifting convictions and it did not look into the circumstances of them which would have shown that they were a different form of theft from that for which *Gilmore*'s conviction was upheld – stealing from a garden shed in the early hours of the morning. It is unlikely that the shoplifting convictions would have been admitted under the common law as similar fact evidence because they involved a different kind of theft. Dennis concludes that:

So it would appear that in at least some cases the fact of conviction of a given offence, as opposed to the facts of the conviction, may qualify for admission under s101(1)(d). This of course was the government's policy objective, and the Court of Appeal has to some extent now endorsed it. How far the opening up of admissibility of convictions will go remains to be seen.⁴⁰

The Court in *Hanson* – a conjoined appeal – did give guidance as to the parameters of the bad character provisions although this guidance was not followed when dealing with one of the appeals. The cases were not heard individually but rather as conjoined appeals and this, it is submitted, indicates that the Court of Appeal wants trial judges to

³⁸ No 29 at [30] to [38].

³⁹ No. 29 at [38].

⁴⁰ [2005] *Crim LR* 599 at 600.

have responsibility for the application of the provisions. That is the view of Judge LJ in *Renda and others* :

We have some general observations. Several of the decisions or rulings questioned in these appeals represent either judgments by the trial judge in the specific factual context of the individual case, or the exercise of a judicial discretion. The circumstances in which this court would interfere with the exercise of a judicial discretion are limited. The principles need no repetition. However we emphasise that the same general approach will be adopted when the court is being invited to interfere with what in reality is a fact-specific judgment. As we explain in one of these decisions, the trial judge's 'feel' for the case is usually the critical ingredient of the decision at first instance which this court lacks. Context therefore is vital. The creation and subsequent citation from a vast body of so-called 'authority', in reality representing no more than observations on a fact-specific decision of the judge in the Crown Court, is unnecessary and may well be counter-productive. This legislation has now been in force for nearly a year. The principles have been considered by this court on a number of occasions. The responsibility for their application is not for this court but for trial judges.⁴¹

If this observation is followed, it will mean that trial judges' discretion (under section 78 of PACE) will become very important in ensuring that bad character evidence is not admitted as a matter of routine, thus maintaining defendants' right to a fair trial under Article 6 of the European Convention of Human Rights.

However, other decisions of the Court of Appeal have set out some general principles relating to the bad character provisions, none of which are in favour of defendants. In *Edwards* the Court made the observation that '[u]nder the new regime it is apparent that Parliament

⁴¹ No 29 at [3].

intended that evidence of bad character would be put before juries more frequently than had hitherto been the case'.⁴² In *Highton*⁴³ the Court decided that, because the defendant had attacked the good character of a prosecution witness, then the appellant's previous convictions had been properly admitted through gateway (g) but, once that had happened, the evidence could be used for the first purpose of gateway (d) – to show the defendant had a propensity to commit the kind of offence charged. This is an interpretation which is obviously unfair to defendants but in *Edwards* the Court made it clear that the pathways, set out in s101, CJA, dealt with the issue of admissibility and not with relevance or weight and that, once the evidence was 'admitted (no matter through which gateway) it can be used for any purpose for which it is relevant'.⁴⁴ In *Weir* the Court considered gateway (d) and held that evidence of a caution could be evidence of a propensity to commit offences of the type with which the defendant is charged. This means the evidence need not be convictions but there is very little guidance as to the assessment of such evidence.

The limited guidance by the Court on the bad character provisions shows that it is complying with Parliament's intention of having more bad character evidence before juries and magistrates. The Court also wants trial judges (and magistrates) to have responsibility for the application of the bad character provisions.

Conclusion

The Government changed the law of bad character, with the common law controls on the admissibility of defendants' bad character being swept away with the aim of making more evidence of bad character admissible in court, thus enabling the courts to convict more offenders with many of them being sent to prison. Thus, the changes represent an attempt to escalate the criminal justice process, with the purpose of re-balancing the process in favour of victims. The overall

⁴² No 29 at [1 (iii)].

⁴³ No 29.

⁴⁴ No 29 at [99].

consequence of these changes in the law of bad character is the possibility of admission of evidence ‘which would previously have been excluded because the risk of potential prejudice outweighed its probative force’.⁴⁵ This may lead to ‘prejudicial reasoning’ when a jury gives too much weight to bad character evidence (‘he has done it before; he must have done it this time’) or even ‘moral prejudice’ when the jury convict where, even with the bad character evidence, the prosecution have failed to establish a *prima facie* case. The great danger is that prejudicial reasoning or moral prejudice by the jury (and perhaps more importantly magistrates’ courts as they hear the majority of criminal cases) will mean the standard of proof *de facto* will be reduced as it may be possible to convict on the basis of ‘bad character at large’.⁴⁶ By applying the principle of full proof⁴⁷ against a defendant, the courts influence police practice because they know that in a trial evidence will have to be produced to make the magistrates or jury satisfied so as to be sure that the prosecution has proved its case and the defendant is guilty of the preferred charges. But, if this principle is weakened, police practice may become sloppy without full investigations as cases may be solved on the basis of rounding up the usual suspects. The Home Affairs Select Committee, in its scrutiny of the Criminal Justice Bill, referred to research that shows that knowledge of previous convictions increases the chances that the innocent will be found guilty.⁴⁸

The Court of Appeal wants trial judges to have responsibility for the application of the bad character provisions. So, it is to trial judges that we must look for some control of the Government’s appetite for escalation. Although the gateways (except subsection (1)(d) and (g) gateways) to admission are not subject to a specific judicial discretion

⁴⁵ Colin Tapper, ‘Criminal Justice Act 2003: Part 3: Evidence of Bad Character’, [2004] *Crim LR* 533 at 538.

⁴⁶ Paul Roberts and Adrian Zuckerman, *Criminal Evidence* (OUP, 2004), ch 11, p 510.

⁴⁷ *Ibid.*

⁴⁸ *House of Commons Home Affairs Committee, Criminal Justice Bill. Second Report of Session 2002-03*, available at: www.publications.parliament.uk/pa/cm200203/cmselect/cmhaff/83/83.pdf

to exclude to avoid an adverse effect on the fairness of the trial, section 78 of PACE will apply to evidence of bad character and in each case there will be a need for a judgement on the ordinary principles of relevance and probative value versus the prejudicial effect. It is hoped that this discretion is used wisely to avoid the risk of 'prejudicial reasoning' or 'moral prejudice', thus maintaining defendants' Article 6 rights and avoiding an unnecessary escalation of the criminal justice process.

Of course, this process of escalating the criminal justice process is not new but a process that has been continuing since, at the very least, the enactment of the Criminal Justice and Public Order Act 1994 when, *inter alia*, the mandatory warnings relating to the evidence of accomplices, complaints of sexual offences and the fact that silence had no evidential consequences for suspects were abolished.⁴⁹ The changes to the law of bad character are part of a process whereby controls on admissibility of evidence are being removed. These changes indicate the Government wishes to move towards a conservative model of criminal justice but there is the risk of ending up with an authoritarian model where, as Radzinowicz identified, 'strictly enforced rules of evidence, strictly interpreted and inspired by the principle of the presumption of innocence are absent or neglect'.⁵⁰

How far will this desire for re-balancing and escalation go? The British Crime Survey shows a drop of one quarter in crimes committed between 1997 and 2002⁵¹. Does this not indicate the escalation has reduced crime? Ashworth thinks not:

Does this not show that the high imprisonment policy has worked? No: as suggested above, the simple inference cannot be drawn. There is probably a small incapacitation effect, but

⁴⁹ Ss 32-39.

⁵⁰ Sir Leon Radzinowicz 'Penal Regressions', (1991) 50(3) *Cambridge Law Review* 426.

⁵¹ Andrew Ashworth, 'Criminal Justice Act 2003: Part 2: Criminal Justice Reform-Principles, Human Rights and Public Protection' [2004] *Crim LR* 516 at 520.

the crime rate began to decline before the steep rise in imprisonment, there has also been a decline in the number of young people in society (the most crime-prone age-group), and international comparisons show declines in crime rates in recent years in countries where the use of imprisonment has not escalated.⁵²

So, at the very least the escalation should stop otherwise the criminal justice process will continue its relentless move towards an authoritarian model where those accused of crime have limited or no rights. Unfortunately, any human rights culture in the Home Office (and now the Ministry of Justice) has eroded since 1997 so much so that the culture is now ‘how far can we push things to achieve public protection without risking a human rights challenge?’⁵³ This change of culture is currently being fuelled by the need to deal with comparatively rare violent crime and terrorism but those should not be an excuse for further escalation of the criminal justice process in general as that process is mainly concerned with acquisitive crime, which is reducing.

⁵² *Ibid*, at 520-521.

⁵³ *Ibid*, at 526-7. See also Danny Nicol, ‘The Human Rights Act and the politicians’, (2004) 24 *LS* 451.