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SCOTTISH LAW COMMISSION

Report on Similar Fact Evidence and the *Moorov* Doctrine

Report on a reference under section 3(1)(e) of the Law Commissions Act 1965
Laid before the Scottish Parliament by the Scottish Ministers

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The Scottish Law Commission was set up by section 2 of the Law Commissions Act 1965[1] for the purpose of promoting the reform of the law of Scotland. The Commissioners[2] are:

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NOTES

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[1] Amended by the Scotland Act 1998 (Consequential Modifications) (No 2) Order 1999 (SI 1999/1820).
[2] As at 16 April 2012.

SCOTTISH LAW COMMISSION

Report on a reference under section 3(1)(e) of the Law Commissions Act 1965

Report on Similar Fact Evidence and the *Moorov* Doctrine

To: Kenny MacAskill MSP, Cabinet Secretary for Justice

We have the honour to submit to the Scottish Ministers our Report on Similar Fact Evidence and the *Moorov* Doctrine

(Signed) LAURA J DUNLOP
PATRICK LAYDEN
HECTOR L MACQUEEN
ANDREW J M STEVEN

Malcolm McMillan, *Chief Executive*
16 April 2012

Contents

Contents (cont'd)

Contents (cont'd)

Contents (cont'd)

Contents (cont'd)

Abbreviations

1887 Act	Criminal Procedure (Scotland) Act 1887
1898 Act	Criminal Evidence Act 1898
1926 Act	Criminal Appeal (Scotland) Act 1926
1975 Act	Criminal Procedure (Scotland) Act 1975
1995 Act	Criminal Procedure (Scotland) Act 1995
2002 Act	Sexual Offences (Procedure and Evidence) (Scotland) Act 2002
2003 Act	Criminal Justice Act 2003
2010 Act	Criminal Justice and Licensing (Scotland) Act 2010
2011 Act	Double Jeopardy (Scotland) Act 2011
The Convention ECHR	The European Convention on Human Rights
The Crown Office	The Crown Office and Procurator Fiscal Service
The Faculty	The Faculty of Advocates
The judges	The Senators of the College of Justice
The Law Society	The Criminal Law Committee of the Law Society of Scotland

Chapter 1 – Introduction

OUR REMIT

1.1 On 20 November 2007 we received a reference[1] from the Cabinet Secretary for Justice, Mr Kenny MacAskill MSP, asking us:

> "To consider the law relating to:
>
> - judicial rulings that can bring a solemn case to an end without the verdict of a jury, and rights of appeal against such;
> - the principle of double jeopardy, and whether there should be exceptions to it;
> - admissibility of evidence of bad character or of previous convictions, and of similar fact evidence; and
> - the *Moorov* doctrine[2];
>
> and to make any appropriate recommendations for reform."

We published a Discussion Paper[3] and Report[4] on *Crown Appeals* in 2008, which dealt with the first part of the reference. In 2009 we published a Discussion Paper[5] and a Report[6] on *Double Jeopardy*, which dealt with the second part of the reference. We published a Discussion Paper[7] on *Similar Fact Evidence and the* Moorov *Doctrine* in 2010.

1.2 This Report relates to the final elements of the reference, namely the admissibility of evidence of bad character or of previous convictions, and of similar fact evidence and the *Moorov* doctrine.

1.3 The subject matter of this project is complex and controversial, and we received a diverse range of views, for which we are grateful, from all those who responded to our Discussion Paper.[8] Our work on this Report was also greatly assisted by discussions with our advisory group, and with the judges who were members of our judicial reference group. The names of those persons and organisations who responded, or who participated in the two groups, are listed in Appendices C and D. We also benefited greatly from a conversation with Justice Cromwell, of the Supreme Court of Canada, who took the time to discuss with us the jurisprudence in that country.

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[1] Under the Law Commissions Act 1965, section 3(1)(e).
[2] The *Moorov* doctrine is explained at paragraph 1.7 of this Chapter.
[3] DP No 137.
[4] Scot Law Com No 212.
[5] DP No 141.
[6] Scot Law Com No 218.
[7] DP No 145.
[8] Ibid.

The scope of the reference: definition of terms

1.4 The Discussion Paper began by defining the individual matters in the reference, that is, bad character, similar fact evidence and the *Moorov* doctrine. ("Previous convictions" is self-explanatory). In the Paper we dealt with those matters separately, because the courts had dealt with them separately. But, logically, it is possible to view them as parts of a coherent whole. For reasons developed in this Report, we recommend not only reform of the law, but reform upon the basis of general principles, rather than on the basis of the various strands of the reference. Nevertheless, for ease of reference and clarity we repeat our definitions below:

"Evidence of bad character"

1.5 We adopt a broad interpretation of the term "evidence of bad character". Bad character is not a term of art in Scots law and we take it as having its ordinary English-language meaning. Accordingly, we treat "evidence of bad character" simply as evidence tending to show the person to whom it relates as being either a morally bad person or as a person who has previously done something discreditable, including having broken the law. Allegations of having committed offences other than those with which the accused is presently charged will fall within this definition, whether or not these allegations involve reference to previous criminal charges or convictions. So too will more general allegations of dishonesty or bad character which relate to conduct which, while not criminal, might be thought to be reprehensible.

"Similar fact evidence"

1.6 While a number of other English-speaking jurisdictions have developed considerable jurisprudence regarding the admission of "similar fact evidence", the expression is not a term of art in Scots law.[9] In this Report, we use the term as meaning "evidence that the accused has, before or after the facts alleged in the instant charge, acted in a similar way to that charged." It would accordingly include evidence of the accused person's previous convictions. We should add that there are indications that when the term has been used by judges in Scotland, it may have been intended to refer *only* to evidence of previous convictions. That matter is discussed in Chapter 7.

The Moorov *doctrine*[10]

1.7 One of the distinctive features of Scots criminal law is the requirement of corroboration: with a very few statutory exceptions, no criminal charge may be proved unless each crucial fact is established by evidence from more than one source. The *Moorov* doctrine represents what might at first sight appear to be an exception to this requirement by

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[9] Peter Duff observes that "[a]n interesting feature of the Scots law of evidence is the almost total absence of the use of the term 'similar facts evidence', when, in most jurisdictions with an adversarial criminal justice process much academic discussion and many recent cases have centred upon this topic.": Peter Duff, "Towards a unified theory of 'similar facts evidence' in Scots law: relevance, fairness and the reinterpretation of *Moorov*." 2002 JR 133 at 133. *Cross and Tapper on Evidence*, a leading English textbook, defines "similar fact evidence" as "that part of the law of evidence concerned with the rule which prevents a party, usually a prosecutor, from leading evidence showing the discreditable disposition of the other, usually the accused, as derived from his discreditable acts, record, possessions or reputation." It is clear from this definition that "similar fact evidence", in English law, may be used to refer to the whole area of evidence of bad character.

[10] Taken from *Moorov v HM Advocate* 1930 JC 68.

permitting the credible but uncorroborated evidence of a single witness to an offence to corroborate, and to be corroborated by, the credible but uncorroborated evidence of a single witness to another offence. Such mutual corroboration is only permitted where the crimes are sufficiently connected in time, character and circumstance. What constitutes a sufficient connection has been the matter of extensive discussion in the courts. Logically, the *Moorov* doctrine is an example of the admissibility of similar fact evidence.

The Howden *doctrine*

1.8 We also consider the related doctrine first identified by the High Court in *Howden v HM Advocate*.[11] This doctrine recognises that where a jury is satisfied beyond reasonable doubt that two offences, libelled together in the same indictment, must have been committed by the same person, they may rely upon the corroborated evidence of identity in relation to one charge to support conviction in relation to the other (in respect of which there would otherwise be insufficient evidence of identity). The *Howden* doctrine may be seen as a particular application of the ordinary Scottish rules as to circumstantial evidence.

GENERAL SUMMARY

1.9 This Report recommends that the current, common law on the admissibility of evidence as to bad character, similar fact evidence and previous convictions should be replaced with a coherent restatement in a new statute. As we explain in Chapter 2, we have come to the view that that is best done against the background of the basic rules of criminal evidence. We accordingly recommend that that statute should set out the fundamental rules of evidence. In particular, it should be recognised that relevance is a matter of logic, rather than of law, and that all relevant evidence should be admissible, subject to some public policy exclusions. We also recommend that irrelevant evidence should be inadmissible, either because its irrelevance is recognised before it is led or, where it has to be led before a decision can be made, because it is then recognised as irrelevant and excluded. Any such restatement would subsume the *Moorov* and *Howden* doctrines.

1.10 The basis upon which we proceed is that similar fact evidence, and previous convictions in particular, are relevant because they may demonstrate a propensity on the part of the accused person to act in a particular way. We focus on propensity, because it is our view that, upon analysis, evidence that a person has acted in a particular way on other occasions demonstrates that he has a tendency to act in that way. Such evidence of propensity may, depending upon the weight given to it by the fact finder, corroborate other evidence that the accused committed the crime with which he is charged.

1.11 In relation to previous convictions, we have analysed the present law, which in our view operates in an illogical and arbitrary manner. Under the current statutory framework, the accused may well refrain from challenging the character of the prosecution witnesses for fear that his own previous convictions will be revealed to the fact finder. Where that happens, the result is that the fact finder may well be denied relevant information as to the accused person's previous convictions, as well as relevant information as to the character of the prosecution witnesses. Where the accused does challenge the character of the prosecution witnesses, all of his or her own convictions, relevant and irrelevant, are liable to be revealed to the jury. We have concluded that the "tit for tat" character of the current

[11] 1994 SCCR 19.

regime is not satisfactory. We accordingly recommend replacing the current statutory framework as to the admissibility of previous convictions with new provisions focussing on the relevance of such convictions to the offence with which an accused person is currently charged.

1.12 The Report recognises that many people will be strongly of the view that implementation of our recommendations will diminish the presumption of innocence of those who have previous convictions. Their concern is that this will happen in two ways: first the police will feel able simply to "round up the usual suspects"; second, the prosecutor may simply use the evidence of previous convictions to "give a dog a bad name, and hang him". As a corollary, both police and prosecutor may be tempted to take less trouble over finding other supporting evidence in cases where a suspect already has a record of having committed similar offences.

1.13 We recognise these concerns, which we have considered carefully. We think that they are founded essentially upon two basic premises: first, that our recommendations subvert the presumption of innocence of those who have previous convictions and, second, that juries (and to a lesser extent sheriffs and justices) will be so prejudiced by the knowledge of an accused person's previous convictions that they will pay no or insufficient regard to the other evidence in the case, and will simply convict because of the accused person's record. The result in both cases is that the accused will not receive a fair trial.

1.14 We do not agree that the presumption of innocence is affected by the revelation of previous convictions, when these are relevant to the current offence. As we point out in Chapter 4 of this Report, a number of other common law, adversarial jurisdictions allow evidence of previous convictions. Such evidence was admitted as a matter of routine in Scotland until late in the nineteenth century. And as the practice in other European jurisdictions shows, an accused person has no Convention right to keep his previous convictions from the fact finder.

1.15 If our recommendations are followed, we envisage that there will be attached to a complaint or indictment a docket setting out the accused person's relevant previous convictions. At the close of the trial the fact finder will be addressed on those previous convictions by counsel for the prosecution and defence, and, where the fact finder is a jury, they will receive appropriate directions from the judge.

1.16 Nor do we believe that a jury cannot give proper weight to information about an accused person's previous conduct. The system of trial by jury continues to command popular support, and in our view enables ordinary citizens to be usefully involved in the most serious cases of criminal conduct.

THE STRUCTURE OF THIS REPORT

1.17 Chapter 2 sets out, in broad terms, why we consider that the present law needs to be put on a statutory basis, and why any such statute should approach the matter by restating the general principles of the law of criminal evidence in Scotland.

1.18 Chapter 3 deals with preliminary matters. It includes a consideration of what is meant by "relevance", whether juries can be trusted, and a discussion of the nature of corroboration.

1.19 Chapter 4 considers the law on this matter in other, comparable systems, that is, Australia, Canada, England and Wales and New Zealand. It demonstrates that, while their regimes differ in emphasis and in the way they approach different aspects of the matter, they all, to a greater or lesser extent, permit evidence of similar conduct by the accused as relevant to some or all of the issues in current criminal proceedings. If the Scottish Parliament decides to adopt the recommendations in this Report, it will certainly be changing the law in Scotland, but in ways which would be recognised as appropriate in a number of other jurisdictions.

1.20 Chapter 5 examines in detail what is meant by bad character, similar fact evidence and propensity. In relation to propensity, we note the wide judicial acceptance, in other jurisdictions, that evidence that a person has a propensity to act in a particular way is relevant to the question of whether he has acted in that way in current criminal proceedings, and we recommend changing Scots law to reflect that position.

1.21 Chapter 6 analyses the *Moorov* and *Howden* doctrines in detail, and considers various limitations on them as they operate at present. We suggest that a statute along the lines we propose would subsume those doctrines.

1.22 Chapter 7 examines the current statutory regime with regard to the admission of evidence of previous convictions. It confirms the view we expressed in the Discussion Paper, that the current position is illogical, arbitrary and inconsistent. It then deals with a number of questions as to the practicability of introducing a new regime, and concludes that such a regime, based upon the relevance of evidence of previous convictions, would strike a better balance between the rights of society and the rights of the accused than is achieved by the present position.

1.23 Chapter 8 summarises the recommendations made in this Report.

Corroboration and Lord Carloway's Review[12]

1.24 In relation to corroboration, we are of course aware of the recommendation by Lord Carloway that the requirement for corroboration should be abolished. His Lordship took the view that the requirement was archaic, and that its retention would ensure that "Scots criminal law remains deeply steeped in what is essentially late medieval jurisprudence". It is certainly true that, along with other aspects of our criminal law, the requirement for corroboration has long sought to protect the individual from unjust results in the criminal courts. We agree that the longevity of a principle or practice does not in itself justify its continuation. On the contrary, it is sensible to review any long-standing rule from time to time, in order to see whether it is still of use. In relation to the requirement for corroboration, our view is that it continues to perform a valuable function. In any event, to remove only one feature of a complex interrelationship of rights and procedures is to run a serious risk of unbalancing the system.

1.25 In any event, we believe that what we say in this Report would apply even if corroboration were no longer necessary but merely desirable. To that extent there is no logical conflict between what Lord Carloway has recommended in his Report and what we recommend here.

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[12] The Carloway Review: Report and Recommendations, 17 November 2011.

1.26 But it is the case that, if our recommendations are accepted, the practical result will be that there will be a wider range of corroborative material available to the Crown than is currently the case. That may well result in more guilty people being convicted. That consideration may well inform any decision by the Scottish Government, and the Parliament, on whether or not to abolish the requirement for corroboration.

LEGISLATIVE COMPETENCE

1.27 The legislative competence of the Scottish Parliament is limited by section 29 of, and Schedules 4 and 5 to, the Scotland Act 1998. In particular, Schedule 5 sets out a list of matters in relation to which legislative competence is reserved to the United Kingdom Parliament.

1.28 The matters considered in this Report concern criminal law and evidence. With a few exceptions, which do not concern the matters in this Report, these areas of law are not reserved to the United Kingdom Parliament by Schedule 5.[13]

1.29 In addition to the provisions of Schedule 5, the Scotland Act provides that an Act of the Scottish Parliament is not law if "it is incompatible with any of the Convention rights or with Community law".

1.30 So far as Convention rights are concerned, the most critical point in this Report is our recommendation that evidence of relevant previous convictions should be admissible in criminal trials. That matter was considered in detail in the case of *DS v HM Advocate,*[14] and it was found that the admission of such evidence did not breach the accused person's right to a fair trial under Article 6 of the Convention.

1.31 Separately, the European Union is taking a more active stance on matters of criminal procedure; but, here too, there is no bar to the adducing of evidence of previous convictions. Indeed, EU legislation requires convictions in any Member State to be admissible in other Member States under the same conditions as apply in the receiving Member State.[15] That obligation is implemented by various provisions in the 1995 Act.[16]

1.32 In our view, enactment of the recommendations made in this Report would be compatible with Convention rights and with Community law. We consider that our recommendations would therefore be capable of being implemented by legislation of the Scottish Parliament.

IMPACT ASSESSMENT

1.33 In considering any law reform proposal, we are obliged to consider its economic impact. In the context of criminal procedure, the principal issues in play are those of justice:

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[13] Scotland Act 1998, s 126(5); Sch 5.
[14] 2007 SC (PC) 1.
[15] Council Framework Decision 2008/675/JHA of 24 July 2008, Article 3: "Each Member State shall ensure that in the course of criminal proceedings against a person, previous convictions handed down against the same person for different facts in other Member States, in respect of which information has been obtained under applicable instruments on mutual legal assistance or on the exchange of information extracted from criminal records, are taken into account to the extent previous national convictions are taken into account, and that equivalent legal effects are attached to them as to previous national convictions, in accordance with national law."
[16] Cf sections 286A, 307(5)(a).

both the right of the accused to a fair trial and the public interest in securing the conviction of the guilty. Economic considerations are not paramount, but they may not be discounted.

1.34 We are of the view that any change to the law of evidence and procedure which might be made as a result of this project would be unlikely to have a significant economic impact upon members of the public, or upon businesses.

1.35 It is possible that there may be a slight impact upon the resources of police and prosecution, inasmuch as any expansion of the admissibility of evidence of past offending may make it desirable to retain fuller records of past cases. It is also possible that, by allowing the prosecution the use of a wider range of evidence, our recommendations would result in more convictions. But we are inclined to think that any economic impact from this would be minimal. The over-riding consideration is the need to have a law of criminal evidence which assists in the conviction of the guilty while protecting the innocent.

Chapter 2 Need for Reform of the Law of Criminal Evidence

2.1 In this Chapter we reiterate our guiding principles in relation to the law of criminal evidence, and set out our reasons for concluding that there is a need for reform.

Our guiding principles

2.2 The Scottish Law Commission has a long history of involvement with the law of evidence. The law of evidence was included in our First Programme of Law Reform.[1] As long ago as 1980 we published a Consultative Memorandum, "Law of Evidence",[2] in which we had this to say:

> "The object of all reform in this area of law, whether in the long or the short term, must be to make the law of evidence, so far as possible, an intelligible and coherent whole. To that end, the Commission has tried to bring to bear certain guiding principles, which in its opinion should govern any discussion of the law of evidence, on its consideration of that law in its present state. These principles may be stated in the following terms:
>
> (1) The law should be simplified to the greatest degree consistent with the proper functioning of a law of evidence.
>
> (2) As a general rule all evidence should be admissible unless there is good reason for it to be treated as inadmissible.
>
> (3) Where a report of an event has been committed contemporaneously to writing in the ordinary course of a person's work, that writing should be given evidential value.
>
> (4) Every person should be both a competent and compellable witness unless there is some good reason to the contrary.
>
> (5) The rules of evidence in civil and criminal proceedings should be identical unless there is good reason to the contrary."[3]

2.3 Principles (1) and (2) remain directly relevant to the present project. Principle (5) also has some relevance, although the principal aspects in which the criminal law of evidence differs from the civil – that is, the requirement for corroboration and the persistence of a rule against the admission of hearsay evidence – lie outwith our terms of reference.[4] We would refine principle (2) by referring explicitly to *relevant* evidence, and add a further

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[1] Scot Law Com No 1 (1965).
[2] Consultative Memorandum No 46. The Consultative Memorandum was prepared partly on the basis of a substantial Research Paper prepared for the Commission by Sheriff I D MacPhail.
[3] Ibid, para A.03.
[4] We note that the Scottish Parliament has recently given effect to Principle (4) by enacting that the spouse or civil partner of an accused shall be a compellable, as well as a competent, witness: 1995 Act, s 264, as substituted by the Criminal Justice and Licensing (Scotland) Act 2010, s 86. And Ministers are currently considering Lord Carloway's Report, which deals, *inter alia,* with corroboration.

principle, that evidence which is not relevant should be excluded.[5] Our guiding principles, therefore, are as follows:

> (1) The law should be simplified to the greatest degree consistent with the proper functioning of a law of evidence.
>
> (2) As a general rule all relevant evidence should be admissible unless there is good reason for it to be treated as inadmissible.
>
> (3) Evidence which is not relevant should be excluded.[6]

The need for reform

2.4 Our perception of a need for reform is based partly upon our consideration of the responses of our consultees to both general and particular issues, and partly upon a consideration of the way in which the courts have dealt generally with similar fact evidence. It may be helpful to give some particular, and illustrative, examples.

2.5 First, in the Discussion Paper, in paragraphs 3.10 to 3.11, we attempted to summarise the present law relating to evidence of bad character:

> "3.10 In summary, the approach of the courts appears to be to allow evidence of the character of the accused, including other misconduct, where this is sufficiently relevant to the proof of a crime charged. Where this evidence discloses the commission of another crime, fair notice may require that it be narrated in the indictment. Difficulties may arise where the conduct has been the subject of prior criminal proceedings; we return to this topic in the next Part.
>
> 3.11 These specialities aside, it is not clear that Scots law presently has any general rule restricting the use of evidence of bad character as such. The most important question is relevance: where evidence is relevant to the proof of an offence charged, it will not generally be excluded merely on the basis that it shows the accused to be of bad character."

We then went on to ask two closely related questions: is the current law in relation to evidence of bad character, as set out in paragraphs 3.10-3.11, satisfactory; and, if not, what changes should be made?

Consultees' responses

2.6 The answers were illuminating. The professional groups who responded generally viewed the present law as satisfactory in practice. The Senators of the College of Justice ("the judges") regarded the present law as satisfactory partly on the basis that the Discussion Paper had shown the potentially broad admissibility of evidence of relevant similar facts, and suggested that any further development of the law be left to the courts. The Crown Office and Procurator Fiscal Service ("the Crown Office") considered that "there is a degree of uncertainty surrounding this area of law", but were concerned that re-stating

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[5] It is of course implicit in the Consultative Memorandum's use of the term "evidence" that only matter which is relevant counts as evidence. Nevertheless, for reasons that will become clear in the course of this Report, we feel that it is necessary to make this point explicit.

[6] As mentioned in Chapter 1, it may not always be possible to determine, in advance of its being led, that a particular piece of evidence is irrelevant: we analyse that question in more detail in Chapter 3.

the law in statute would not lead to more certainty. The Faculty of Advocates ("the Faculty") responded simply that "the current system works well in practice". The Glasgow Bar Association and the Society of Solicitor Advocates thought that the current law was satisfactory, and the Criminal Law Committee of the Law Society ("the Law Society") thought that it was not unsatisfactory. PW Ferguson QC thought that the current law was unsatisfactory, and focused particularly on the uncertainty as to what evidence might competently be led under section 266(4)(a) or 101(2) of the 1995 Act (evidence of previous conviction competent to prove guilt of current charge). Professors Raitt and Ferguson considered that the law was unsatisfactory, and should be re-stated. Professor Duff thought that it was probably satisfactory, but that it might be as well to clarify it.

2.7 It would therefore appear that while some of the academics who responded to our Discussion Paper consider that the current law is unsatisfactory, most of the bodies representing different groups of practitioners take the contrary view. Further, a number of the latter thought that development is best left to the courts.

2.8 We would not discount in any way the views of academics on these issues, but we recognise that those of practitioners must carry great weight on what is essentially a practical matter. On the other hand, among practitioners, Crown Office were a notable exception to the consensus that the current law is satisfactory. Further, while many of the practitioner bodies shared a common view that the law is satisfactory, an examination of their answers to subsequent questions demonstrated that they did not share a common view as to what the current law *is.*

2.9 For example, the judges considered (as did we) that it was already competent to lead evidence of criminal actings abroad, relevant to a crime alleged to have been committed in Scotland.[7] But Crown Office considered that it was not competent to lead evidence of an offence committed outwith the jurisdiction of the Scottish courts, and that this was a matter which required to be rectified. Whatever the correct answer might be, the practical result of this divergence of view is that the Crown Office would not initiate a prosecution which depended upon such evidence. In fact, they mentioned a case in which that view of theirs had resulted in an accused person's being charged with, and convicted of, lesser crimes than might have been prosecuted had they considered that leading of evidence from outwith Scotland was competent. It would accordingly appear sensible to make some statutory provision to resolve the issue.

2.10 A similar divergence of view as to what the law is was apparent in relation to whether or not it is competent to lead evidence of charges of which an accused person has been acquitted as corroborating evidence of a current charge. We describe that matter in more detail at paragraphs 2.16-2.17 and 6.35-6.47 below.

2.11 Accordingly, while, as we have noted, most practitioners seemed to regard the present law as working well in practice, they did not agree as to what it was; this diversity of opinion rather tends to reduce the force of the argument for the status quo. This divergence among the practitioners was reflected in the views of those consultees who saw the present law as unsatisfactory in its lack of clarity. Whatever changes might be required to the substance of the law – and we discuss these below – we are in little doubt that it would

[7] *HM Advocate v Joseph* 1929 JC 55.

benefit from clarification and restatement. The application of the law in any given case may depend upon complicated facts and require an exercise of judgment, but this is no reason why the basic principles of the law should not be clearly stated.

Common law good, statute law bad?

2.12 There is a further, general question which we should address at this point. A number of practitioners raised the concern that re-stating existing common law principles in statute would inhibit the development of the law. Indeed, the Crown Office observed:

> "It is far from clear that a statutory provision could be formulated to provide more certainty when the basis for the admissibility of such evidence is relevance to the charges."

2.13 This is a recurring theme in discussions on the common law, and its relative virtues as compared to statute law. Certainly, in an area which is so fact-specific as criminal law, it would not be desirable to deny courts the flexibility to apply principles to individual cases in an appropriate manner. But it is also important that lawyers should be able to advise their clients as to the likely application of the law to a particular set of circumstances.

2.14 In that regard, it is not always clear that the flexibility of the common law produces, even over a period, a consistent line of authority which would enable practitioners to advise as to the likely legal consequences arising from a particular set of facts. This is so even in an area, such as criminal law, where there are ample opportunities for judicial decisions.

2.15 We give two examples.

2.16 One of the questions we asked in the Discussion Paper was whether it should be competent, in a case to which the *Moorov* doctrine might apply, to lead evidence arising out of proceedings which had resulted in an acquittal. The judges commented that, while "the intuition of some judges may leave them feeling uncomfortable when evidence which resulted in an earlier acquittal is presented in support of a later prosecution", the leading of such evidence would be consistent with a number of recent decisions, and would therefore be competent under the present law. The judges referred in particular to the case of *Cannell v HM Advocate.*[8] In that case, although its facts were somewhat specialised, the High Court had held that evidence of an alleged crime of which the accused had been acquitted could be used as providing corroboration for the purposes of applying the *Moorov* doctrine. It did not seem to us to be a particularly novel development in the law: the courts in England and Wales had for some time allowed such evidence (in much less specialised circumstances).[9]

2.17 Since the consultation period ended, however, the Appeal Court has considered the case of *PM v HM Advocate,*[10] which at one point might have raised issues similar to those in *Cannell,* and in which the decision in *Cannell* was discussed. As set out in the SCCR report, in *PM:*

> "the appellant was tried on an indictment which included a charge of assault and sodomy (charge (3)) and a charge of rape (charge (5)). There was no evidence of

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[8] [2009] HCJAC 6; 2009 SCCR 207.
[9] *R v Z* [2000] UKHL 68; [2000] 2 AC 483.
[10] [2011] HCJAC 62; 2011 SLT 1047; 2011 SCCR 500.

> assault in relation to charge (3) and at the conclusion of the Crown case the advocate depute withdrew the libel on that charge, but sought to rely on evidence led in respect of that charge to corroborate the complainer in charge (5). The appellant was convicted of charge (5) and appealed against conviction on the grounds that the trial judge erred in law by directing the jury that for *Moorov* purposes they could take account of evidence pertaining to charge (3)."

While, as a result of a concession made by the Crown, the point did not require to be decided, the court observed, *obiter*, that:

> "[O]ur preliminary inclination would have been to follow the consistent, and logically attractive, line of authority in *Moorov*, *Ogg*, *Danskin*, *Thomson* and *Dudgeon* rather than the more recent decision in *Cannell* where these earlier cases do not appear to have been considered."[11]

2.18 The second example relates to whether it is necessary to demonstrate a "course of conduct" for the purposes of applying the *Moorov* doctrine in criminal proceedings. In the Discussion Paper we said that it appeared that the High Court was moving away from a formal requirement of proof of a *course* of conduct towards what was described as the "*underlying similarity* of the conduct". That seemed to be the *ratio* of a decision from the Court of Criminal Appeal in *CAB v HM Advocate*.[12]

2.19 *B* was prosecuted on an indictment which contained three charges: charge (1), lewd, indecent and libidinous practices towards a child under the age of 12 years, charge (2), public indecency and charge (3), a sexually motivated breach of the peace. The complainer in charge (1) was the appellant's stepdaughter, and the complainer in charges (2) and (3) was the grandmother of the complainer in charge (1). The conduct complained of in charge (1) was that the accused had masturbated in front of the complainer on a number of occasions and on other occasions had got her to masturbate him. The conduct complained of in charges (2) and (3) was that the accused had masturbated in front of the complainer both in his taxi and at his home.

2.20 Both at the trial and on appeal the accused maintained that there was insufficient similarity between charge (1), on the one hand, and charges (2) and (3), on the other, to allow of the operation of the *Moorov* doctrine. Lord Eassie concluded, in the course of a careful analysis of the *Moorov* doctrine and the cases in which it had been applied, that:

> "[M]utual corroboration is admissible only where one is concerned with a single unified course of criminal conduct. Unless there is that unity, there is no common subject to which the claimed corroborative testimonies can jointly be directed … [R]elevance necessarily requires that there be an essential similarity in the nature of the criminal conduct."[13]

In his view, neither of these characteristics was present in the facts of the instant case:

> "[T]he crime of sexually abusing one's stepdaughter, under the age of 12 years — in its terms a crime of child sex abuse or paedophilia — is inherently different in its essence from the crime of causing upset or annoyance to one's mother in law by

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[11] Ibid, at para 14.
[12] [2008] HCJAC 73; 2009 JC 88; 2009 SLT 151; 2009 SCCR 106 (Lord Justice General Hamilton with Lord Nimmo Smith and Lord Eassie).
[13] Ibid, at para 31.

> some masturbatory activity in her presence. Put in other terms, the respective complainers in this case are in fundamentally different positions. […] In my view, it is difficult indeed to identify in these circumstances what the Lord Justice-General in Moorov indicated as necessary, namely identification of a 'particular and ascertained unity of intent, project, campaign, or adventure which lies beyond or behind … the separate acts'."[14]

2.21 But the other two judges took a different view. Lord Justice General Hamilton, with whom Lord Nimmo Smith agreed, observed:

> "[6] It thus appears that, notwithstanding the approach adopted in Moorov, the law has developed to the extent that identity of the crimes charged is not a prerequisite for the application of the doctrine associated with that case. […] What is now critical, it appears, is, apart from similarity of time, place and circumstance, 'similarity of the conduct described in the evidence'. The rule is, after all, a rule of evidence, not a rule of substantive law…
>
> [7] In the present case the appellant was charged with crimes which each included the averment that 'you did expose your naked private member towards [the complainer], masturbate yourself in [her] presence'. He was convicted on all three charges as libelled. Although the appellant's criminal conduct on each of charges (1) and (2) went beyond such exposure and masturbation, these were the central features of each charge. Although the crimes charged were categorised differently (having regard amongst other things to the fact that the victim in charge (1) was a child and in charges (2) and (3) was an adult) the essential conduct was identical. Provided that the further requirement of external relationship in time, character or circumstance is satisfied (which in my view in the present circumstances it was), the doctrine can, in my view, apply."

2.22 But in *AK v HM Advocate,*[15] a differently constituted bench adopted a different approach:

> "I think that it is important to keep in mind that the *Moorov* principle does not apply merely because there are similarities between the conduct libelled in two or more charges in respect of time, character and circumstances. As Lord Sands described it succinctly in *Moorov v HM Advocate* (at p 89) the similarities must be such as to indicate a 'course of conduct' on the part of the accused."

2.23 We discuss this case in more detail, and we return to the whole question of the *Moorov* doctrine later, in Chapter 6. For the present, we note that differently constituted appeal courts are taking different attitudes to what seems to be essentially the same question.

2.24 No doubt either question, when it arises again, could be referred to a larger court. But even that would not necessarily guarantee a clear decision on the point. In that connection we have noted the recent decision of the (5 judge) High Court of Justiciary in *Petto v HM Advocate*[16] that there are aspects of the development of the law which would be better dealt with by the Parliament.

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[14] Ibid, at para 34.
[15] [2011] HCJAC 52; 2011 SLT 915; 2011 SCCR 495 at para 10 (Lord Justice Clerk Gill, Lord Emslie, Lord Brodie).
[16] [2011] HCJAC 80; 2011 SLT 1043; 2011 SCCR 519.

2.25 Further, some of the responses to the Discussion Paper specifically sought recommendations as to changes in the position reached by the common law. For example, the Crown Office asked whether provision might be included in relation to the use of the *Moorov* doctrine in "generational" crimes, where it is alleged that a father has committed sexual crimes against his children and then against his grandchildren, but where, for the purposes of the *Moorov* doctrine, the intervening periods are so long as to make it very unlikely that the current criteria for its application could be met. They also asked that consideration be given to making it clear that evidence of a lesser offence could, in appropriate cases, corroborate evidence of a more serious one. The Faculty drew to our attention a case (*Gallagher v HM Advocate*[17]) in which section 266(4)(c) of the 1995 Act had placed an accused person in an unfortunate dilemma. One of a number of co-accused had to decide either not to give evidence in his own behalf, or to give evidence with the consequence that his previous convictions would be laid before the jury.

2.26 Finally, on this matter of the development of legal principle by means of the common law, we are of the view – hardly a revolutionary one – that there is a place for consideration of these matters by the legislature. Within the constraints of the Convention, there is room for policy decisions as to the balance to be struck between the interests of society and the interests of an accused person. Parliament has frequently intervened in these areas in the past: it is the case that the current regime as to the non-admissibility of previous convictions is a creature of statute. It is entirely appropriate that the Parliament should re-examine the underlying policy.

2.27 On the general issue, therefore, we are of the view that the current law with regard to similar fact evidence is unclear and inconsistent, and that it should be restated by reference to underlying principles. We hope that this Report, and the attached draft Bill, will enable the Scottish Parliament to reach considered decisions on the various matters of policy which arise.

2.28 We recommend:

1. The law relating to the admission of evidence of similar facts, including evidence of bad character and previous convictions, is unclear and inconsistently applied. It should be clarified and restated in statute, with appropriate amendments.

The character of the restatement

2.29 The next question which arises is whether the restatement should focus on the individual matters mentioned in the Reference (bad character, similar fact evidence etc.) or whether an attempt should be made to set out the relevant law on the basis of general principles, which would subsume those matters, and whose application to particular circumstances could be left to the courts.

2.30 There are two general comments to be made here. First, some of the comments we received were to the effect that the present system was well understood, and that only minor alterations were necessary or desirable. In that regard, we have already remarked (at

[17] [2010] HCJAC 130; 2011 SLT 175; 2011 SCCR 108.

paragraph 2.8 above) that, while a number of consultees said that the law was well understood, their respective understandings of it were on occasion markedly different.

2.31 In any event, a number of consultees considered that it would be useful to treat the matter more generally. The Law Society questioned the value of continuing to treat the *Moorov* and *Howden* doctrines as discrete doctrines, rather than as examples of corroboration derived from relevant circumstantial evidence. The judges also considered that:

> "*Moorov* is arguably one particular application of the general principle that evidence of similar facts relating to events other than those of the charge which are relevant to an issue in the case is admissible. Likewise *Howden* may simply be an example of the application of the principle to circumstantial evidence of similar facts".

We would agree with that analysis of the underlying principles of *Moorov* and *Howden.* In addition, in their answer to a question about the possible statutory re-statement of the *Moorov* and *Howden* doctrines, Professors Raitt and Ferguson observed:

> "[W]e submit that the codification of these two doctrines or of their underpinning principles should be considered in the wider context of the purpose and role of the rule of corroboration in modern legal practice in the Scottish criminal trial …"

Similarly, James Chalmers commented:

> "I doubt that much sense can be made of this area of law by continuing to approach it in the piecemeal fashion which has so unsatisfactorily developed".

2.32 Second, more generally, and perhaps more compellingly, a consideration of the cases leads to the conclusion that there are differences of view, expressed in differing *dicta* in a range of cases, as to some of the most fundamental concepts of the law of evidence. For example, it is not clear that there is a common understanding or application of the relationship between relevant evidence and corroborative evidence. Nor is there agreement as to what may or may not be proved by evidence of a propensity on the part of the accused to commit crimes of the kind with which he is currently charged.

2.33 It seems to us that, in order to remove ambiguity as to what the position is in relation to these fundamental issues, it is necessary not only to re-state rules on the admissibility of similar fact evidence and the other specific matters with which this Report is concerned. It is necessary to do that by reference to more general rules as to the admissibility of evidence in criminal cases. We accordingly recommend:

> **2. Any statute on similar fact evidence should include a restatement of the fundamental principles of the admissibility of evidence in criminal proceedings.**
>
> (Draft Bill, section 1(2) and (3))

Chapter 3 Preliminary matters

3.1 In this Chapter we discuss some of the general concepts mentioned in the previous Chapter, and upon which we should clarify our position before setting out our detailed proposals.

Introduction

3.2 The particular matters which we deal with here are:

- What is meant by "relevance"?
- can the jury be trusted?
- the nature of corroboration.

Relevance

3.3 The most fundamental principle in relation to legal proceedings is that evidence led should be relevant to the issues in the case.

Relevance is independent of procedural history

3.4 Before proceeding any further, we should make a preliminary point: the relevance of evidence of the accused's conduct on other occasions is independent of what we might call its legal procedural history. If evidence of conduct is relevant to the proof of a charge ("charge X"), it is relevant regardless of whether or not that conduct forms the subject of a charge in the same complaint or indictment as charge X, or of whether it has previously been the subject of legal proceedings.

3.5 Equally, evidence which is not relevant to the proof of charge X does not become relevant merely because the conduct to which it relates has been the subject of a previous conviction, or by virtue of that conduct founding a charge contained in the same indictment or complaint as charge X.

3.6 The procedural history may well have a bearing on the *admissibility* of the evidence. But that is the second stage of the analysis – the question of whether or not relevant evidence should nevertheless be excluded. It does not affect the first stage, which is to consider what the evidence, if accepted, would contribute to the proof of charge X.

What is meant by "relevance"?

3.7 In the Discussion Paper we observed:

> "Evidence is relevant if it renders more or less probable the existence of a fact which must be established in order to prove the offence charged."[1]

A similar approach may be found in a number of foreign legal enactments. Section 7 of the Evidence Act 2006 (New Zealand) establishes a general rule that relevant evidence should be admissible unless excluded under statute, and states that:

> "Evidence is relevant in a proceeding if it has a tendency to prove or disprove anything that is of consequence to the determination of the proceeding."[2]

The United States Federal Rules of Evidence 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".[3]

In Australia, section 55(1) of the (Commonwealth) Evidence Act 1995 provides:

> "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."

In relation to the law in England, Stephen[4] defines the term as follows:

> "[Relevance connotes that] any two facts to which it is applied are so related to each other that according to the common course of events one either taken by itself or in connection with other facts proves or renders probable the past, present or future existence or non-existence of the other"

Relevance to what?

3.8 Evidence may be direct evidence of a crucial fact (W saw A stab V). Or it may be circumstantial evidence, tending to establish some fact which is not in itself essential to the offence but from which an inference may be drawn as to the likelihood of the existence of a crucial fact (a bloody knife is found in A's dustbin). There is no necessary correlation between the strength of evidence and whether or not it is analysed as direct or circumstantial: a mass of evidence showing the blood-stained accused running from the scene of the crime and speaking to his earlier threats of violence against the victim may be more compelling than a single witness who speaks to having seen the stabbing from some distance away. As one of the respondents to the Discussion Paper[5] remarked, the distinction between direct and circumstantial evidence will not always be a clear or helpful one. There may even be disagreement about what evidence is direct and what circumstantial. We are reasonably sure that many people would say that DNA provided direct evidence. But, while evidence as to DNA is certainly real evidence, and may establish beyond any reasonable doubt that a particular person has been at a particular place, or associated in some way with a particular person, it is still circumstantial, in the sense that it cannot by itself establish what he did when he was there.

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[1] At para 2.3.
[2] Evidence Act 2006 (NZ), s 7(3).
[3] At Rule 401.
[4] James Fitzjames Stephen, *A Digest of the Law of Evidence* (12th Edn, 1948), Art 1.
[5] Professor Mike Redmayne.

3.9 Evidence, to be relevant, need not have a direct bearing upon the proof of a crucial fact, but may assist in establishing some other fact or issue from which an inference may be drawn. So, for example, where a witness gives evidence, evidence casting doubt upon the credibility of that witness may be relevant, even though it has no direct bearing upon the facts of the present charge. Most pertinently for present purposes, the general bad character of an accused person will be irrelevant to proof that he or she committed an offence, but may become relevant where that accused falsely asserts that he or she is of good character.

3.10 It will be clear from the various definitions quoted above that jurisdictions which have defined the expression have done so in terms which do not limit it to a narrow focus on the crucial facts of the case. What evidence is relevant to a particular set of proceedings cannot be determined on an *a priori* basis, because the matters which will be of importance cannot be determined in general terms. In their comments upon Stephen's definition (above) Paul Roberts and Adrian Zuckerman[6] tease out the matter as follows:

> "In cases where the relevance of a particular piece of evidence may be doubtful or contested it is incumbent upon counsel to make imaginative arguments to persuade the judge that the evidence should be admitted. Counsel must seek to elaborate probative connections with other evidence in the case and to frame the disputed evidence in contextual webs of meaning and significance for the fact finder. Evidence rejected on one 'theory of relevance' (or 'story' about the disputed facts), may yet be admissible when re-presented as part of an alternative theory or story that the judge finds more persuasive."[7]

3.11 On reflection, and in the light of these wider considerations, we consider that while it would be useful to set out the basic principle, the proposition advanced in the Discussion Paper was stated too narrowly. It follows that any definition should not proceed by way of an attempted enumeration of the matters in relation to which evidence will be relevant, nor should it be focused on the crucial facts of the case. It should be a broader proposition, in general terms, leaving the way in which it is to be applied to the circumstances of the particular case, and the discretion of the presiding judge. We would suggest that in criminal proceedings, evidence will be relevant if it renders more or less probable some fact relating to the crucial facts of the case, or to an issue which is of consequence in the proceedings. Accordingly, we recommend:

3. Any statute on similar fact evidence should include a definition of "relevance".

(Draft Bill, section 1(1))

4. The definition should provide that evidence will be relevant if it tends to prove or disprove a fact which is at issue in the proceedings or is otherwise of consequence in the context of the proceedings as a whole.

(Draft Bill, section 1(1))

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[6] *Criminal Evidence* (2nd Edn, 2010).
[7] Ibid, at 100.

3.12 The next question is whether relevance is – or should be – the only test for the admissibility of evidence. At first sight it would appear so. As Lord Hope of Craighead said in *DS v HM Advocate*:[8]

> "*Prima facie* all evidence which is relevant to the question whether the accused is guilty or innocent is admissible".

3.13 The question of the guilt or innocence of the accused may not of course depend purely upon evidence directly relating to the crucial facts of the case. Under reference to our discussion of the matter, set out above, we are of the view that "the question whether the accused is guilty or innocent" may itself depend upon evidence of a wide range of matters, which may or may not be replicated in all cases.

3.14 Lord Sands set out the position rather more fully in *Moorov v HM Advocate*:[9]

> "The object of the leading of evidence is the ascertainment of the truth so far as human fallibility may permit. From certain facts certain inferences fall to be drawn by a fair and reasonable mind. In this view all evidence might appear admissible which would help such a mind to draw a certain inference."

His Lordship is postulating a "fair and reasonable mind" as the target at which evidence is to be aimed. The objectivity of the tribunal, and particularly of the finder of fact, is critical to the way in which evidence is evaluated. Later in this Report we look in some detail at that consideration, with regard to the admissibility of evidence of previous convictions. And there are other considerations which might militate against the admission of evidence of particular types, or from particular sources. These are set out in the following paragraphs. But, whatever the exceptions, we are of the view that, as a general proposition, all evidence which is relevant should be admissible.

3.15 We recommend:

> **5. Any statute on similar fact evidence should include a provision to the effect that all relevant evidence should *prima facie* be admissible.**
>
> (Draft Bill, section 1(2))

What is meant by "admissibility"?

3.16 In an ideal world, it would be possible for the court to decide upon the relevance, and therefore the admissibility, of any particular piece of evidence before it is led. But that will not always be possible. It may be that the court will have to hear the evidence before deciding that it should be admitted. This Commission has dealt with this matter in the context of civil evidence, in our Discussion Paper on Interpretation of Contract.[10] In that Paper, at paragraph 6.19, we said:

> "The fourth policy objective is that relevant evidence should be admissible and irrelevant evidence should be inadmissible.[…] But … evidence will often have to be examined in a court before its admissibility or relevance can be finally determined. In

[8] 2007 SC (PC) 1; 2007 SLT 1026; 2007 SCCR 222, at para 26.
[9] 1930 JC 68 at 86.
[10] DP No 147 (2011).

this sense anything purporting to be evidence is therefore in some sense "admissible".

3.17 It seems to us that similar factors inform the consideration of this question in both criminal and civil proceedings. In either case it may be necessary to hear evidence before a conclusion as to its admissibility can be reached. In civil proceedings that can be done by way of a proof before answer. In criminal proceedings (on indictment) it can be done by way of a "trial within a trial", where the evidence is heard outwith the presence of the jury. If it is decided that the evidence is admissible, it is heard again in their presence.

3.18 It is also possible that evidence which is not admissible may be elicited inadvertently as, for example, where a witness gives an unexpected answer to a question, and the answer deals with irrelevant – and therefore inadmissible – matters. In such a case the judge would direct the jury to disregard the evidence.

Is irrelevant evidence ever admissible?

3.19 Before we turn to the question of when relevant evidence may be inadmissible, it may be convenient to deal here with the general inadmissibility of irrelevant evidence. The proposition that irrelevant evidence is inadmissible seems to follow logically, as the converse of the proposition that relevant evidence is admissible. Dickson, writing generally, and in relation both to civil and criminal proceedings, observes:

> "The first and most general of the primary Rules of Evidence is this, – that the evidence led be confined to matters which are in dispute or under investigation".[11]

Davidson, in a more modern Scottish text, says:

> "[W]hile not all relevant evidence is admissible, evidence which is not relevant cannot be admissible."[12]

3.20 In current practice, the only exception, of which we are aware, to this rule is in relation to evidence of previous convictions. Under the arrangements currently in place with regard to what we have described as the "tit for tat" rationale underlying sections 101, 266 and 275A of the 1995 Act, there are circumstances in which evidence of previous convictions, which are demonstrably irrelevant to any issue in the proceedings, may nevertheless be placed before the fact finder. Since we deal with that matter in some detail, in Chapter 7, we go no further with it at this stage. For the present, we recommend:

> **6. There should be a general statutory prohibition on the admission of evidence which is not relevant.**
>
> (Draft Bill, section 1(3))

When is relevant evidence inadmissible?

3.21 While, as we have recommended, only relevant evidence should be admissible, it does not follow that all evidence which is relevant will be admitted. There are a number of public policy grounds upon which otherwise relevant evidence might nevertheless be held to

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[11] *The Law of Evidence in Scotland* (3rd edn, 1887), Ch 1, para 1.
[12] Fraser Davidson, *Evidence* (2007), at 29-30.

be inadmissible. We considered these exceptions at paragraphs 2.4-2.5 of the Discussion Paper, quoting the summary given by Lord Sands in *Moorov v HM Advocate:*

> "But, for one reason or another, rules of law exclude certain evidence as being inadmissible to be taken into consideration, although it might be deemed to answer the above description.
>
> Certain kinds of evidence are excluded for reasons of public policy, or a sense of fairness or propriety. Such is the evidence in a criminal case of a spouse (except in special cases), of statements made by the accused to his law agent, statements made in precognition, hearsay, however authentic, statements extorted by the police from a person in custody, or made to them by him without proper caution."[13]

3.22 Lord Sands lists recognised public policy-based grounds for excluding evidence. These are (to paraphrase) the evidence of a spouse; legal professional privilege; hearsay; statements made in precognition; and evidence unfairly or improperly obtained.

The evidence of a spouse

3.23 At common law the spouse of the accused was not a competent witness,[14] unless the spouse was the alleged victim, in which case he or she was both a competent and compellable witness.[15] Macphail suggests that this general rule appears to be founded on respect for the matrimonial relationship, and the risk of perjury if the evidence of the spouse were admitted.[16] He adds that in modern Scotland the interest in conviction of the guilty might be regarded as heavily outweighing the interests in the avoidance of perjury and in the preservation of the very small number of marriages that removal of this ground of incompetence might affect.[17] The restriction on the admissibility of the evidence of a spouse has been removed by statute. Following the Criminal Justice and Licensing (Scotland) Act 2010, the spouse or civil partner of an accused person is a compellable, as well as a competent, witness.[18]

Legal professional privilege

3.24 Statements made by an accused to his law agent or counsel are privileged – they are confidential and need not be disclosed in evidence. This exclusion is based in the common law, recognised by Stair,[19] and subject to an exception where the accused calls his present or former agent as a witness.[20] Legal professional privilege rests upon the fundamental relationship of trust between lawyer and client. The statutory exception rests upon fairness, not to mention practicability: the corollary is that a client who wishes to preserve the

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[14] I D Macphail, *Evidence* (1987) (a revised version of *Research Paper on The Law of Evidence of Scotland* published by the Scottish Law Commission in 1979), paras 6.05-6.06.
[15] *Harper v Adair* 1945 JC 21; *Foster v HM Advocate* 1932 JC 75.
[16] Macphail, *Evidence* (1987), para 6.06.
[17] Ibid.
[18] Criminal Justice and Licensing (Scotland) Act 2010, s 86, substituting a new s 264 of the 1995 Act. S 86 was commenced on 28 March 2011 (SSI 2011/178).
[19] "Advocates, agents, factors, trustees, are suspected witnesses for those who intrust them; but they are not obliged to depone as to any secret committed to them." (Stair, IV, *xliii*)
[20] 1995 Act, s 265(2). There is a further exception at common law where fraud or some other illegal act is alleged against the party and it is suggested that his legal advisers have been directly concerned in carrying out the illegal transaction: *Micosta SA v Shetland Islands Council* 1983 SLT 483 (IH).

relationship of confidentiality with his or her lawyer must sacrifice the opportunity to cite the lawyer as a witness.

Hearsay

3.25 Hearsay is inadmissible at common law. In *Morrison v HM Advocate,*[21] a court of seven judges observed:

> "The general rule is that hearsay, that is evidence of what another person has said, is inadmissible as evidence of the facts contained in the statement. We accept as the law of Scotland the definition of hearsay in Cross on Evidence (6th edn), p.38, quoted by Lord Havers in *R. v Sharp* [at p. 11E]:
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> > '[A]n assertion other than one made by a person while giving oral evidence in the proceedings is inadmissible as *evidence of any fact asserted'.*"[22]

Macphail set out six reasons why hearsay is treated with caution: (1) hearsay is evidence of a statement made by a person when not under oath and not subject to cross-examination or the scrutiny of the court; (2) hearsay is not "the best evidence"; (3) there is a danger of inaccuracy through the repetition of the statement; (4) juries would be unable to evaluate hearsay evidence accurately; (5) hearsay evidence may be superfluous; and (6) hearsay evidence may be concocted.[23] The scope of the general exclusion of hearsay evidence is governed by its exceptions, which are contained in sections 259-262 of the 1995 Act. Under section 259, where the trial judge is satisfied that (a) the witness is unavailable; (b) had the maker of the statement given evidence the statement would not be hearsay; (c) the maker of the statement was competent as the time the statement was made; and (d) the statement can be proved without recourse to hearsay, then in certain circumstances, hearsay evidence is admissible. These certain circumstances are set out in section 259(2) as (a) where the witness is dead or unfit or unable to give evidence; (b) where the witness is outwith the UK and it is not practicable to secure his or her attendance or obtain evidence by an alternative means; (c) where the witness cannot be found; (d) where the witness declines to give evidence having considered it to be incriminating; and (e) where the witness refuses to take the oath or to give evidence. Under section 260 it is possible for the prior statement of a witness to be admissible where the statement is contained in a document (except a precognition) and the witness adopts the statement as his or her evidence. It is essential that, at the time the statement was made, the witness was competent.

Statements made in precognition

3.26 Since precognitions are records of things said by the person precognosced, "filtered through the mind"[24] of the precognoscer, they are by definition hearsay. The exceptions to the rule against hearsay evidence in sections 259-261 of the 1995 Act do not apply to statements contained in precognitions. Under section 262(1) a precognition on oath is admissible.

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[21] 1990 SCCR 235.
[22] Ibid, at 247.
[23] Macphail, *Evidence*, para 19.03.
[24] *Kerr v HM Advocate* 1958 JC 14, at 19 per Lord Justice Clerk Thomson.

Evidence unfairly obtained

3.27 The court has an undoubted power to exclude evidence which has been unfairly obtained. The test of fairness is not a straightforward one, having been held to involve a balancing exercise, and has arguably led to inconsistent decisions.[25] The fundamental concern, akin to most rules of criminal evidence, is the striking of a balance between the interests of the accused to receive a fair trial and ensuring the proper administration of justice. The leading authority on the modern rule of unfairly obtained evidence is *Lawrie v Muir*[26] where Lord Cooper stated the two conflicting interests of:

> "(a) the interest of the citizen to be protected from illegal or irregular invasions of his liberties by the authorities, and (b) the interest of the State to secure that evidence bearing upon the commission of crime and necessary to enable justice to be done shall not be withheld from Courts of law on any mere formal or technical ground."[27]

What can evidence be used for?

3.28 There is a question as to whether, once evidence has been admitted, the use to which it can competently be put should be peremptorily limited or restricted. This question arises in a number of ways. First, there is the case where evidence of a particular nature is held by the court to be relevant only to particular issues, and not generally. Second, there is the case where an accused appears on a number of charges, and the question is whether evidence adduced in relation to one charge is admissible in relation to another. Third, there is a question as to whether the source of evidence, for example, a co-accused, should be taken as determining the uses to which it can be put. We look at each of these examples in turn.

Should the use of relevant evidence of a particular nature be restricted to particular issues and excluded from others?

3.29 One of the features of the Scottish treatment of evidence of previous convictions, under the existing law, has been the courts' view that such evidence can be used only for the purposes of casting doubt on the credibility of the accused. Thus, in *Leggate v HM Advocate,*[28] the High Court observed:

> "In cases where cross-examination of an accused on his previous convictions or character is permitted the reason is that these may have a bearing upon his credibility. Such evidence is not, however, relevant to his guilt of the offence charged on the indictment. It may therefore be necessary to consider whether allowing cross-examination of the accused might be unduly prejudicial to him so far as proof of the offence charged is concerned."[29]

This is a matter which we deal with more fully below, in Chapter 7, but, for the present, it may be sufficient to point out that this appears to be a somewhat illogical approach. In a case where a person was accused of a crime of dishonesty, previous convictions for crimes

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[25] See Fiona Leverick and Findlay Stark "Illegally obtained evidence and Scots law: a fair balance?" In: *XVIIIth International Congress of the International Academy of Comparative Law*, July 25 - August 1 2010, Washington DC.
[26] 1950 JC 19.
[27] Ibid, at 26.
[28] 1988 JC 127.
[29] Ibid, at 146.

of violence would say nothing as to his tendency to tell the truth. On the other hand, where a person was accused of a crime of violence, previous convictions for such crimes might well be taken by the fact finder to tend to support evidence that he had committed the instant offence.

3.30 The point, to which we return later, is that in this instance Scots practice denies the fact finder the possible benefit of evidence of previous convictions because the view has been taken that their use might be "unduly prejudicial" to the accused. That is of course a legitimate policy choice, but it is not a necessary one, in the sense that a discriminating use of evidence of such convictions would still be compatible with the right of the accused to a fair trial. It also appears to be inconsistent with the more general approach taken by Scots law to the availability of evidence adduced in relation to one charge for the purposes of another, to which we now turn.

Can evidence admitted in relation to one charge be excluded from consideration in relation to another?

3.31 Generally, Scots law permits the combination of a number of charges relating to different incidents in a single complaint or indictment. This is in the interests of general efficiency, and to reduce the time spent in suspense by the accused. As Hume says:

> "[The prosecutor] is permitted to combine several charges which are of different sorts, and have little or no connection with each other in the particular case; so that a person may be tried, on one libel, for a murder, a theft, and a forgery, committed in different years, and to the injury of different persons. This is allowed, not only for the sake of doing justice as expeditiously, and with as little expense and trouble as may be to the public, but also (provided it is kept within certain bounds) for the advantage of the pannel; that he may be relieved of the long confinement, and of the anxiety and distress, which would attend a series of successive trials."[30]

As will appear from our examination of other jurisdictions (Chapter 4), other systems tend not to permit such a wide licence to the prosecutor. But the courts in Scotland have continued to take a robust view of the matter, and applications for the separation of trials are rarely granted. The question which arises is whether the fact finder can take into account, when considering one charge, evidence admitted for the purposes of another. We went into that matter with an advisory group comprising practitioners and academics, and (separately) with a reference group of judges and, following that process, said in the Discussion Paper:

> "[T]here remains the question as to whether (assuming the requirement for corroboration is adequately met in relation to each separate charge) the jury is entitled to take any notice of evidence relating to one charge in their consideration of another. In that regard we understand that, at least where the charges are not entirely unconnected, juries are routinely directed that the whole evidence is there for their consideration. Where it does appear that the charges have no connection, we understand that the usual practice is not to direct the jury to ignore the evidence on one charge in considering another, but to give no direction on the point."[31]

3.32 We did not ask any specific question on this matter in the Discussion Paper, and our description of the present position did not attract any formal dissent from any consultee.

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[30] Hume, ii, 172.
[31] At para 2.44

Since the Discussion Paper was published, the Lord Justice General has agreed that the Jury Manual produced by the Judicial Studies Committee can be made public. We note from that Manual that, in relation to multiple charges, the suggested formulation of the charge to the jury is:

> "The indictment sets out the charges which the accused faces. You'll need to return a verdict on each charge separately. There must be sufficient evidence on each charge for a conviction on that charge. You can't say 'because we're satisfied the accused is guilty of one charge, he must be guilty of the other'. That means you'll need to consider the evidence that relates to each charge separately. But that doesn't mean that because a piece of evidence is relevant to one charge, it isn't relevant to another charge. The same piece of evidence can be relevant to more than one charge. That's a matter for you to judge and take into account." [32]

It appears to us that the present position is satisfactory, and we recommend no change.

Evidence of co-accused

3.33 The rules relating to the circumstances in which one accused may give evidence about, or ask questions of, a co-accused are set out in section 266 of the 1995 Act. The Faculty have expressed concern, reflected in various judicial *dicta,* as to the effect of section 266(4)(c). We deal with that matter elsewhere in this Report, in the context of our general discussion of the use of previous convictions. Otherwise, we have no reason to suppose that there is any general problem in regard to the evidence of co-accused persons, and we make no recommendation in that regard.

Can the jury be trusted?

3.34 This issue underlies much of the discussion on the balance between prejudicial effect and probative value, which we consider in some detail in Chapter 5 below. It may be useful to set out our position on the matter early in this Report.

3.35 In the Discussion Paper[33] we mentioned that there had been no detailed research into what happens inside the jury room (because of the risks that such research would be contrary to the Contempt of Court Act 1981). On the other hand, there was anecdotal evidence, from a survey of judges,[34] that only in a very few cases did they consider that the jury had convicted someone whom they themselves would not have convicted. We also pointed out that, in other areas where the jury might be expected to be open to prejudice, such as where there are allegations of prejudicial publicity, courts operate upon the presumption that a jury will comply with directions to ignore prejudicial material. In the light of that discussion, we suggested that:

> "There is no reason to suppose that a jury, properly directed, would not be able to accord a proper significance to evidence of relevant previous convictions."

3.36 This occasioned a good deal of adverse comment. Two consultees said that this was "rather a naïve assumption", and that, before issuing a report we should commission research on mock juries, to gauge the impact of revealing previous convictions. The Faculty

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[32] Jury Manual (2011) Ch 2, p 21.
[33] At paras 7.122 to 7.131.
[34] Thomas Lundmark, "Split verdicts in Scotland: a Judicial Survey" (2010) 14 Edin LR 225.

utterly rejected our suggestion, and pointed to a case in which the jury had demonstrably failed to follow directions, and had in fact proceeded on material they had found on the internet, including foreign reporting. (We had ourselves mentioned a case, from England, in which the jury had relied on an ouija board.) The Law Society said that:

> "on this important issue, we have no evidence one way or another to assist us in knowing whether juries [might or might not] be prejudiced."

3.37 On the other hand, Peter Ferguson QC agreed with us, as did Professor Duff. The judges said that they would prefer to say that juries normally followed directions, and pointed out that:

> "judges are experienced in identifying for juries the issues to be addressed and the relevance and significance of the evidence in relation to these issues."

3.38 As we have just noted, a number of consultees pointed out that lack of knowledge of how juries worked did not equate to a demonstration that they worked well. It is certainly the case that the workings of a jury are, to some extent, mysterious: it is not possible to know exactly how real juries arrive at their decisions, since their deliberations are confidential.[35] Occasionally, too, a jury's verdicts will be inconsistent, permitting an inference that they cannot have properly applied the judge's directions.[36]

3.39 So far as this project is concerned, we are not conscious of any widespread public dissatisfaction with the jury system in practice or in principle, and none of our consultees mentioned any such feeling. As recently as 2009, a Scottish Government consultation on various matters to do with the operation of the jury system revealed no concern with the system as a whole.[37]

3.40 In the responses to the Discussion Paper, there was little comment on – and no damaging criticism of – the study into judges' perception that juries very rarely convicted persons whom the judges themselves would not have convicted.[38] Nor was there any expressed criticism of our comment that, in relation to the issue of prejudicial publicity, juries were generally trusted to comply with directions from the judge. On that last matter, we would draw attention to the *dictum* of Lord Prosser in *Cox and Griffiths, Petitioners*:

> "Juries are healthy bodies. They do not need a germ-free atmosphere. Even when articles in the press do contain germs of prejudice, it will rarely be appropriate, in my opinion, to bring these to the attention of the court, far less for specific directions to have to be given, far less for the issue to be treated as even potentially one of contempt."[39]

3.41 There will of course be individual examples of juries which proceed upon a wrong basis, just as there are examples of judges who give incorrect directions. In that regard we do not believe that it is inevitable that jurors will ignore instructions not to use the internet. Much will depend on how seriously the courts in Scotland deal with the problem. We have

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[35] Contempt of Court Act 1981, s 8(1).
[36] For instance, *HLJ v HM Advocate* 2003 SCCR 120, to which our attention was drawn by the Scottish Criminal Cases Review Commission in their response to the Discussion Paper.
[37] Scottish Government, *The Modern Scottish Jury in Criminal Trials: Analysis of Written Consultation Responses* (2009) available at www.scotland.gov.uk/Publications/2009/01/30113034/0.
[38] See para 3.35 above.
[39] 1998 JC 267 at 276.

noted that on two recent occasions jurors in England have been imprisoned for contempt of court, having disobeyed instructions not to research the case on the internet. If nothing ever went wrong with justice at first instance, there would be little reason to have an appeal system. That said, if we had been convinced that such an essential element of the criminal justice system was manifestly defective, we would have said so.

3.42 But, on the whole matter, we remain of the view that the jury system serves Scotland well. It remains a valuable safeguard for the rights of the individual against the Executive. It secures the place of the ordinary citizen in the most important decisions as to responsibility for serious crimes.

3.43 Accordingly, we proceed in this Report on the basis that, generally, juries can be trusted to carry out their duties in a conscientious and common sense way, and to pay proper attention to the directions which they are given by the judge.

Corroboration

General

3.44 This is not a project about corroboration. As we noted in the Discussion Paper, the broader question of whether the requirement of corroboration should remain formed part of the terms of reference of Lord Carloway's review of criminal evidence and procedure. Lord Carloway's report, published in November 2011, recommended (among other things) that the requirement should be abolished. At the time of writing, it is not clear whether the Scottish Government will accept or reject his Lordship's recommendation. We understand that the Government will consult on whether or not to legislate to implement his Lordship's recommendations. For the purposes of this Reference, we proceed upon the basis that the requirement for corroboration will remain.

3.45 In practical terms, and as we said in Chapter 1, we are conscious that if the recommendations in this Report are accepted, there will be available to the prosecutor, and hence to the fact finder, in criminal proceedings, a wider range of material which may constitute supporting, or corroborative, evidence.

If there were no requirement of corroboration, would it still be a relevant consideration for this Report?

3.46 We should nevertheless address the question of whether this Report's recommendations would be undermined, or perhaps rendered irrelevant, should the requirement of corroboration be abolished. We do not think that they would. This project is essentially concerned with the question of when it will be appropriate to admit evidence of other acts (including other crimes) as evidence that an accused person has committed the crime with which he or she is presently charged. This question will arise whether or not that evidence is needed in order to satisfy a requirement of corroboration. Indeed, whether or not there is a technical *requirement* for corroboration, both common sense and consideration of other legal systems suggest that corroboration will continue to be sought wherever possible, since a corroborated case will more easily satisfy the standard of proof beyond a reasonable doubt. In that connection we note that many of the cases which we quote in this Report are from England and Wales, where there is no requirement for corroboration. But that has not apparently led to any tendency to ignore the desirability of securing

corroboration, or in any way to treat corroboration less seriously. Indeed, in that jurisdiction the courts consider most anxiously whether evidence of particular kinds can constitute corroboration.

3.47 While corroboration remains a requirement in this jurisdiction, it remains important to ask, in relation to any evidence, not only whether it is admissible, but also whether it is capable of being corroborative. In order to address this question, it is necessary to consider, first, the current law regarding corroboration generally and, second, the rationale for any existing limitations on the corroborative effect of relevant evidence.

The present law

3.48 With certain minor statutory exceptions, Scots law requires that the crucial facts in relation to every crime be proved by corroborated evidence. As we noted in the Discussion Paper, a classic statement of the rule is found in the judgment of Lord Justice Clerk Aitchison in *Morton v HM Advocate:*

> "[B]y the law of Scotland, no person can be convicted of a crime or a statutory offence, except where the Legislature otherwise directs, unless there is evidence of at least two witnesses implicating the person accused with the commission of the crime or offence with which he is charged. This rule has proved an invaluable safeguard in the practice of our criminal Courts against unjust conviction, and it is a rule from which the Courts ought not to sanction any departure."[40]

3.49 The crucial facts are that the offence was committed, and that the person who committed it was the accused.[41] Corroboration concerns the quantity, rather than the quality, of evidence. Each crucial fact must be established by evidence from two independent sources. The question of whether or not there is evidence capable of satisfying the requirement of corroboration may be considered, as a question of law, at the close of the Crown case, at the close of the whole of the evidence, or at the conclusion of the prosecutor's address to the jury.

3.50 The classic, core case of corroboration involves two eye-witnesses to the commission of the crime, or an eye-witness plus the confession of the accused. In such a case there can be no doubt that the technical requirement of corroboration has been met: two independent witnesses speak directly to the same facts, with the evidence of each supporting that of the other. Naturally, there remains a question as to whether or not the evidence is credible and reliable; but there is a sufficiency of evidence, if the fact finder accepts it, to meet the requirement for corroboration.

3.51 It is obvious that a strict application of a rule requiring the direct evidence of two witnesses would go too far in the direction of protecting the suspect: in many cases, the obstacle to proof would be insurmountable.[42] It has long been recognised that corroboration

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[40] 1938 JC 50 at 55; Discussion Paper, para 2.14.

[41] It is sometimes said that *mens rea* is also a crucial fact requiring corroboration (see, for instance, Discussion Paper para 2.15).

[42] At least in the absence of means of extracting confessions by coercive means, a practice which Scotland was relatively slow to abandon: the use of torture was abolished "in ordinary crimes or without evidence" in the Claim of Right 1689 and definitively outlawed, by statute of the British Parliament, in 1708 (7 Anne c 21). See Brian P Levack, "Judicial Torture in Scotland During the Age of Mackenzie" in Stair Society Miscellany IV (2002). There is at least one recorded instance of a prisoner being taken from England to be interrogated and tried in Scotland (an early example of "extraordinary rendition"): see David Hope, "Torture" (2004) 53 ICLQ 807.

may be supplied by circumstantial evidence, and that a corroborated case may be made by direct evidence, by a combination of direct and circumstantial evidence, or by circumstantial evidence alone. This was neatly summarised by Hume, in a passage which we quoted in the Discussion Paper:

> "It would not [...] be a reasonable thing, nor is it our law, that the want of a second witness to the fact cannot be supplied by the other circumstances of the case. If one man swear that he saw the pannel stab the deceased, and others confirm his testimony with circumstances, such as the pannel's sudden flight from the spot, the blood on his clothes, the bloody instrument found in his possession, his confession on being taken, or the like; certainly these are as good, nay better even than a second testimony to the act of stabbing. Neither is it to be understood in cases of circumstantial evidence, either such as the foregoing case, or one where all the evidence is circumstantial, that two witnesses are necessary to establish each particular; because the aptitude and coherence of the several circumstances often as fully confirm the truth of the story, as if all the witnesses were deponing to the same facts."[43]

3.52 The rational basis of corroboration lies in the support which the different pieces of evidence give to one another. In the case of direct evidence corroborated by circumstantial evidence, the focus will naturally be upon the extent to which the circumstantial evidence does in fact support the direct evidence. Where the case is entirely circumstantial, the focus will be, as Hume suggests, upon the "aptitude and coherence of the several circumstances". The commonly-invoked image is that of a cable composed of a number of strands, each of which may be thin when considered individually but which, when considered together, have considerable strength.[44] This will generally be true of circumstantial cases: while each circumstance need not in itself infer guilt, the circumstances taken together will commonly support each other in leading to an inference of guilt.

3.53 There is, not surprisingly, a requirement that the circumstantial evidence be of relevance to the crucial fact which it is to corroborate. But, in contrast to some common law jurisdictions in which a conviction may be based on circumstantial evidence only if that evidence is inconsistent with an innocent explanation,[45] Scots law has taken the view that circumstantial evidence, in order to be capable of providing corroboration, does not need to be incriminating in itself. Circumstantial evidence may be consistent both with the existence of the crucial fact in support of which it is led and with an innocent explanation. It is for the fact finder to determine what weight is to be attached to the evidence and, in particular, whether to accept the innocent explanation for it which is advanced by the defence, or the inference of guilt suggested by the Crown. The law was stated by Lord Justice General Rodger in the Full Bench case of *Fox v HM Advocate:*

> "While evidence can provide corroboration only if it is independent of the direct evidence which it is to corroborate, the evidence is properly described as being corroborative because of its relation to the direct evidence: it is corroborative because it confirms or supports the direct evidence. The starting point is the direct evidence. So long as the circumstantial evidence is independent and confirms or supports the direct evidence on the crucial facts, it provides corroboration and the requirements of legal proof are met.

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[43] Hume, ii, 384; quoted in Discussion Paper, para 2.18.
[44] Although it is not necessary to direct the jury in terms of this analogy: *Docherty v HM Advocate* [2010] HCJAC 31; 2010 SCL 874 at para 75.
[45] See the discussion of Australia in Chapter 4.

> According to *Mackie*, however, circumstantial evidence is corroborative only if it is more consistent with the direct evidence than with a competing account given by the accused. This introduces a new element. It amounts to saying that circumstantial evidence cannot confirm or support direct evidence, which the jury have accepted, simply because the facts and circumstances could also be explained on a different hypothesis. […I]t is of the very nature of circumstantial evidence that it may be open to more than one interpretation and that it is precisely the role of the jury to decide which interpretation to adopt. If the jury choose an interpretation which fits with the direct evidence, then in their view—which is the one that matters—the circumstantial evidence confirms or supports the direct evidence so that the requirements of legal proof are met. If on the other hand they choose a different interpretation, which does not fit with the direct evidence, the circumstantial evidence will not confirm or support the direct evidence and the jury will conclude that the Crown have not proved their case to the required standard.
>
> There seems to be no good reason why circumstantial evidence should not be available to the jury as a potential source of corroboration simply because the accused has put forward a possible scenario which could furnish an innocent explanation of the facts and circumstances. The jury may reject the accused's evidence and his scenario. Indeed in any case where the direct evidence of the Crown witness is inconsistent with the accused's account, in accepting the evidence of the Crown witness, the jury will have rejected the accused's account. With the accused's account out of the way as a possible explanation for the circumstantial evidence, the jury can consider any other possible explanations for the facts and circumstances. Having done so, they will be entitled to find that the circumstantial evidence fits with the direct evidence of the Crown witness. If that is their conclusion, then the circumstantial evidence as interpreted by them will confirm or support the direct evidence and complete the legal proof."[46]

3.54 Whether the requirement of corroboration is met by direct evidence from two independent sources, or direct evidence supported by circumstantial evidence, or circumstantial evidence alone, the end result must be that there is sufficient evidence, if it is believed, to justify an inference of guilt.

All crucial facts must be corroborated

3.55 It is of course the case that evidence which supports one of the crucial facts may not support the others. It is not every piece of supporting evidence which will satisfy the whole requirement of corroboration.

3.56 For example, the need to pay close attention to the relevance of the circumstantial evidence may be seen in the often difficult area of corroboration by distress.[47] It has been recognised, particularly in the context of sexual offences, that evidence from a third party that the complainer was in a distressed state shortly after an alleged rape or sexual assault is capable of corroborating that complainer's account that a distressing incident took place.[48] Such evidence may therefore, depending upon the circumstances, be capable of

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[46] 1998 JC 94 at 100-101; 1998 SCCR 115 at 126-127. The reference to *Mackie* is to *Mackie v HM Advocate* 1994 JC 132; 1994 SCCR 277.

[47] For an interesting discussion, see Lord Hope of Craighead, "Corroboration and Distress: Some Crumbs from Under the Master's Table" in James Chalmers et al (eds) *Essays in Criminal Law in Honour of Sir Gerald Gordon* (2010).

[48] *Smith v Lees* 1997 JC 73 (Full Bench).

corroborating the complainer's evidence that there was no consent.[49] It may also, in certain circumstances, be capable of corroborating evidence showing the accused to have been aware that the complainer did not consent.[50] The distress of the complainer may be relevant to the complainer's state of mind at the time of the alleged offence (i.e. lack of consent) and, indirectly, to the state of mind of the accused (i.e. knowledge of lack of consent). But the complainer's distress has no logical bearing on the question of identity, or upon the specific act which caused the distress. So while the circumstance that the complainer evinced distress just after the alleged incident may be relevant to the proof of a charge of rape, it will not be relevant to the proof of every crucial fact. In this example, in relation to those crucial facts to which it is not relevant – the identity of the perpetrator and the particular nature of the perpetrator's conduct – evidence of the complainer's distress cannot amount to corroboration.

How does evidence corroborate other evidence?

3.57 There is nothing special about corroborative evidence. It is simply evidence which, if believed, supports other evidence. The only requirement for evidence to be corroborative is that it be relevant. As the Lord Chancellor, Lord Hailsham of St Marylebone, put it in the House of Lords in *DPP v Kilbourne*:

> "The word 'corroboration' by itself means no more than evidence tending to confirm other evidence. In my opinion, evidence which is (a) admissible and (b) relevant to the evidence requiring corroboration, and, if believed, confirming it in the relevant particulars, is capable of being corroboration of that evidence and, when believed, is in fact such corroboration. […] That this is so in the law of Scotland seems beyond dispute, and it would be astonishing if the law of England were different in this respect, since one would hope that the same rules of logic and common sense are common to both."[51]

As we noted in quoting this passage at paragraph 6.4 of the Discussion Paper, *Kilbourne* was notable for its extensive and approbatory citation of Scottish authority including *Moorov.*

3.58 Lord Reid made a similar point:

> "There is nothing technical in the idea of corroboration. When in the ordinary affairs of life one is doubtful whether or not to believe a particular statement one naturally looks to see whether it fits in with other statements or circumstances relating to the particular matter; and the more it fits the more one is inclined to believe it. The doubted statement is corroborated to a greater or lesser extent by the other statements or circumstances with which it fits in."[52]

3.59 See also, to similar effect, the comment of Lord Mackay of Clashfern in *DPP v P*:[53]

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[49] Ibid. In *McKearney v HM Advocate* 2004 JC 87 at 91, Lord Justice Clerk Gill doubted, *obiter*, whether evidence of *de recenti* distress could corroborate a complainer's evidence of lack of consent in circumstances where there had been no use or threat of force.

[50] Scottish Law Commission, *Report on Rape and other Sexual Offences*, Scot Law Com No 209 (2007), para 6.9; James Chalmers, "Distress as Corroboration of Mens Rea" 2004 SLT (News) 141; *Spendiff v HM Advocate* 2005 SCCR 522.

[51] [1973] AC 729 at 741-742.

[52] Ibid, at 750.

[53] [1991] 2 AC 447 at 461.

> "Although there is a difference between the law of Scotland, which requires corroboration generally in criminal cases, and the law of England, which does not, the principles that determine whether a piece of evidence can corroborate another are the same as those which determine whether evidence in relation to one offence is admissible in respect of another."

3.60 These comments from three very distinguished judges, one approving the law in Scotland, and two actually Scottish, seem to us to be very much in line with Lord Rodger's statement of the law in *Fox v HM Advocate*, which we repeat here:

> "… the evidence is properly described as being corroborative because of its relation to the direct evidence: it is corroborative because it confirms or supports the direct evidence. The starting point is the direct evidence. So long as the circumstantial evidence is independent and confirms or supports the direct evidence on the crucial facts, it provides corroboration and the requirements of legal proof are met."

3.61 The same principle applies where all the evidence is circumstantial. In *Megrahi v HM Advocate,*[54] in which the Appeal Court was a court of five judges, Lord Justice General Cullen, delivering the opinion of the court, quoted this passage from Lord Justice General Rodger's judgment and went on:

> "This passage is, in our view, equally applicable where there is no direct evidence and the evidence is wholly circumstantial."[55]

In the light of these *dicta,* and of the decision in the case of *O'Brien v Chief Constable of South Wales Police,*[56] which we discuss at paragraph 5.16 below, we are of the view that the general principle is clear: any evidence which is relevant to other evidence may support that other evidence and, if it supports the other evidence, it corroborates it.[57] Accordingly, we recommend:

> **7. It should be made clear that any evidence which is relevant to other evidence is capable of corroborating that other evidence.**
>
> (Draft Bill, section 2)

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[54] 2002 JC 99.
[55] At para 34.
[56] [2005] 2 AC 534.
[57] We have not overlooked the Privy Council case of *DS v HM Advocate* 2007 SC (PC) 1; 2007 SLT 1026; 2007 SCCR 222 and the *obiter dicta* of Lord Hope of Craighead (at para 33) and Lord Rodger of Earlsferry (at para 86) relating to the effect of evidence of previous convictions for sexual offences admitted under section 275A of the 1995 Act. Each was firmly of the view that while such previous convictions would be relevant to the propensity of the accused to commit sexual offences, and not merely to his credibility, they could not amount to corroboration. We discuss that matter in more detail in Chapter 5, in our discussion of propensity.

Chapter 4 Comparative Law

4.1 Comparisons with other systems of law have always played a part in the Commission's approach to individual projects. It is generally sensible to see how other jurisdictions have solved what are essentially common problems, in any particular area of the law.

Introduction

4.2 In this Chapter of the Report we discuss the approaches adopted to the admission of similar fact evidence in four common law jurisdictions: Australia, Canada, England and Wales and New Zealand. We consider how these systems operate in practice and discuss the problems they experience, in an attempt to aid an evaluation of our options and recommendations.

4.3 It should however be borne in mind that caution ought to be exercised when making comparisons between legal systems. The nature of comparative law, in relation to a project such as the present one, necessarily involves looking at only specific aspects of a variety of jurisdictions. This undoubtedly results in certain nuances, attitudes and interaction with other parts of a justice system being missed, which may distort the result of any comparisons. It is after all the justice system as a whole that must be considered when determining whether or not a fair trial has been offered, and a focus on a particular feature may give a distorted view of how a system operates.[1] Be that as it may, we consider the use of comparative legal research a valuable tool, and endorse the view, expressed by Zweigert and Kötz, that:

> "comparative law can provide a much richer range of model solutions than a legal science devoted to a single nation, simply because the different systems of the world can offer a greater variety of solutions than could be thought up in a lifetime by even the most imaginative jurist who was corralled in his own system."[2]

4.4 In order to achieve the most useful results from a comparative study it is essential to be discriminating on the selection of the jurisdictions. The jurisdictions we selected are all common law systems that have recently reviewed, or at least considered, their country's approach to similar fact and bad character evidence.[3]

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[1] "In short, the whole train of proceedings in this or any other country, must be taken into consideration, in judging of any part. And if upon a complex view of the entire process, the prisoner appears to have a fair and equitable trial, in which innocence runs no risk of being ensnared or surprised; it is all that a reasonable man can wish for, and all perhaps that is attainable to human wisdom." Hume, i, *xlvi*.

[2] K Zweigert & H Kötz, *An Introduction to Comparative Law* (3rd edn, 1998), p 15.

[3] The Law Commission of England and Wales published their Report on *Evidence of Bad Character in Criminal Proceedings* (Law Com No. 273) Cm 5257 in 2001; The Australian Law Reform Commission published their Report on *Uniform Evidence Law* (ALRC No. 102) in 2006; and The New Zealand Law Commission published their Report on *Disclosure to Court of Defendant's Previous Convictions, Similar Offending, and Bad Character* (NZLC R103) in 2008. The Canadian law was examined in the case of *R v Handy* 2002 SCC 56; [2002] 2 SCR 908.

4.5 In this Chapter we discuss the approaches adopted in these jurisdictions to similar fact and bad character evidence. We examine each jurisdiction in detail, considering their respective approaches under the heads of:

- admissibility;
- bad character evidence in practice;
- the issue of raising character;
- separation of charges;
- cross-admissibility;
- the purpose for which bad character and similar fact evidence can be used; and
- the issue of satellite trials.

THE COMMON BACKGROUND

4.6 Historically within common law jurisdictions the general rule has been to have a presumption against admitting bad character and similar fact evidence into criminal trials.[4] The justifications for such an approach centred around concerns about fairness, in particular: the possibility of prejudice outweighing the probative value of the evidence;[5] a perception that such evidence was not particularly relevant to a trial;[6] the potential for distracting the fact finder's attention from the core issues;[7] and the danger of substantially increasing the duration of a trial.[8] Prior to the mid 1990s this was the position in all four of the jurisdictions we consider in this Chapter,[9] with each being influenced to a greater or lesser degree by Lord Herschell's classic statement in the Privy Council case of *Makin v Attorney General of New South Wales:*[10]

> "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. The statement of these general principles is easy, but it is obvious that

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[4] This has been described as "one of the most deeply rooted and jealously guarded principles of our common law" – *Maxwell v DPP* [1935] AC 309 at 317, per Viscount Sankey LC.
[5] Law Com No 273 (2001), at para 2.2.
[6] Ibid.
[7] Ibid, at para 6.30.
[8] *R v O'Dowd* [2009] EWCA Crim 905; [2009] 2 Cr App R 16, at para 84.
[9] Australia: *Pfennig v. The Queen* [1995] HCA 7; Canada: *DPP v Boardman* [1975] AC 421, R v Corbett [1988] 1 SCR 670 and *B.(C.R.)* [1990] 1 SCR 717; New Zealand: *R v M* [1999] 1 NZLR 315 (CA), *R v Mokaraka* [2002] 1 NZLR 793 and *R v Holtz* [2003] 1 NZLR 667 (CA); and England and Wales: *DPP v Boardman* [1975] AC 421. It is noteworthy that even when the House of Lords in England attempted to lower the threshold for admissibility, it remained a high standard: *DPP v P* [1991] 2 AC 447.
[10] 1894 AC 57 (PC).

it may often be very difficult to draw the line and to decide whether a particular piece of evidence is on the one side or the other."[11]

4.7 In its Report on the subject the Law Commission of England and Wales recorded five scenarios upon which bad character or similar fact evidence would be of significant value:

a. where the evidence is such an integral element of the offence charged that a trial without it would not be possible;

b. where the evidence is such an important part of the factual background that an incorrect picture of events would be built up without it;

c. for establishing propensity;

d. for judging credibility where there are different accounts of events to choose from; and

e. where without it the fact-finders would be misled by the defence.[12]

4.8 The common law of each of the jurisdictions which we studied allowed the use of similar fact evidence, in certain circumstances, for purposes (a), (b), (d) and (e); but each remained, to a greater or lesser extent, wary of allowing such evidence to be used for purpose (c), propensity.

ADMISSIBILITY OF SIMILAR FACT EVIDENCE

Canada

4.9 Of the countries which we have considered, Canada is the only one in which the law of similar fact evidence has not been restated in statute and remains entirely governed by the common law. Evidence of similar facts is generally excluded, on the presumption that it is more prejudicial than probative.[13] In *R v B(CR)* the Supreme Court of Canada summarised the law in these terms:

> "The analysis of whether the evidence in question is admissible must begin with the recognition of the general exclusionary rule against evidence going merely to disposition. As affirmed in *Boardman* and reiterated by this Court in *Guay*, *Cloutier*, *Morris* and *D.(L.E.)*, evidence which is adduced solely to show that the accused is the sort of person likely to have committed the offence is, as a rule, inadmissible. Whether the evidence in question constitutes an exception to this general rule depends on whether the probative value of the proposed evidence outweighs its prejudicial effect. […] where the similar fact evidence sought to be adduced is prosecution evidence of a morally repugnant act committed by the accused, the potential prejudice is great and the probative value of the evidence must be high indeed to permit its reception. The judge must consider such factors as the degree of distinctiveness or uniqueness between the similar fact evidence and the offences alleged against the accused, as well as the connection, if any, of the evidence to issues other than propensity, to the end of determining whether, in the context of the

[11] Ibid, at 65.
[12] Law Com No 273 (2001), at para 5.14.
[13] *R v Handy* [2002] 2 SCR 908; 2002 SCC 56, at paras 31-46.

> case before him, the probative value of the evidence outweighs its potential prejudice and justifies its reception."[14]

4.10 The present law was stated by the Supreme Court of Canada in *R v Handy*.[15] In that case, the accused was charged with sexual assault causing bodily harm. His defence was that the sex, though violent, was consensual. The prosecution sought to introduce evidence from the accused's ex-wife of a number of incidents in which he had inflicted painful sex with little regard to consent. The trial judge admitted the evidence. On appeal, the Supreme Court unanimously concluded that he had been wrong to do so. In doing so, they suggested that the relevance of similar facts depended upon an inference of propensity: "When similar facts are attributed to an accused acting 'in character', it is the inferred continuity of character and nothing else that displaces what might otherwise be explained innocently as mere 'coincidence'".[16] "Similar fact evidence is sometimes said to demonstrate a 'system' or '*modus operandi*', but in essence the idea of '*modus operandi*' or 'system' is simply the observed pattern of propensity operating in a closely defined and circumscribed context."[17] In Canada, the term "propensity" is given a broad meaning.

4.11 The Supreme Court, in *Handy*, reaffirmed the view that propensity evidence was usually inadmissible. The policy basis for the general prohibition on such evidence was set out as follows:

> "'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 assaulted and a pedophile has engaged in pedophilic acts. Yet the policy of the law is wholly against this process of reasoning.' The policy of the law recognizes the difficulty of containing the effects of such information which, once dropped like poison in the juror's ear, 'swift as quicksilver it courses through the natural gates and alleys of the body': *Hamlet*, Act I, Scene v, 11. 66-67."[18]

4.12 The presumption that evidence of similar facts should be excluded is rebuttable, but the threshold for achieving this is high. The presumption might be rebutted if the prosecution, on the balance of probabilities, establish that the probative value of the evidence exceeds the prejudicial effect. The test is thus, in outline, the same as that which applied in England and Wales prior to the Criminal Justice Act 2003. In order to establish the probative value the prosecution must establish a high degree of similarity between the previous conduct and the charged conduct, to the extent that the acts are examples of "repeated conduct in a particular and highly specific type of situation" at which point "the evidence of similar facts provides a compelling inference that may fill a remaining gap in the jigsaw puzzle of proof, depending on the view ultimately taken … by the jury".[19]

4.13 According to the Supreme Court of Canada in *Handy*, an important control in the analysis of the admissibility of similar fact evidence is to determine the precise "issue in

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[14] 1990-1 SCR 717, pp 21-22 (McLachlin J).
[15] 2002 SCC 56; [2002] 2 SCR 908.
[16] Ibid, at para 63 (Opinion of the Court, per Binnie J).
[17] Ibid, at para 90.
[18] Ibid, at paras 39-40. The Supreme Court also recognised that propensity evidence has a potential for prejudice, distraction and time consumption. It was also thought that it might encourage the police to round up the "usual suspects" (paras 37-38).
[19] Ibid, at para 91.

question" to which the Crown argues it to be relevant.[20] The court then requires to assess the cogency of that evidence in relation to that issue, by reference to the various connecting factors argued for by the Crown[21] and the objections made by the defence aimed at undermining the inferences which the Crown argues might be drawn from the evidence. Having thus assessed the probative value of the evidence, the court will consider prejudice, "both moral prejudice (i.e. the potential stigma of "bad personhood") and reasoning prejudice (including potential confusion and distraction of the jury from the actual charge against the respondent)."[22] It is then for the court to consider whether the Crown has succeeded in demonstrating, on a balance of probabilities, that the likely probative value of the evidence will outweigh the potential prejudice.[23] The Supreme Court emphasised the absence of a common basis of measurement – as probative value advances, prejudice does not necessarily recede. The "two weighing pans on the scale of justice" can rise and fall together.[24]

Australia

4.14 Australia has a number of State and Territory jurisdictions and a Commonwealth (federal) jurisdiction. The Commonwealth, New South Wales and Tasmania have legislated to allow the use of similar fact evidence in certain circumstances. In the remaining States and Territories, the rules of criminal evidence are governed by the common law.

Common law

4.15 The common law position in Australia is that similar fact evidence is inadmissible unless the probative value far outweighs any prejudice to the defendant. The rule is based upon the old English common law position: the conduct must demonstrate strict compliance, or striking similarity, with the conduct charged, to the extent that exact conformity or signature style is required. The test was established in *Pfennig v The Queen* as follows:

> "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 view of it other than as supporting an inference that the accused is guilty of the offence charged."[25]

4.16 Practically speaking there are very few occasions where the *Pfennig* test is capable of being met. The Law Commission of England and Wales criticised the striking similarity test adopted in *Pfennig*, suggesting that "wrongful acquittals would result from setting the test so high".[26]

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[20] Ibid, at paras 69-75.
[21] An illustrative list of such factors was given by the Court at para 82. These were: proximity in time of the similar acts; extent to which the other acts are similar in detail to the charged conduct; number of occurrences of the similar acts; circumstances surrounding or relating to the similar acts; any distinctive feature(s) unifying the incidents; intervening events; and any other factor which would tend to support or rebut the underlying unity of the similar acts. The Court notes, at para 85, a comparative list set out in *DPP v Kilbourne* [1973] AC 729 at 758.
[22] Ibid, at para 100.
[23] On the facts of *Handy*, the Supreme Court held that while the evidence of the accused's conduct towards his ex-wife was capable of raising the inferences contended for by the Crown (ibid, at para 135), that evidence also had a serious potential for both moral and reasoning prejudice and the Crown had failed to displace the presumption of inadmissibility (ibid, at para 151).
[24] Ibid, at para 149.
[25] [1995] HCA 7; (1995) 182 CLR 461; (1995) 127 ALR 99, at para 58, per Mason CJ, Deane and Dawson JJ.
[26] Law Com No 273 (2001), at para 11.13.

4.17 In the later case of *Phillips v The Queen*[27] the High Court followed the *Pfennig* approach of excluding similar fact evidence except where there is remarkable similarity between the offences. *Phillips* also discussed the task of the judge:

> "What is said in *Pfennig v The Queen* about the task of a judge deciding the admissibility of similar fact evidence, and for that purpose comparing the probative effect of the evidence with its prejudicial effect, must be understood in the light of two further considerations. First, due weight must be given to the necessity to view the similar fact evidence in the context of the prosecution case. Secondly, it must be recognised that, as a test of admissibility of evidence, the test is to be applied by the judge on certain assumptions. Thus it must be assumed that the similar fact evidence would be accepted as true and that the prosecution case (as revealed in evidence already given at trial or in the depositions of witnesses later to be called) may be accepted by the jury. *Pfennig v The Queen* does not require the judge to conclude that the similar fact evidence, standing alone, would demonstrate the guilt of the accused of the offence or offences for which he or she is charged. But it does require the judge to *exclude* the evidence if, viewed in the context and in the way just described, there is a reasonable view of the similar fact evidence which is consistent with innocence."[28]

4.18 The approach of the Australian common law is to exclude evidence of similar facts in all but the most exceptional circumstances. As the High Court of Australia put it in *Pfennig v The Queen*:

> "… propensity evidence is circumstantial evidence and … as such, it should not be used to draw an inference adverse to the accused unless it is the only reasonable inference in the circumstances. More than that, the evidence ought not to be admitted if the trial judge concludes that, viewed in the context of the prosecution case, there is a reasonable view of it which is consistent with innocence."[29]

4.19 The threshold set by the Australian common law is thus high enough to exclude even "considerable similarity" between offences, to the extent that it is not clear whether some "signature" is required before evidence may be admissible as similar fact evidence.

4.20 It is worth mentioning that in Australia, as in the other jurisdictions which we consider, the same test is applied regardless of whether the similar fact evidence takes the form of a previous conviction or is evidence relating to another charge appearing on the same indictment. In the leading case of *Phillips v The Queen*, the question was whether evidence relating to a number of counts of rape against different complainers was capable of being admitted in relation to each count. In Scotland, the case would have appeared a good candidate for the application of the *Moorov* doctrine; in Australia it was held that evidence relating to the other charges had to be excluded.

Statute

4.21 The Evidence Act 1995 (Commonwealth), the Evidence Act 1995 (New South Wales) and the Evidence Act 2001 (Tasmania) each make provision, in identical terms, for the admission of similar fact evidence. For convenience, we refer to provisions of the 1995

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[27] [2006] HCA 4; (2006) 225 CLR 303; (2006) 224 ALR 216.
[28] Ibid, at para 63.
[29] [1995] HCA 7; (1995) 182 CLR 461; (1995) 127 ALR 99, at para 65.

Commonwealth Act (though we could have chosen any of the three Acts, since the relevant sections, as well as being identical in substance, are identically numbered.)

4.22 Under the 1995 Act, similar fact evidence is inadmissible unless it can be established that it is of significant probative value, and that probative value substantially outweighs any prejudice that may be caused to the defendant. Similar fact evidence is split into evidence of propensity and evidence of credibility. Relevant evidence carries the definition: "… 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".[30]

4.23 In regard to evidence of credibility, the sections on admissibility begin with a general precautionary provision that evidence is not to be taken to be irrelevant only because it relates only to the credibility of a witness.[31] Section 102 contains the "credibility rule", that evidence relevant only to a witness's credibility is not admissible, unless (a) the evidence is adduced by cross-examination and has "substantial probative value" taking into account, *inter alia*, whether the evidence tends to prove a knowing or reckless false representation when under an obligation to tell the truth; or (b) evidence is adduced by a defendant to prove he or she is of good character.[32]

4.24 The 1995 Act divides propensity evidence into two sub-categories: coincidence evidence and tendency evidence. Coincidence evidence consists of the leading of evidence that the defendant has previously been involved in a similar occurrence, and thus it is improbable that they occurred coincidently. The provisions apply to related events, where two or more events are taken to be related if the events are substantially and relevantly similar, and the circumstances in which they have occurred are substantially similar.[33]

4.25 Tendency evidence is what we have referred to as propensity evidence. It is admissible only if the court thinks that the evidence will, 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.[34] The tendency rule does not apply, however, to evidence adduced by a defendant to prove good character, and therefore, by corollary, to evidence adduced in rebuttal. Neither tendency nor coincidence evidence may be led against the defendant unless the probative value substantially outweighs any prejudicial effect it may have on the defendant.[35]

4.26 Regardless of the route of admissibility, including where it arises out of the defence leading good character evidence, the general rules on evidence exclusion remain intact.[36] Under the 1995 Act admissibility primarily depends on the issue of significant probative value. For such evidence to be admissible it must be relevant, and be of significant probative value. The Act provides no further assistance on the determination of *significant*

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[30] s 55(1).
[31] s 55(2)(a).
[32] s 110 provides for the character of an accused person.
[33] s 98.
[34] s 97.
[35] s 101.
[36] s 137 provides that the court must exclude the prosecution evidence if its probative value is outweighed by the risk of prejudice to the defendant.

probative value. It has been held that "significant" means something more than mere relevance but less than a substantial degree of relevance.[37]

4.27 One might ask why there is a need for "significant probative value"[38] for the admission of propensity evidence, yet credibility evidence must have substantial[39] probative value? According to the Australian Law Reform Commission ("ALRC"), the explanation for the distinction may lay in the fact that a more rigorous requirement is needed for evidence the admissibility of which can only be justified on the basis that it relates to issues of credibility. Credibility issues are, the ALRC considers, "collateral issues" carrying dangers of adding unnecessarily to the time and cost of proceedings. On the other hand, the provisions relating to tendency and coincidence evidence concern evidence relevant to the facts in issue and a lower preliminary threshold is warranted.[40] As mentioned above, section 101 of the 1995 Act restricts the admission of tendency and coincidence evidence by setting out the balancing act between probative value and prejudicial effect. The exception to this position is the scenario where the defence leads evidence of the defendant's good character. If such good character evidence is led all restrictions on the leading of similar fact evidence are removed and there is no requirement for the evidence to be of significant probative value.[41]

New Zealand

4.28 The law of evidence in New Zealand, previously governed largely by the common law, is now found in the Evidence Act 2006. The general rule is that all relevant evidence is admissible, unless excluded by some provision of the Act.[42] There is a general exclusion for evidence the probative value of which is outweighed by the risk of unfair prejudice or of needlessly prolonging the proceedings.[43] Against this general presumption of the admissibility of relevant evidence, the Act makes specific provision in relation to evidence of bad character.[44] The combined effect of these provisions is a reversal of the policy of the common law in relation to the admission of evidence of previous convictions and other bad character: "The starting point is no longer exclusion, unless admissibility is justified. It is admissibility, unless exclusion is justified."[45]

4.29 The 2006 Act apportions bad character evidence into two types: evidence of veracity[46] and evidence of propensity[47]. Different considerations apply to each category.

4.30 Veracity is defined for the purposes of the Act as "the disposition of a person to refrain from lying".[48] Evidence for the purpose of establishing the defendant's lack of veracity is only admissible with the permission of the judge,[49] and will only be granted if the defence leads evidence about the defendant's veracity or challenges the veracity of a prosecution

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[37] *R v Lockyer* (1996) 89 A Crim R 457, at 459.
[38] ss 97 and 98.
[39] s 103.
[40] ALRC No. 102, para 11.50.
[41] s 110(1).
[42] 2006 Act, s 7(1). s 7(3) defines relevance: "Evidence is relevant in a proceeding if it has a tendency to prove or disprove anything that is of consequence to the determination of the proceeding."
[43] Ibid, s 8.
[44] Ibid, ss 36-43, 49.
[45] New Zealand Law Commission (Report 103, May 2008), para 3.53.
[46] 2006 Act , ss 37-39.
[47] Ibid, ss 40-43.
[48] Ibid, s 37(5).
[49] Ibid, s 38(2)(b).

witness.[50] In addition to this requirement, the veracity evidence must be "substantially helpful" in establishing the veracity of the defendant for it to be admitted into evidence.[51]

4.31 Where evidence is admitted as relevant to veracity, the trial judge must direct the jury to use that evidence only in assessing the defendant's credibility, and not as indicating a propensity to offend in the manner charged in the present case.[52]

4.32 Propensity evidence is defined as evidence of acts, omissions, events or circumstances with which a person is alleged to have been involved, which tend to show a person's propensity either to act in a particular way or to have a particular state of mind.[53] The definition expressly excludes evidence of an act or omission that is one of the essential elements of the offence for which the person is being tried.[54] Propensity evidence may only be admitted if its probative value, regarding a disputed issue, outweighs the risk that the evidence will unfairly prejudice the defence.[55] The probative value test does not however apply to propensity evidence which is led as a consequence of the defendant leading evidence about his or her propensity.[56]

4.33 There has been some uncertainty as to whether the 2006 Act should be interpreted as an entirely fresh start to the law of evidence in New Zealand regarding the use of propensity evidence, or whether resort may still be had to pre-Act case law.[57] The better view appears to be that the focus should be on the wording of the statute.[58]

England and Wales

4.34 A new regime for the admission of similar fact evidence in England and Wales was introduced by the Criminal Justice Act 2003. Prior to that Act, the English common law had produced a number of varying versions of the test to be applied for the admission of similar fact evidence, before settling, in *DPP v P,*[59] for a test of balancing probative value against prejudicial effect. In that case the Lord Chancellor, Lord Mackay of Clashfern, observed:

> "… the essential feature of evidence which is to be admitted is that its probative force … 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."[60]

The Lord Chancellor continued:

> "Once the principle 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.

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[50] Ibid, s 38(2)(a).
[51] Ibid, s 37(1).
[52] New Zealand Law Commission (Report 103, May 2008), para 3.42.
[53] 2006 Act, s 40(1)(a).
[54] Ibid, s 40(1)(b).
[55] Ibid, s 43(1).
[56] Ibid, s 41(3).
[57] Compare *R v Healy* [2007] 3 NZLR 850 (regard may be had to pre-Act case law, since s 43(1) test balancing probative value against prejudicial effect is substantially the same as the common law) and *Mahomed v The Queen* [2011] NZSC 52 (the Act substantially codified the case law and it is preferable to focus firmly on the terms of the Act.)
[58] *Mahomed v The Queen* [2011] NZSC 52.
[59] [1991] 2 AC 447.
[60] Ibid, at 460.

> Whether the evidence has sufficient probative value to outweigh its prejudicial effect must in each case be a question of degree."[61]

This was a development of the test previously articulated by the House of Lords in *Boardman*, but with the omission of *Boardman's* requirement that there be "striking similarity" before evidence of similar facts could be admitted.[62]

4.35 Prior to the 2003 Act, it was unclear whether it was competent to lead evidence of similar facts for the purpose of showing that the accused had a propensity to act in the way charged. The House of Lords in *R v Boardman*[63] held that it was not; whereas it was accepted as a legitimate purpose in the *dicta* of Lord Mackay of Clashfern LC in *DPP v P.*[64] The Law Commission of England and Wales noted, in their Report, that the position was "by no means clear".[65]

4.36 One notable feature of the English law is the undoubted significance of the accused's good character. At common law, in any case where the defendant does not have prior convictions, the judge must direct the jury that the defendant is a person of good character, and that this is relevant to their assessment of the defendant's credibility and also to the likelihood that the defendant committed the offence with which he or she is charged.[66] It appears that this requirement, as part of the law relating to a defendant's *good* character, survived the abolition by the Criminal Justice Act 2003 of the pre-existing common law relating to the admission of evidence of *bad* character.

The Criminal Justice Act 2003

4.37 The Criminal Justice Act 2003 replaces the pre-existing common law relating to the admission of evidence of bad character with detailed rules providing that similar fact and bad character evidence is admissible if it falls within one or more of a number of "gateways". These are:

a. All parties agree to admission;

b. The evidence is adduced by the defence;

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;

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[61] Ibid, at 460H-461A.
[62] The striking similarity test was established in *Boardman v DPP* [1975] AC 421 at 441. *DPP v P* [1991] 2 AC 447, at 460, recognised the merits of this test but noted that it was not the only way to establish probative force.
[63] [1975] AC 421. Any chain leading directly from propensity to guilt was termed the "forbidden chain of reasoning", per Lord Hailsham at 453.
[64] [1991] 2 AC 447.
[65] Law Com No 273 (2001), at para 2.12.
[66] *R v Vye* [1993] 1 WLR 471; (1993) 97 Cr App R 134. Lord Steyn, in *R v Aziz* [1996] AC 41, at 53 notes that the trial judge is accorded a residual discretion to decline to give a character direction if this is thought to be an "insult to common sense".

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.[67]

4.38 Gateways (a) – (c), (f) and (g) largely re-enacted the common law. Gateways (d) and (e), by contrast, permitted a broader use of similar fact evidence than had previously been allowed, by explicitly allowing the use of propensity evidence.

4.39 The over-arching purpose of the 2003 Act was described by the Court of Appeal in *R v Hanson,*[68] where it was observed that the Act was designed:

> "… to assist in the evidence based conviction of the guilty, without putting those who were not guilty at risk of conviction by prejudice. Accordingly, the prosecution applications to adduce evidence of bad character were not to be made routinely, simply because a defendant had previous convictions, but were to be based on the particular circumstances of each case."[69]

4.40 For the purposes of this Report the most relevant are gateways (c), (d), and (e). We consider each in turn.[70]

"Gateway (c) – It is important explanatory evidence"

4.41 Gateway (c) allows evidence of the defendant's bad character to be admitted if it is "important explanatory evidence", defined in section 102 as that which is of "substantial" value for understanding the case and without which the court "would find it impossible or difficult properly to understand other evidence in the case". This gateway appears to have been intended to re-enact the common law position, as summarised by Purchas LJ in *R v Pettman:*[71]

> "… 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 itself a ground for excluding the evidence."[72]

In *R v Cox,*[73] Lord Justice Hughes observed that the primary cases contemplated by this gateway are "… the kind of cases where the story simply cannot be told without a reference to past misbehaviour."[74] His Lordship noted the simple example of an assault in a prison where the fact that the defendant has been convicted of something becomes a necessary part of the story.[75]

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[67] 2003 Act, s 101(1).
[68] [2005] EWCA Crim 824; [2005] 1 WLR 3169; [2005] 2 Cr App R 21.
[69] Ibid, at para 4. Further observations were made at para 18.
[70] See too the Discussion Paper, paras 6.31-6.44.
[71] *R v Pettman*, Court of Appeal, unreported, 2 May 1985, CA no. 5048/C/82. The case, though unreported, is regularly cited (see eg *R v Dominic Josef Fulcher* [1995] 2 Cr App R 251 and *R v G* [2008] EWCA Crim 241).
[72] Ibid, at 65.
[73] [2007] EWCA Crim 3365.
[74] Ibid, at para 37.
[75] Ibid.

"Gateway (d) – Evidence relevant to 'an important matter between the defendant and the prosecution'"

4.42 Gateway (d) allows the leading of evidence of the defendant's bad character if it is "relevant to an important matter in issue between the defendant and the prosecution". This is expanded by section 103(1) to include evidence relating to propensity. Where propensity is an issue section 103(2) provides that such propensity may be established by evidence that the defendant has been convicted of an offence of the same description or category as the one with which he is charged. Section 103(3) inserts the proviso that the propensity may not be established in this way if the court is satisfied that due to the length of time since the previous conviction, or any other reason, that would be unjust.

4.43 Propensity is not the only important matter to which evidence of misconduct may be relevant. For example, it might help the prosecution to prove the defendant's guilt of the offence by establishing their involvement or by rebutting the defendant's explanation of his conduct. Gateway (d) is broad in scope allowing for an array of propensity evidence to be admitted. It is suggested that evidence of a defendant's bad character might be admitted if it shows him or her to have a propensity to commit offences of the same kind, description or category as the present charge and to establish a propensity to be untruthful. The explanatory notes explain that the intention is "to enable the admission of a limited range of evidence such as convictions for perjury or other offences involving deception … as opposed to the wider range of evidence that will be admissible where the defendant puts his character in issue".[76] It can be said that the scope of gateway (d) is therefore broad. Gateway (d) is not, however, restricted to the admissibility of propensity evidence.

4.44 Evidence of a defendant's propensity to commit offences of the kind which he is charged is admissible except where "his having such a propensity makes it no more likely that he is guilty of an offence".[77] The explanatory notes offer the example where there is no dispute about the facts of the case and the question is whether those facts constitute the offence. Such a dispute may be factual (for example, in a homicide case, whether the defendant's actions had caused the death) or legal (the accused's conduct did not amount to an offence).[78]

4.45 It is open to the accused to object to the admission of evidence under gateway (d) on the basis that "the admission of the evidence would have such an adverse effect on the fairness of the proceedings that the court ought not to admit it."[79] In considering such an objection, "the court must have regard, in particular, to the length of time between the matters to which that evidence relates and the matters which form the subject of the offence charged."[80]

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[76] 2003 Act – Explanatory Notes, para 374.
[77] 2003 Act, s 103(1)(a).
[78] It has been suggested by one academic commentator that "in cases where the prosecution wishes to avail itself of s 103(1)(a) and to introduce evidence that the defendant has convictions for identical offences to those charged … it is open to that defendant to introduce evidence showing that, statistically or logically speaking, these previous convictions … do not demonstrate that the defendant has a 'propensity to commit offences of the kind with which he is charged'" Roderick Munday, "Bad character rules and riddles: "explanatory notes" and the true meanings of s.103(1) of the Criminal Justice Act 2003" (2005) Crim LR 337 at 338.
[79] 2003 Act, s 101(3).
[80] Ibid, s 101(4).

"Gateway (e) – Evidence which has substantial probative value in relation to an important matter in issue between the defendant and a co-defendant"

4.46 Gateway (e) provides that all evidence of the defendant's bad character will be admissible if "it has substantial probative value in relation to an important matter in issue between the defendant and a co-defendant". Section 104 makes further provision on this gateway by providing that evidence will not be admissible through gateway (e) unless the "nature or conduct of [the defendant's] defence is such as to undermine the co-defendant's defence". As is noted in the Discussion Paper, section 104 suggests that this gateway is intended to deal with "cut throat" defences, rather than to provide another gateway for propensity evidence.[81] Only evidence which is to be (or has been) adduced by the co-defendant, or which a witness is to be invited to give (or has given) in cross-examination by the co-defendant, is admissible.[82]

4.47 What amounts to "substantial probative value", and what is meant by "an important matter"? In *R v Edwards*[83] the question of "substantial probative value" was considered to be one "for the judge on his 'feel' of the case".[84] An "important matter" is defined by section 112(1) as "a matter of substantial importance in the context of the case as a whole". Again, it appears that the assessment will call for a decision by the trial judge based upon his or her feel of the case.[85]

BAD CHARACTER EVIDENCE IN PRACTICE

Previous Convictions

4.48 As a rule, the jurisdictions which we have studied do not treat previous convictions differently from other similar fact evidence.

England and Wales

4.49 In England and Wales the admission of previous convictions or cautions is treated in the same manner as other similar fact evidence, and thus is admissible if it falls within one of the gateways that are outlined above. In 2005 guidance was given by the Court of Appeal on the operation of the Act in the case of *R v Hanson*.[86] The Court explained that whilst the Act made it clear that there would be occasions where the admission of previous convictions would be appropriate, this should not be done on a routine basis, but should be based entirely on the circumstances of the case and whether there was some probative force by reason of the offence charged.[87]

4.50 In the subsequent case of *R v Tully*[88] the Court of Appeal criticised the trial judge who had failed to fully weigh the probative value of admitting previous convictions against the risk of prejudice. The trial judge had observed that Parliament's intention in enacting the 2003

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[81] Discussion Paper, para 6.39.
[82] s 104(2).
[83] [2005] EWCA Crim 3244; [2006] 1 WLR 1524; [2006] 2 Cr App R 4.
[84] Ibid, at para 27.
[85] For examples, see *R v Lawson* [2006] EWCA Crim 2572; [2007] 1 WLR 1191; [2007] 1 Cr App R 11 and *R v Rosato* [2008] EWCA Crim 1243.
[86] [2005] EWCA Crim 824; [2005] 1 WLR 3169; [2005] 2 Cr App R 21.
[87] Ibid, at para 4.
[88] [2006] EWCA Crim 2270; (2007) 171 JP 25; (2007) 171 JPN 306.

Act was that previous convictions should be admitted. Smith LJ, in the Court of Appeal, indicated that "[t]he whole thrust of the guidance in *Hanson* is that the court should only admit convictions which have some probative force by reason of their similarity to the offence charged … In *Hanson* the court said that the judge should look for similarities between what the defendant had done in the past and what he was now charged with. Those similarities did not have to be striking in the way that similar fact evidence has to be, but there must be a degree of similarity."[89]

Canada

4.51 We have referred to the restrictive attitude of Canadian law to evidence of similar facts.[90] It is only in exceptional circumstances that evidence of similar facts, including previous convictions, will be admitted with a view to demonstrating propensity. If the defendant chooses to testify he or she may, like any other witness, be examined on his or her previous convictions.[91] Furthermore, if the defendant attacks the credibility of a prosecution witness the prosecution may tender the defendant's previous convictions into evidence.[92]

New Zealand

4.52 Similarly, in New Zealand the approach to the admission of previous convictions is the same as the approach to similar fact evidence generally.[93] There is an additional requirement for considering admissibility of convictions for the purpose of establishing veracity, which is to consider the length of time that has elapsed since the conviction. The Evidence Act 2006 explicitly specifies that previous convictions will be admissible evidence in criminal trials if they are not excluded by another provision of the Act.[94]

Australia

4.53 Australia also treats evidence of previous convictions in the same way as other evidence of similar facts, whether at common law or under statute.

Previous acquittals

4.54 Until relatively recently, each of the jurisdictions we have studied would have excluded evidence of previous acquittals, on the basis that the prosecution was barred from making assertions in subsequent proceedings which contradicted a previous acquittal. This, the principle in *Sambasivam*,[95] was departed from by the House of Lords in *R v Z,*[96] in which the prosecution was permitted, in support of a charge of rape, to rely upon the evidence of a number of complainers in previous proceedings where the defendant had been accused, but acquitted, of similar offences. The consequence of *R v Z* is that evidence of previous acquittals may be treated in the same way as other similar fact evidence.

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[89] Ibid, at para 26.
[90] See para 4.9 above.
[91] Canada Evidence Act 1985, s 12.
[92] *R v Corbett* [1988] 1 SCR 670.
[93] See paras 4.28-4.33 above.
[94] 2006 Act, s 49(1).
[95] *Sambasivam v Public Prosecutor, Federation of Malaya* [1950] AC 458.
[96] *R v Z* [2000] 2 AC 483.

4.55 *R v Z* has found acceptance in each of the jurisdictions which we considered,[97] with the exception of Canada, where evidence of previous acquittals remains inadmissible. In the leading case on this point, *R v Grdic*,[98] the Supreme Court of Canada explained the principle:

> "There are not different kinds of acquittals and, on that point, … 'as a matter of fundamental policy in the administration of the criminal law it must be accepted by the Crown in a subsequent criminal proceeding that an acquittal is the equivalent to a finding of innocence' … To reach behind the acquittal, to qualify it, is in effect to introduce the verdict of 'not proven', which … has never been … part of our law … However, this does not mean that, for the purpose of the application of the doctrine of *res judicata*, the Crown is estopped from re-litigating all or any of the issues raised in the first trial. But it does mean that any issue, the resolution of which had to be in favour of the accused as a prerequisite to the acquittal, is irrevocably deemed to have been found conclusively in favour of the accused ..."[99]

4.56 The only purpose for which evidence of previous acquittals may be admitted, in Canada, is for proving guilty knowledge: for example in a complex fraud case a previous acquittal could be admitted to establish that the defendant had knowledge that the act charged was a criminal offence. Even this use of the evidence is likely to be regarded as inappropriate in most cases.[100]

Previous extra-territorial convictions

4.57 Each of the jurisdictions analysed in this Chapter appears to apply the same principles to admission of evidence of previous convictions from abroad as they do with those from their own jurisdiction.

Previous non-criminal misconduct

4.58 There are occasions where the bad character evidence the prosecution wish to lead is not related to a previous criminal charge. None of the jurisdictions discussed offer a definition of this type of behaviour, but typical examples include: the possession of certain lawful objects, e.g. a substance used in the cutting of illegal drugs which is not by itself an illegal substance; the personality of the accused, e.g. things from which the accused is known to derive pleasure or certain character traits such as displaying aggressive tendencies after consuming alcohol; the accused's previous conduct towards a specified individual or category of person; and the accused's lifestyle, e.g. evidence of lifestyle and income may be used to demonstrate the accused's lawful income is not sufficient to fund the lifestyle that is led by the accused.

4.59 The majority of the jurisdictions we have examined treat this type of evidence in the same way as other examples of similar fact evidence. The exception is Canada, where the leading of non-criminal bad character evidence, for the purpose of establishing the general disposition of the defendant is strictly prohibited:

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[97] New Zealand followed *R v Z* in *R v Degnan* [2001] 1 NZLR 280.
[98] [1985] 1 SCR 810.
[99] Ibid, at 825.
[100] *R v Arp* [1998] 3 SCR 339.

> "Bad character is not an offence known to the law. Discreditable disposition or character evidence, at large, creates nothing but "moral prejudice" and the Crown is not entitled to ease its burden by stigmatizing the accused as a bad person."[101]

RAISING THE CHARACTER ISSUE

4.60 Each of the jurisdictions examined make special provision for admitting evidence if the defence either adduces evidence of good character or attacks the character of other witnesses.

4.61 The provisions vary from the Canadian approach that should character be brought into issue all protections from prejudice are removed,[102] to the approach in England and Wales where while raising character is a ground for admissibility of bad character evidence it carries with it an additional fairness test that does not apply to some of the other routes to admission.[103] Resting between these approaches lie the Australian and New Zealand positions.

4.62 In Australia the exclusionary rules[104] regarding tendency and credibility do not apply to evidence adduced by a defendant as to his or her own good character, whether generally or in a particular respect.[105] By corollary, evidence adduced in rebuttal is similarly admitted.[106] That said, sections 135-137 remain applicable and evidence which is unfairly prejudicial, misleading, confusing or time-wasting is excluded.

4.63 In New Zealand, the defendant's veracity can be challenged by reference to his or her previous convictions only if the defence raises the issue of character. Nevertheless, that evidence may still be excluded where the judge refuses to permit the evidence upon consideration of the extent to which veracity has been put in issue, any time lapses and whether the evidence given by the defendant was elicited by the prosecution.[107] Section 41(2) of the 2006 Act makes provision for propensity evidence: where the defendant offers propensity evidence about himself or herself, the prosecution or a co-defendant may offer further propensity evidence about the defendant in rebuttal.[108]

SEPARATION OF CHARGES

4.64 The jurisdictions examined appear to be stricter with regards to their approach to separating charges than the current position in Scotland. In England and Wales, the Criminal Procedure Rules 2011[109] only permit charges to be combined on an indictment if they are founded on the same facts or form part of a series of offences of the same character.

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[101] *R v Handy* 2002 SCC 56, at para 72.
[102] Section 666 of the Canadian Criminal Code provides: "Where, at 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 offences, including any previous conviction by reason of which a greater punishment may be imposed."
[103] See discussion of the gateways at paras 4.37-4.47 above.
[104] Note also, hearsay and opinion evidence.
[105] 1995 Act, s 110(1).
[106] Ibid, ss 110(2) and (3).
[107] 2006 Act, s 38.
[108] Where propensity evidence is offered by the prosecution under s 41(2), the stringent rules under s 43 do not apply (that is, there is no consideration of the probative value and prejudicial effect of that evidence).
[109] SI 2011/1709, rule 14.2(3).

4.65 Australia requires a high degree of similarity between charges before it will be permissible to combine them on an indictment. As stated in *Phillips*, "criminal trials in [Australia] are ordinarily focused with high particularity upon specified offences".[110] The rationale is to prevent juries from being contaminated by the knowledge of one accusation when considering the verdict on another, on the basis that "no other outcome would be compatible with the fair trial of the [defendant]".[111] As in *Phillips*, cases which might in Scotland have taken advantage of the *Moorov* doctrine may be required, in Australia, to be tried separately.

4.66 In Canada, while it is within prosecutorial discretion to combine any number of charges (except murder) on one indictment, the judiciary have the discretion to sever an indictment if there is a valid reason to do so (such as where it is considered prejudicial, where multiple charges are likely to cause confusion, or where the accumulated charges would be "untriable" for a jury). According to one Supreme Court Justice we consulted, this power of severance is regularly used.[112] Following the subsequent dropping of a charge the jury will be directed to disregard the evidence that related to that dropped charge.

CROSS-ADMISSIBILITY

4.67 Where charges are combined this automatically raises issues regarding the cross-admissibility of evidence (that is, the use of evidence on one charge in relation to another charge in the same proceedings) and, for our purposes, specifically the cross-admissibility of similar fact, character or propensity evidence. The Supreme Court of Canada addressed this issue in the case of *R v Arp*[113] where it was held that cross-admissibility between counts on the same indictment was permissible assuming that careful instructions were given to the jury.[114] Similarly, this issue has been specifically addressed in England and Wales in their admissibility rules for bad character evidence. Generally evidence on one charge of an indictment would also be admissible in relation to any other charge on that indictment. Section 112(2) of the 2003 Act provides that where a defendant is charged with two or more offences in the same criminal proceedings Chapter 1 of Part 11 of the 2003 Act – except s 101(3) – has effect as if each offence were charged in separate proceedings. Therefore, a "gateway" is required to support cross-admissibility between charges in the same proceedings in exactly the same way as where only one offence is charged.[115]

PURPOSE FOR WHICH BAD CHARACTER EVIDENCE MAY BE USED

England and Wales

4.68 The leading case on this subject in England and Wales is *R v Highton*.[116] *Highton* provides that once evidence has been admitted through one gateway it becomes admissible evidence for any purpose for which it may be relevant (with the exception of bolstering a weak case, becoming the evidence upon which guilt is based). This includes the ability to admit the evidence through one gateway on specific admissibility grounds and then to use it

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[110] *The Queen v Phillips* [2006] HCA 4; (2006) 225 CLR 303, at para 79.
[111] Ibid.
[112] Cromwell J, personal communication.
[113] [1998] 3 SCR 339.
[114] Ibid, at para 79. A number of factors which should be considered are listed at para 80.
[115] The leading case is presently *R v Freeman and Crawford* [2008] EWCA Crim 1863 [2009] 1 WLR 2723; [2009] 1 Cr App R 11: see, specifically, para 17.
[116] [2005] EWCA Crim 1985; [2005] 1 WLR 3472; [2006] 1 Cr App R 7.

for an additional purpose such as establishing propensity. Lord Woolf came to the key conclusion that:

> "A distinction must be drawn between the admissibility of evidence of bad character, which depends upon it getting through one of the gateways, and the use to which it may be put once it is admitted. The use to which it may be put depends upon the matters to which it is relevant rather than upon the gateway through which it was admitted."[117]

4.69 Propensity is specifically listed as one of the purposes for which similar fact evidence can be used in the 2003 Act under gateway (d). The wording of the Act uses the word "includes" and there is no exclusion of similar fact evidence being used for any particular purpose. This is in stark contrast to the common law prior to the 2003 Act under which bad character evidence could not be used for the purpose of establishing propensity to commit the type of offence charged.[118] In the Privy Council case of *DS v HM Advocate,* Lord Brown of Eaton-under-Heywood commented upon this change of approach:

> "There is nothing intrinsically unfair or inappropriate in putting [past convictions] into evidence, and indeed, in doing so not merely on the limited basis that they go only to the accused's credibility (the fiction which to my mind disfigured the administration of criminal justice in England and Wales for far too long, now at last ended by the Criminal Justice Act 2003 …) but on the wider ground that they bear also on the accused's propensity to commit offences of the kind which he is charged."[119]

4.70 At odds with the general proposition set out in *Highton*, is the decision of the Court of Appeal in *R v D*[120] where it was questioned whether gateway (c) ("important explanatory evidence") might be different. The court stated that evidence admitted under s 101(1)(c) is for the purpose of providing background evidence and its legitimacy is established by reference to its own rationale and purpose – namely the necessity of that evidence. Without such evidence, the jury would find it impossible or difficult to understand other evidence of the case.[121] Hughes LJ said:

> "… evidence of propensity should not readily slide in under the guise of important background evidence and … evidence which is admitted under gateway (c) should not readily be used, once admitted, for a purpose, such as propensity, for which additional safeguards on different tests have first to be met."[122]

The Court went on to consider that:

> "Since evidence admitted under this gateway is admitted generally as 'important explanatory evidence' whose value is substantial for understanding the case as a whole, it would seem difficult to think that the jury should be limited in its use (as the judge purported to limit the jury in this case, but without objection on this appeal). On the other hand, there must be a danger in admitting such evidence merely as 'explanatory', however important, if the use to which it is really intended to put it is as evidence of propensity, where the statutory tests and safeguards are different. We consider that such considerations require that the statutory test for gateway (c) should be applied cautiously where it is argued to overlap with a submitted case of

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[117] ibid, at para 10.
[118] *Makin v Attorney General of New South Wales* [1894] AC 57 (PC).
[119] *DS v HM Advocate* 2007 SC (PC) 1, para 103.
[120] [2008] EWCA Crim 1156; [2009] 2 Cr App R 17.
[121] Ibid, at para 21.
[122] Ibid, at para 34.

propensity. Alternatively, s 78 [of the Police and Criminal Evidence Act 1984] might well require such evidence to be excluded where it really amounts to evidence of propensity which would not be admitted as such."[123]

New Zealand

4.71 Under the Evidence Act 2006 similar fact evidence can be used to attack the veracity of the defendant or to demonstrate the propensity of the defendant to commit the type of offence charged. There are clear dividing lines between the two purposes and evidence that was admitted solely for the purpose of establishing propensity cannot be used to evaluate veracity (due to the additional requirement of bringing character into issue before veracity evidence can be admitted).

Canada

4.72 In Canada, if similar fact evidence is admitted it is to be admitted for a specific purpose and cannot be considered for assessing other aspects of the case.[124] Furthermore there is a general presumption against propensity evidence, to the extent that it is only allowed in very limited circumstances. This approach has developed as a result of the recognition of the high likelihood of prejudice and built upon an adherence to the fairness principle.

Australia

4.73 Australia does distinguish admissibility eligibility on the basis for which evidence is to be used: in practice, the Australian common law position is to completely prohibit the admission of propensity evidence. The actual test is not a complete prohibition, the test allows for admission where there can be no reasonable explanation consistent with innocence of the accused.[125] In practice however, this is an impossible standard to meet, and attempts have been made to depart from it.[126] Furthermore, the 1995 Act specifically divides propensity evidence into two categories: tendency and coincidence, dealing with the rules governing the purposes of the evidence separately.

SATELLITE TRIALS AND REHEARING EVIDENCE

England and Wales

4.74 In England and Wales the prospect of satellite litigation exists with regards to bad character evidence admitted under the 2003 Act. It is not however intended that every piece of evidence should be the subject of a full hearing; in fact there are protections against this: one of the possible considerations under the 2003 Act is whether admitting the evidence will unduly lengthen or increase the complexity of the proceedings.[127] In *R v O'Dowd*[128] bad character evidence was provided by three previous complainants. The Court of Appeal

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[123] Ibid, at para 36.
[124] *R v Handy* 2002 SCC 56 at 70: "An indication of the importance of identifying 'the issue in question' is that the trial judge is required to instruct the jury that they may use the evidence in relation to that issue and not otherwise." (Opinion of the Court, per Binnie J).
[125] This is the *Pfennig* test as set out by the High Court in *Philips v The Queen* [2006] HCA 4, at para 9.
[126] See, for example, *R v O'Keefe* [1999] QCA 50 and *R v Kay* [2006] QCA 302.
[127] This forms part of the balancing exercise required under s 101(3).
[128] [2009] EWCA Crim 905; [2009] 2 Cr App R 16.

acknowledged that with satellite litigation the important factor is not the number of allegations but their nature and complexity, and the time it will take to put them before the jury where they are contested.[129] In *R v McKenzie*[130] Toulson LJ described three potential difficulties that need to be considered in cases where satellite issues might arise:

a. The need to consider whether admission of such evidence would result in the trial becoming unnecessarily and undesirably complex even if not unfair;[131]

b. The danger of a trial of collateral issues not only adding to the length and cost of the trial but complicating the issues which the jury has to decide and taking the focus away from the most important issue or issues;[132]

c. The dilemma that if allegations of previous misconduct are few in number, they may well fail to show propensity even if they are true, but the greater the plethora of collateral allegations, the greater the risk of the trial losing its proper focus.[133]

4.75 In relation to previous convictions in particular there is further protection against unnecessary satellite litigation in the form of section 74 of the Police and Criminal Evidence Act 1984. This section provides that there is a presumption that convictions from courts of the UK shall be presumed to be evidence that the defendant committed that offence, unless the contrary is proved.

4.76 Furthermore there are specific legal principles and procedures that should be utilised to prevent unnecessary satellite litigation. The Criminal Procedure Rules 2011[134] place on parties an obligation to "actively assist" the court's case management procedures.[135] The form of the defendant's notification for challenging the admissibility of bad character evidence aims to reduce unnecessary satellite litigation by requiring the defendant to specify the reason why the evidence should not be admitted. The Court of Appeal remarked on a predecessor[136] of these procedures in the case of *R v Hanson*:

> "We would expect the relevant circumstances of previous convictions generally to be capable of agreement, and that, subject to the trial judge's ruling as to admissibility, they will be put before the jury by way of admission. Even where the circumstances are genuinely in dispute, we would expect the minimum indisputable facts to be thus admitted. It will be very rare indeed for it to be necessary for the judge to hear evidence before ruling on admissibility under this Act."[137]

4.77 A further protection offered by the 2003 Act is the high standard that is required to achieve a successful challenge to the accuracy of the character evidence. Section 109 provides that there should be an assumption of truth with regards to evidence which is undergoing the relevance and probative value tests. Satellite litigation is of course not limited to hearings on admissibility but could include hearings challenging the content of the

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[129] Ibid, at para 64.
[130] [2008] EWCA Crim 758; (2008) 172 JP 377; [2008] RTR 22; (2008) 172 JPN 559.
[131] Ibid, at para 22.
[132] Ibid, at para 23.
[133] Ibid, at para 24.
[134] SI 2011/1709.
[135] Rule 3.3.
[136] Namely, the Criminal Procedure Rules 2005 (SI 2005/384), repealed by the Criminal Procedure Rules 2010 (SI 2010/60). The rules are now contained in the Criminal Procedure Rules 2011 (SI 2011/1709).
[137] *R v Hanson* [2005] EWCA Crim 824; [2005] 1 WLR 3169; [2005] 2 Cr App R 21, at para 17.

admissible evidence. The strong presumption in favour of accepting the character evidence as the truth may act as a deterrent against bringing unrealistic challenges. Section 109(2) provides that the only exception to this provision is that, on the basis of any material before the court (including any evidence it decides to hear on the matter), no court or jury could reasonably find it to be true. This establishes a very high threshold for any type of character or propensity evidence to be challenged (in effect a standard analogous to "Wednesbury unreasonableness").

New Zealand

4.78 In New Zealand, the 2006 Act incorporates a scheme similar to that laid out in the Police and Criminal Evidence Act 1984. It provides that evidence of a conviction is proof that the defendant committed the offence. The 2006 Act goes further than the position in England and Wales in that exceptions to this rule should only be permitted in exceptional circumstances. If an exception is permitted by the Judge, the result is a re-hearing of the evidence to establish the truth behind the conviction.[138]

Canada

4.79 On the face of it, the issue of satellite trials for adducing the truth behind a conviction does not occur in Canada as satellite litigation is not permitted. In reality, Canada's rules on bad character evidence do not escape satellite trials entirely as Canada does conduct "voir dire" trials on admissibility.

Australia

4.80 Australia requires the re-hearing of evidence unless there is a certificate signed by a judge, in the appropriate form proving the matter that the party seeks to adduce, for example the conviction, acquittal, particulars, indictment or sentence and the court in which it occurred.[139]

CONCLUSION

4.81 The jurisdictions which we have studied adopt a range of approaches to the admission of similar fact evidence. The common laws of Canada and Australia continue the restrictive approach once favoured by the English common law, rejecting the use of evidence of similar facts (whether in the form of similar allegations or similar convictions) except where their probative value is exceptionally high. The other jurisdictions have seen the law extensively reformed in statute. There, it is recognised that evidence of similar facts may be introduced for the purpose of showing the accused to have a propensity (in England and Wales or New Zealand) or tendency (in Australia) to commit offences of the kind with which he or she is presently charged, abandoning the common law's view that evidence of propensity was presumptively inadmissible. The analysis of whether such evidence should be admissible depends on a balancing of probative value against prejudicial effect, and not

[138] 2006 Act, s 49(2)(b).
[139] 1995 Act, ss 91 and 178.

upon whether or not the evidence of similar facts takes the form of evidence in another live charge or that of a previous conviction.

Chapter 5 Bad Character, Similar Fact Evidence and Propensity

5.1 In this Chapter we set out our analysis of the current law regarding these three issues, and consider whether it is satisfactory.

Bad character

5.2 As we noted in the Discussion Paper, Scots law has been, and continues to be, reluctant to admit evidence of the *general* bad character of an accused person. We quoted Hume, who observed that:

> "On the part of the prosecutor, it will hardly be maintained, that he is entitled to throw in the balance against the pannel, a proof of his general bad fame, whether in respect of temper, or honesty, (unless there is a charge of habite and repute a thief) or licentious habits, or any other vice of disposition."[1]

But aside from a general concern about fairness, the basis for this exclusion is one of relevance. As Hume continued:

> "It is, however, something substantially different from that, where the prosecutor offers to prove, in a case of homicide for instance, a vindictive humour, and a series of cruel treatment, with respect to the individual killed, - his wife, perhaps, or his child, his apprentice, or other person nearly related to him, and subject to his authority. In such a case, the pannel's former acts of aggression, if violent and repeated, and more especially if recent, are just grounds of presumption against him: They are circumstances in the state of those parties with respect to each other; and may serve to detect the true character, the *quo animo* of the fatal blow, whether it was struck out of malice and cruelty, or casual irritation, or in the way of discipline and correction only."[2]

5.3 We concluded, in paragraphs 3.10-3.11, that the approach of the courts appeared to be to allow evidence of the character of the accused, including other misconduct, where this was sufficiently relevant to the proof of a crime charged. The most important question was relevance: where evidence is relevant to the proof of a charge, it would not generally be excluded merely on the basis that it shows the accused to be of bad character.[3] The first and most important question to be answered is that of relevance.

5.4 There was no dissent from the view that evidence of (relevant) bad character should be admissible. Most consultees agreed that it was already admissible. It was, however, pointed out that it could not corroborate. Crown Office observed:

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[1] Hume, ii, 413, quoted in Discussion Paper para 3.3.
[2] Ibid.
[3] It would, however, be excluded where it disclosed previous convictions and (perhaps) previous charges: see Chapter 7.

> "The [Discussion Paper] refers to the case of *HMA v Beggs*[4] as an example of the courts' willingness to accept character evidence that is not directly related to the facts of the instant case but which is relevant and admissible. […] However, while such evidence may be helpful to the Crown as an adminicle of evidence, such evidence does not provide corroboration."

We do not understand the apparent difference between "an adminicle of evidence" and corroborating evidence. "Adminicle" is certainly an unusual term, not in common use, but its meaning in the Oxford English Dictionary is "Anything that aids or supports". The OED provides another meaning:

> "*Law.* Supporting or corroboratory evidence; that which, without forming complete proof in itself, contributes to proving a point. *In Sc. Law,* Any document or writing tending to prove the existence and tenor of a lost deed, which if it existed would have been full evidence."

We have found nothing in any Scottish legal publications to indicate that the word "adminicle" has a different technical meaning. We therefore take the Crown Office comment as referring to the Scottish rule that certain categories of relevant, admissible evidence cannot provide corroboration of other evidence in the case. We discuss the use to which evidence may be put, in our consideration of propensity, later in this chapter. For the time being, we are focussing on the question of relevance and admissibility, and we agree that evidence of relevant aspects of character, whatever moral judgment may be made about them, should be admissible. We recommend:

> **8. Where aspects of the accused's character are relevant to an issue which is of consequence in the proceedings, evidence as to those aspects should be admissible.**
>
> (Draft Bill, section 1)

Similar Fact Evidence

What is "similar fact evidence"?

5.5 As we have indicated above, it is possible to see a coherent theme running through the various matters covered by the Reference. They all, broadly, relate to evidence that the accused has acted in a similar way on another occasion or occasions. On one view, it is clear from some of the decided cases that Scots law has no principled objection to the admission of such evidence, provided it is relevant to one of the issues in the proceedings. Thus, in *Nelson v HM Advocate*[5] Lord Justice General Hope, delivering the opinion of a bench of five judges, observed:

> "The Crown can lead any evidence relevant to the proof of a crime charged, even although 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

[4] 2002 SLT 153; 2001 SCCR 891.
[5] 1994 JC 94; 1994 SCCR 192.

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."[6]

The implication is that, if the other crime referred to was of the same kind as that charged, notice would *not* be required. In the light of that very clear statement, it might be thought that the leading of similar fact evidence including, where appropriate, evidence that the accused had committed other crimes of the same kind as the crime charged, might be something acceptable in Scots law. But, as we have already noted, in *DS v HM Advocate*[7] Lord Hope of Craighead said, at paragraph 41:

"Although Scots law does not admit similar fact evidence …".

In the same case Lord Rodger of Earlsferry remarked, at paragraph 86, in relation to the innovation (which we discuss in some detail below) made by section 275A of the Criminal Procedure (Scotland) Act 1995:

"If this amounts to a limited departure from the usual Scottish rule against adducing evidence of similar facts, then it is one which the legislature is entitled to make."

5.6 In the light of these conflicting statements, it is difficult to give content to precisely what is meant by the "usual Scottish rule against adducing evidence of similar facts". It may be that it is to be confined to the case where the similar facts in question take the form of previous convictions. That matter is not specifically mentioned in the High Court's decision in *Nelson v HM Advocate.*[8] *Nelson* was of course decided against the background of a statutory regime which generally prohibited the leading of evidence as to previous convictions, and it would be reasonable to assume that that is the reason for the absence of reference to previous convictions in the otherwise general proposition which the Court set out. On the other hand it may, more generally, be an aspect of the broader rule against the leading of evidence as to collateral matters. If that is the case, then the rule would appear to be inconsistent with the comprehensive formulation of the *Nelson* judgment. Since we deal in some detail with similar fact evidence in the form of evidence of previous convictions later in this Report, it may be useful to clarify our position on the more general aspects of the matter here.

5.7 Similar fact evidence, in a broad sense, and as we observed in the Discussion Paper,[9] is "evidence that the accused has, before or after the facts alleged in the instant charge, acted in a similar way to that charged." As the judges have pointed out, there is a "general principle that evidence of similar facts relating to events other than those of the charge which are relevant to an issue in the case is admissible." It may be worth reiterating some of the considerations which make such evidence valuable. In terms of the existing Scots law, we referred in the Discussion Paper to the case of *Gallagher v Paton,*[10] in which the accused was charged with defrauding a shop assistant by pretending to her that her employer paid yearly for an advertisement in a directory. He objected to the leading of evidence to the effect that he had made similar representations to other persons on the same day. At advising, Lord McLaren observed, *inter alia*:

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[6] Ibid, at 104.
[7] 2007 SC (PC) 1.
[8] 1994 JC 94; 1994 SCCR 192; Discussion Paper para 2.29.
[9] At para 1.5.
[10] 1909 SC (J) 50; Discussion Paper para 3.5.

> "Now, when the question is whether the accused person made false statements, knowing the statements to be false, and for the purpose of obtaining money to which he was not entitled, *I do not know of any better way of establishing the criminal intention than by proof that he had made similar false statements on the same day to other people, and apparently with the same object*. […] A false statement made to one person may be explained away, but when a system of false statements is proved, the probability is very great that the statements were designedly made. *Unless a decision to the contrary could be produced, I am unable to hold that the law will reject as inadmissible evidence on which every one would act in the ordinary affairs of life, and which is calculated to produce conviction to any fair-minded person who hears it."*[11]

The second passage emphasised was quoted with approval by the Lord Justice Clerk in the case of *Moorov v HM Advocate* itself.[12] In the same case Lord Sands observed:

> "It cannot, I think, be suggested that the evidence of a witness who detailed an elaborate story told by a party accused of fraud would not be corroborated by evidence that the same man had on another occasion told the same story to someone else."[13]

These were of course cases in which the actings were either almost contemporaneous, or very similar in character.

5.8 In criminal cases, the *dicta* in *Moorov v HM Advocate, Nelson v HM Advocate* and *DS v HM Advocate,* which we have mentioned above, would appear to be difficult to reconcile.

Similar fact evidence in civil cases

5.9 It may be of value to examine the position in civil cases. A number of decisions concerning the admission or exclusion of what was, on our definition, similar fact evidence were reviewed by Lord Osborne, sitting in the Outer House, in *Strathmore Group v Credit Lyonnais*.[14] That case concerned a dispute as to the authenticity of a signature of one of a series of bills of exchange. The bank sought to exclude from probation the pursuers' averments relating to a number of other bills, and to an alleged fraudulent scheme perpetrated by one of the bank's employees, of which the pursuers averred the forgery of the signature to have formed a part.

5.10 After reviewing the relevant authorities, Lord Osborne summarised the law as follows:

> "In my opinion, a number of principles emerge from these helpful observations. First, the ultimate test of the relevancy of averment or evidence is whether the material in question has a reasonably direct bearing on the subject under investigation. In any particular case, there could come a point at which it would be possible for the court to say that the bearing of some fact was too indirect and too remote properly to assist in deciding the issue in question. Secondly, in my opinion it is apparent that

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[11] At page 55 (emphasis added).
[12] 1930 JC 68 at 83: "My view of the case as a whole may be summed up in the—if I may say so—wise words of Lord M'Laren in Gallagher: 'Unless a decision to the contrary could be produced, I am unable to hold that the law will reject as inadmissible evidence on which every one would act in the ordinary affairs of life, and which is calculated to produce conviction to any fair minded person who hears it.'"
[13] Ibid, at 87.
[14] 1994 SLT 1023.

> expediency has a part to play in reaching a decision as to what averment or evidence may be held to be relevant, and what not. Accordingly, judicial discretion is involved to that extent in deciding upon the point at which averments or evidence must properly be excluded as irrelevant. Thirdly, it is unhelpful and possibly misleading to focus attention on the word 'collateral' in the consideration of this kind of question. That aspect of the matter was emphasised by Lord President Cooper in *Bark v Scott*, at 1954 SC, p 76; 1954 SLT, p212, where he said: 'and I take it, therefore, that the question is one of degree in each case, the determining factor being whether the matters averred are, in a reasonable sense, pertinent and relevant and whether they have a reasonably direct bearing on the subject under investigation, or whether on the other hand they fall to be rejected as being too indirect or too remote'.
>
> Having regard to the nature of this approach, it appears to me that, in this area of the law, individual decisions related to the facts of any particular case are unlikely to be a guide for the decision of any other, unless the facts are virtually identical."[15]

We are not persuaded that it is helpful to merge, or overlap, the concepts of relevance and expediency, for reasons which we set out below. But we agree wholeheartedly with Lord Osborne's final observation. Decisions as to the relevance of evidence will be highly fact-specific, and should generally be taken on the basis of the facts of the particular case, rather than by reference to past decisions.[16] We also agree that the test of the admissibility of relevant evidence will not be black and white, but will call for the exercise of judgment (or in Lord Osborne's terms, discretion).

5.11 Lord Osborne went on to mention the line of authority which holds that evidence of a person's conduct on one occasion is not relevant to the question of whether he or she acted in a similar manner in the present case. He remarked:

> "When the question in issue is whether a person did a particular thing at a particular time, it is in general irrelevant to show that he did a similar thing on some other occasion. In other words, the existence of a merely human link between two transactions would not be relevant to render one relevant to the resolution of an issue concerning the other. This approach is clearly expressed by Lord McLaren in *Inglis v The National Bank of Scotland Limited* at 1909 SC, p 1040; 1909 1 SLT, p 519, where he said, 'it seems to me to be a good authority for the proposition that it is not evidence against a party of having committed a delict to shew that he has committed delicts of the like description against other persons on other occasions.'"[17]

5.12 In *Inglis* Lord McLaren was referring to, and founding upon, the classic statement of Lord President Robertson in *A v B,* (which we quoted in the Discussion Paper) that:

> "Courts of law are not bound to admit the ascertainment of every disputed fact which may contribute, however slightly or indirectly, towards the solution of the issue to be tried. Regard must be had to the limitations which time and human liability to confusion impose upon the conduct of all trials. Experience shows that it is better to sacrifice the aid which might be got from the more or less uncertain solution of collateral issues, than to spend a great amount of time, and confuse the jury with

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[15] Ibid, at 1031.
[16] Cf the comments of Judge LJ in *R v Renda* [2005] EWCA Crim 2826; [2006] 1 WLR 2948; [2006] 1 Cr App R 24 at para 3.
[17] 1994 SLT 1023 at 1031.

> what, in the end, even supposing it to be certain, has only an indirect bearing upon the matter in hand."[18]

As we read those remarks his Lordship is not saying that proof of collateral issues may not be relevant, but that inquiry into them may take a great deal of time, and confuse a jury, on matters which at the end of the day have only an indirect bearing on the facts in issue. That approach seems to us to be entirely sensible, and to be one which could equally be applicable in criminal as well as civil proceedings. But it is an approach based upon considerations of case management, of expediency, rather than on relevance. If evidence is irrelevant – and we have already remarked that that may not be able to be decided until it has been led – then there should be no question of admitting it. Lord President Robertson's *dictum* in *A v B* is only applicable to relevant evidence. We would have some difficulty with Lord Osborne's remark:

> "When the question in issue is whether a person did a particular thing at a particular time, it is in general irrelevant to show that he did a similar thing on some other occasion. In other words, the existence of a merely human link between two transactions would not be relevant to render one relevant to the resolution of an issue concerning the other."

5.13 In the Discussion Paper, we observed, in commenting upon Lord President Robertson's decision in *A v B*, that there had been a tendency to elide any distinction between collateral issues and lack of relevance.[19] That may indeed also be perceptible in the different way in which Lord McLaren approached the matter in the two cases of *Gallagher v Paton* and *Inglis v The National Bank of Scotland Limited* (although, of course, the latter was civil and the former criminal).

5.14 Lord Osborne's remark may also be an example of the same tendency. If so, it is a tendency shared by many judges, and we came across examples of it in our consideration of the question with our advisory and reference groups. For reasons that we explore more fully below, we do not think that this can be correct. It may, for entirely justifiable considerations of case management, be inexpedient to allow investigation of collateral matters; but the present law recognises circumstances in which evidence of actings on one occasion is relevant to the proof of similar actings on another occasion. The clearest (but not the only) example of this is *Moorov.* Neither common sense nor the law as it stands is compatible with the view that the accused's conduct on other occasions is always, or even typically, irrelevant to the proof of a present charge.

5.15 It is worth expanding upon this point, since the matter is of considerable importance in the scheme of this Report. We do so by reference to a House of Lords decision in an English case.

5.16 *O'Brien v Chief Constable of South Wales Police*[20] was an action by a man who had been convicted of murder. His case had been referred to the Court of Appeal by the Criminal Cases Review Commission, and he had been acquitted. He then sued the Chief Constable, alleging that he had been "framed". He identified two particular policemen who, he said, were primarily responsible for his wrongful conviction, and sought to lead evidence

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[18] *A v B* (1895) 22 R 402 at 404; Discussion Paper para 2.7.
[19] Discussion Paper, para 2.8.
[20] [2005] UKHL 26; [2005] 2 AC 534.

that both of them had acted in a similar way in the past. The defendant objected to the admission of such evidence. Both the single judge and the Court of Appeal agreed that the evidence should be admitted. The case was appealed by the Chief Constable to the House of Lords, which accordingly took the opportunity to explore the matter of "similar fact evidence" generally.

5.17 At advising, Lord Bingham observed:

> "3. Any evidence, to be admissible, must be relevant. […] As Lord Simon of Glaisdale observed in Director of Public Prosecutions v Kilbourne [1973] AC 729, 756, "Evidence is relevant if it is logically probative or disprobative of some matter which requires proof […] relevant (i.e. logically probative or disprobative) evidence is evidence which makes the matter which requires proof more or less probable."
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> 4. That evidence of what happened on an earlier occasion may make the occurrence of what happened on the occasion in question more or less probable can scarcely be denied. If an accident investigator, an insurance assessor, a doctor or a consulting engineer were called in to ascertain the cause of a disputed recent event, any of them would, as a matter of course, enquire into the background history so far as it appeared to be relevant. And if those engaged in the recent event had in the past been involved in events of an apparently similar character, attention would be paid to those earlier events as perhaps throwing light on and helping to explain the event which is the subject of the current enquiry. To regard evidence of such earlier events as potentially probative is a process of thought which an entirely rational, objective and fair-minded person might, depending on the facts, follow. If such a person would, or might, attach importance to evidence such as this, it would require good reasons to deny a judicial decision-maker the opportunity to consider it. For while there is a need for some special rules to protect the integrity of judicial decision-making on matters of fact, such as the burden and standard of proof, it is on the whole undesirable that the process of judicial decision-making on issues of fact should diverge more than it need from the process followed by rational, objective and fair-minded people called upon to decide questions of fact in other contexts where reaching the right result matters."

We would agree with that description of what is meant by "similar fact evidence" and Lord Bingham's analysis of why it is relevant. Accordingly, we take it as a matter of common sense that where a person has acted in one way on one occasion, this information might help a reasonable fact finder to draw an inference as to the likelihood that he or she had acted in a similar way in relation to the offence with which he or she is currently charged. The extent of the inference which may be drawn, and the extent to which it corroborates the other evidence that the accused committed the instant offence, will be a matter for the fact finder. Since there is at least doubt as to the extent to which Scots law has accepted that position, it should be clarified. We recommend:

> **9. Any statute on similar fact evidence should make it clear that evidence that the accused has acted in a similar way on other occasions (including evidence of convictions or acquittals in respect of similar offences) is relevant to the question of whether he has so acted on the occasion which is the subject of the current criminal proceedings.**
>
> (Draft Bill, sections 4 and 5)

5.18 There will of course be occasions, as for example where the accused admits the facts, but denies that they constitute an offence, where the question of whether he has acted

in that way on the current occasion does not require to be proved. And we return to the question of what value such evidence may have later in this Chapter. For present purposes we turn now to the question of the relationship between relevance and collateral matters.

Relevance and collateral matters

5.19 As we have noted above, there has been a tendency to elide the distinction between relevance and the reluctance of courts to become involved in proof of collateral matters. In our view the first question must always be whether evidence is relevant. If it is relevant there may remain a question as to whether it should nevertheless not be admitted because it involves proof of collateral matters which would contribute little to the decision on the issues before the court, and would tend to confuse the fact finder.[21]

5.20 In *O'Brien v Chief Constable of South Wales Police,*[22] Lord Carswell, who gave one of the leading judgments, observed:

> "68. It is helpful in any consideration of the topic to keep distinct these two stages, as there has been a tendency in many of the decided cases to elide them. The first stage is common to both criminal and civil cases, the requirement that the evidence which it is proposed to adduce is relevant to one or more issues in the trial. The second stage is the application of the control test, which is different in civil cases from that which is applied in criminal trials. In the latter the second stage is commonly incorporated with the first to make a composite rule of law, but they do nevertheless reflect distinct reasoning processes."

5.21 As to what considerations might inform a decision not to admit relevant evidence of collateral matters, we note that Lord Phillips of Worth Matravers, who gave the other leading judgment in *O'Brien,* said:

> "Two policy considerations underlie the rules of admissibility with which this appeal is concerned. First, evidence should not be admitted if it is likely to give rise to irrational prejudice which outweighs the probative effect that the evidence has in logic. This consideration of policy carries particular weight where the tribunal is a jury, whose members are not experienced as are judges in putting aside irrational prejudice. Secondly, evidence should not be admitted if its probative weight is insufficient to justify the complexity that it will add to the trial. That is a consideration of general application."[23]

5.22 What we take from these *dicta* are the following propositions. First, evidence which is not relevant should not be admitted. Second, evidence of how the accused has acted on another occasion is relevant to the question of whether he has acted in the same way on the occasion in question; third, such evidence should be admitted unless its probative value is insufficient to outweigh either (a) the irrational prejudice which it may raise in the minds of the jury; and/or (b) the complexity which it will add to the trial.

5.23 The consideration at (a) above is peculiar to criminal cases, and we discuss it further at paragraphs 5.28-5.54. Focusing for the moment on the second, general, consideration, at

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[21] *A v B* (1895) 22 R 402 at 404.
[22] [2005] UKHL 26; [2005] 2 AC 534.
[23] Ibid, at para 11.

(b) above, we would mention the example of the cases of *R v McAllister*[24] and *O'Dowd v R*,[25] both of which we refer to in our Discussion Paper.[26]

5.24 In *McAllister* the defendant appealed against a preliminary ruling that evidence relating to his alleged participation in a robbery in Banff could be admitted in support of a charge that he had committed a similar robbery in Leeds. It was accepted that if the prosecution could prove that McAllister had committed the Banff robbery, this would have been relevant evidence in relation to the English charge.

5.25 But McAllister had already been tried by a Scottish court in relation to that incident, with the jury returning a verdict of not proven. The evidence of the Scottish robbery could only assist the English prosecution if it could be shown, contrary to the view of the Scottish jury, that the robbery was committed by McAllister. In order to do so, the English jury would have had to re-examine all of the evidence in relation to his alleged participation in the Scottish crime. Upholding his appeal, the Court of Appeal held that this would have constituted the paradigm of a satellite trial: there was a risk that the introduction of this evidence would distract the jury, and to admit it would have had an adverse effect on fairness.

5.26 In *O'Dowd*, the appellant had been tried and convicted of rape. The evidence had included three other disputed allegations of similar offences. The investigation of these claims contributed to a trial which took six months. On an appeal against conviction, the Court of Appeal held that:

> "… the introduction of bad character evidence that led to the extensive investigation of satellite issues combined with the numerous interruptions to the trial and its overall length made it very difficult for the jury to keep its eye on the ball. Each member of the court is regrettably driven to the conclusion that the verdicts of the jury are not safe and therefore cannot stand."[27]

5.27 In neither of these cases was the evidence irrelevant, in any logical or common sense understanding of the term. The difficulty was that, in *McAllister*, its introduction would have been prejudicial to the proper conduct of the trial by leading to unnecessary delay or distracting the jury from their focus on the live charges; and in *O'Dowd* it actually had that effect.[28] As we have said above, we consider the question of whether evidence raises "collateral" or, to borrow the helpful English term, "satellite" issues to be distinct from that of relevance.

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[24] [2008] EWCA Crim 1544; [2009] 1 Cr App R 10.
[25] [2009] EWCA Crim 905; [2009] 2 Cr App R 16.
[26] At paras 2.11-2.13.
[27] [2009] EWCA Crim 905; [2009] 2 Cr App R 16, para 84.
[28] But cf Lord Justice Clerk Thomson in *W Alexander & Sons v Dundee Corporation* 1950 SC 123 at 131; 1950 SLT 76 at 80: "This argument comes to this, that, while assuming that these other incidents are relevant as bearing on the issue to be tried in the present case, none the less they ought to be excluded because of the difficulty, the inconvenience and the expense of establishing them. That is to say, the evidence, although not too remote to bear on the issue, ought to be excluded on the ground of expediency. I cannot support that view in the present case. There is a sense in which every proof is truly a collection of small proofs and an accumulation of evidence of separate incidents. There seems no ground for refusing a proof because it consists of a series of investigations … The safeguard against too protracted a proof is the same in all proofs, and it lies in the function of the Judge to see that litigations are carried on in a reasonable way."

Prejudicial effect versus probative value

5.28 We turn to the first of the reasons identified by Lord Phillips in *O'Brien v Chief Constable of South Wales Police*[29] for the exclusion of relevant evidence – that it may prejudice the fact finder. The concept of balancing the probative value of evidence against its prejudicial effect is a familiar one in any discussion of whether or not to reveal previous convictions to a jury, but in principle the same considerations will apply where it is proposed to lead evidence of any misconduct by an accused person on other occasions, whether or not that misconduct has resulted in criminal proceedings.

5.29 The underlying rationale, put at its highest, is that a jury who are informed that the accused has committed serious crimes – or perhaps any crimes – in the past will proceed automatically to convict, irrespective of the weight of the other evidence against him. They will succumb to the temptation to "give a dog a bad name and hang him". They will be so prejudiced against the accused on account of his previous convictions that their judgment of the other evidence will be hopelessly skewed. In practical terms the result will be that the accused will not receive a fair trial.

5.30 This raises two important points, which we reiterate here. The first is that the accused has a right to a fair trial. It is a right which is absolute. Unlike other Convention rights, such as the Article 8 right to privacy, it is not qualified by considerations of wider public interest. But that absolute right is not necessarily infringed by the revelation of his previous convictions. If it were otherwise then the current legislative framework in this jurisdiction, under which all an accused person's previous convictions can, under certain circumstances be revealed to the jury, would, on its face, be incompatible with Convention rights.

5.31 In that regard, we have already mentioned the case of *Gallagher v HM Advocate,*[30] in which the evidence of Gallagher, that he was somewhere else at the time, was held, in terms of the Act, to be "evidence against" the second accused, who was incriminating Gallagher. In the result, all of Gallagher's previous convictions were placed before the jury. Some of those convictions were relevant to the crime charged, and some were not. The effect of leading the convictions, as the commentator pointed out, was to support the second accused's allegations of incrimination. The point, for the purposes of the present argument, is that there appears to have been no issue raised under the Convention, that the leading of these convictions, whether or not relevant to the crime alleged, was incompatible with Gallagher's Convention rights. It was not a point raised by the Faculty, who drew the case to our attention in their response to the Discussion Paper.

5.32 In such a case, even where the (relevant) previous convictions were for crimes of dishonesty, and the (irrelevant) previous convictions were for serious sexual offences, which might be expected to have a prejudicial effect upon a jury, the present law would oblige the court to allow all of them to be led before the jury.

5.33 The second point is that the prejudice that is to be avoided is not prejudice to the accused, because any evidence against the accused must operate to his prejudice, in the

[29] [2005] UKHL 26; [2005] 2 AC 534.
[30] 2011 SCCR 108.

sense that it increases the chance that he will be convicted, and suffer the penalties of the law. What matters here is prejudice to the administration of justice in the broad sense.

5.34 As we noted in our Discussion Paper,[31] prejudice is commonly said to be divided into "reasoning" and "moral" prejudice. Moral prejudice is said to occur where the jury are so influenced by the evidence in question that, consciously or unconsciously, they neglect their duty as triers of fact. They are moved by the piece of evidence to conclude that, whether or not he committed the crime with which he is currently charged, the accused is a bad person who ought to be in prison. The result is that the accused does not receive a fair trial. Reasoning prejudice is said to occur where the jury, while trying to discharge their duty, nevertheless draw inaccurate inferences from a particular piece of evidence.

5.35 Most of our consultees were firmly of the view that it would be necessary to balance the prejudicial effect of any evidence of previous convictions against its probative value. While we have expressed our general confidence in the system of trial by jury in Scotland (at Chapter 3 of this Report), we acknowledge that in some circumstances information as to the accused person's previous misconduct may well prejudice the jury.

5.36 For example, there is a particular, and entirely understandable, public revulsion in relation to sexual offences against children. We would accept that if, in proceedings for, say, a crime of dishonesty, evidence was admitted of the accused's previous crimes for molesting children, that might, depending upon the circumstances, prejudice the jury against him to such an extent as to negate any directions they were given, with the result that they might find him guilty because of his record, and not because of the evidence before them. That, or something like it, may well have been what happened in the case of *HM Advocate v Slater.*[32] Slater was living in an irregular manner in Glasgow in 1909. He was pretending to be a dentist, but in fact did deals of an unspecified but shady nature with jewellery. He used a variety of aliases. He was accused of the violent, brutal murder of an elderly lady, who owned jewellery of some considerable value. The case was circumstantial, but it emerged in the course of the evidence that he was living off the immoral earnings of a woman with whom he shared accommodation. The Lord Advocate founded upon the fact in emotive and prejudicial terms,[33] and, in his charge to the jury, the Judge did little to seek to retrieve the position.[34] In the event, Slater was convicted, and it was the subsequent doubts as to the correctness of that conviction which probably led to the passage of the Criminal Appeal Act in 1926, and to the further Act of 1927, which applied the 1926 Act to convictions occurring before it came into force. At the appeal,[35] the Court (of 5 judges) rejected various claims as

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[31] At para 7.100.
[32] 1928 JC 94.
[33] "Up to yesterday afternoon I should have thought that there was one serious difficulty which confronted you; the difficulty of conceiving that there was in existence a human being capable of doing such a dastardly deed. Gentlemen, that difficulty, I think, was removed yesterday afternoon when we heard from the lips of one who seemingly knew the prisoner better than anyone else, who had known him longer, and known him better than any witness examined, that he had followed a life which descends to the very lowest depths of human degradation, for, by the universal judgment of mankind, the man who lives upon the proceeds of prostitution has sunk to the lowest depths, and all moral sense in him has been destroyed and has ceased to exist. That difficulty removed, I say without hesitation that the man in the dock is capable of having committed this dastardly outrage, and the question for you to consider is whether or not the evidence has brought it home to him."
[34] "He has maintained himself by the ruin of men and on the ruin of women, and he has lived in a way that many blackguards would scorn to live. That is not entirely against him in this case, because, being a man of that kind, taking a wrong name, telling a lie about his destination, going by different names, is just what you would expect from a man of that kind, murder or no murder […] a man of that kind has not the presumption of innocence in his favour which is not only a form in the case of every man but is a reality in the case of the ordinary man."
[35] 1928 JC 94.

to information not disclosed by the Crown to the defence, and as to alleged inaccuracies in the prosecution's and the judge's addresses to the jury. They also heard, but took no account of, further evidence presented on behalf of the appellant. But they founded strongly upon the possible effect of the Lord Advocate's remarks on the pannel's mode of life, and the judge's failure to correct the impression that might well have been given to the jury. In delivering the opinion of the Court, Lord Justice General Clyde observed:

> "But the prosecutor […] explained the difficulty of believing that any man could be capable of a murder in circumstances of such atrocity by pointing to the depravity of the appellant in being a party to a *ménage* supported, in part at least, by the proceeds of the prostitution of one of its female members. There is difficulty in supposing that the prosecutor really intended to submit to the jury—as evidence relevant to the charge of murdering Miss Gilchrist—evidence that the appellant lived partly on the proceeds of his partner's immorality. *It would be just as reasonable to say that the fact that a man was a murderer was relevant to prove a charge of living on the immoral earnings of women. There is obviously no relevant relation of any sort between the two things."*[36]

5.37 The Lord Justice General went on to focus particularly on the question of prejudicial effect *versus* probative value (although without putting the matter in precisely those terms):

> "But the specialty in this trial was that some of the aspects of the life which the appellant lived were relevant, while others were irrelevant, to the question of his guilt. Thus, the circumstance that the appellant never had a dentistry practice in Glasgow, but dealt in some way in articles of jewellery, was relevant to the motive which, according to the prosecution, drew the appellant to Miss Gilchrist's house in search of the valuables she kept there. But that other aspect of his life, with its peculiarly heinous implications, in which he was shown to be partly dependent on the proceeds of prostitution, *was as remote from any bearing on the question of his guilt as it was suggestive of prejudice against his case*."[37].

5.38 There can be no doubt that the introduction of evidence which is irrelevant to the crime charged, and which shows that the accused is of bad character, may distract the jury from carrying out their duty properly. But the important point is that, in a case like *Slater,* the evidence is irrelevant. In such a case it is proper, and straightforward, to agree that the prejudicial effect of the evidence outweighs its probative value. If it is irrelevant then it has no probative value, and should be inadmissible or, where, as in *Slater*, it has been heard, disregarded on that ground.

5.39 The question we turn to now is the case where the evidence is relevant, because it shows, in more or less detail, that the accused has acted in a similar way on other occasions. Is a balancing exercise still required, and how is it to be carried out? We mentioned, in the Discussion Paper, a number of cases in other adversarial jurisdictions, where the matter had arisen in one form or another.

5.40 In Australia there was the case of *B v R,*[38] in which a man was charged with sexual assaults on his daughter. He maintained that his daughter was making false allegations. In support of that statement he admitted that he had previously been convicted of similar assaults against her, and himself led evidence of his previous convictions. He said that

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[36] Ibid, at 104 (emphasis added).
[37] Ibid (emphasis added).
[38] [1992] HCA 68; (1992) 175 CLR 599.

when he had tried to control his daughter she had threatened to accuse him of similar assaults. When the case reached the High Court of Australia, on appeal, the Chief Justice observed:

> "4. Once the prior convictions were admitted into evidence they could be used by the jury as evidence tending to establish the applicant's guilt of the offences charged. There was not, in my view, any basis on which the trial judge could legitimately instruct the jury that they were not evidence tending to establish guilt or were not capable of being corroborative when they had that probative value, despite their prejudicial effect."

The other judges agreed.[39]

5.41 *B v R* did not concern an application by the prosecution to lead evidence of the accused's previous convictions, or similar acting on other occasions. That situation arose in the Canadian case of *R v Handy.*[40] The accused was convicted of sexual assault, and the question was whether evidence of alleged past assaults on his former wife should have been admitted. In the course of a detailed investigation of the whole matter of the (in) admissibility of similar fact evidence, the court remarked:

> "As probative value advances, prejudice does not necessarily recede. On the contrary, the two weighing pans on the scales of justice may rise and fall together. Nevertheless, probative value and prejudice pull in opposite directions on the admissibility issue and their conflicting demands must be resolved."[41]

As we said in the Discussion Paper,[42] we are not persuaded that that statement correctly identifies the balancing which is required. On the contrary, we consider that the argument may in many cases run the other way. Where there is evidence that the accused has committed a serious crime, evidence of his having committed similar crimes in the past is of very considerable probative value. That is because if a person is charged with a particularly horrific kind of crime as, for example, a brutal, apparently motiveless murder, there is a natural tendency to disbelieve that anyone could act in such a way. While it may be clear, from the evidence, that someone has killed the victim, the jury will be naturally reluctant to accept that the accused falls into that very small category of people who might be prepared to carry out such an act. That point was recognised in *B v R,* which we have already mentioned. Brennan J pointed out:

> "True it is that the accused's evidence of those prior acts set the background in which the jury were to evaluate the daughter's evidence and it removed some of the natural reserve that the jury might otherwise have felt in accepting an allegation that the accused had indulged an abnormal passion for his daughter."[43]

5.42 In such a case evidence that the accused has in fact committed a similar crime in the past will go far to overcome the fact finder's natural reluctance to believe that anyone could act in that way. It will therefore tend to provide strong support to other evidence that he has

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[39] In the event, the Court granted B's appeal because of other, defective, material in the judge's charge to the jury.
[40] 2002 SCC 56. See Discussion Paper, paras 6.18 to 6.20.
[41] Ibid, at para 149.
[42] At para 7.119.
[43] [1992] HCA 68; (1992) 175 CLR 599, at para 2.

committed the crime with which he is charged. Certainly, that will be prejudicial to the accused. It does not follow that it will be prejudicial to the interests of justice.

5.43 What might well be prejudicial to the interests of justice, in our view, would be for evidence of convictions for more serious crimes to be led in support of a prosecution for a lesser offence, and particularly where the earlier offence is very much more serious than that with which the accused is currently charged. For example, if a person is accused of exposing himself, that would be a sexual offence, mentioned in section 288C of the 1995 Act. A previous conviction for rape would be a "relevant conviction" in terms of section 275A of that Act. But while the previous conviction might demonstrate a tendency to commit sexual offences, its probative value in relation to the prosecution for the current offence would be heavily outweighed by the prejudicial effect which its revelation might have on the fact finder. There would be a substantial risk that the jury or other fact finder would give disproportionate weight to the evidence of the previous conviction, and that the fact of that conviction would tend to cause them not to evaluate the other evidence against the accused properly.

5.44 Further, while the foregoing discussion is expressed in terms of previous convictions, the same would apply, *mutatis mutandis*, to other conduct which had not resulted in a conviction. In the Canadian case of *R v Handy,* which we have mentioned above, the evidence sought to be led was that the accused had previously subjected his previous wife to violent anal sex. These alleged incidents had not led to criminal prosecutions, but the Supreme Court did not find that fact to be relevant to its consideration of whether the evidence would be more prejudicial than probative. We agree. As we noted in Chapter 3 of this Report, it is the relevance of the evidence, not its procedural history, which is of importance.

5.45 We recommend:

> **10. In considering whether *ex facie* relevant evidence as to conduct on other occasions will have a prejudicial effect upon the interests of justice, the court should not assume that it will have such an effect unless the other conduct is very much more serious than that which is the subject of the current proceedings.**
>
> (Draft Bill, section 7(4))

5.46 We return to how these matters of prejudicial effect and probative value were discussed in the case of *O'Brien*. In his judgment Lord Phillips rehearsed the development of the English courts' treatment of these matters. Commenting on *R v Boardman,*[44] in which the House of Lords had set the standard of probative value very high indeed, Lord Phillips summarised the various *dicta* as follows:

> "Their Lordships expressed the test in different ways: 'a really material bearing on the issues to be decided'; … 'a strong degree of probative force' based on the 'striking similarity' of the material facts; … 'such an underlying unity between the offences as to make coincidence an affront to common sense'; … 'evidence which would point so strongly to his guilt that only an ultra-cautious jury, if they accepted it as true, would

[44] [1975] AC 421.

acquit in face of it'; … 'the similarity would have to be so unique or striking that common sense makes it inexplicable on the basis of coincidence' …".[45]

5.47 Lord Phillips went on to comment on the House of Lords decision in *DPP v P,*[46] a case in which a man was charged with two specimen counts of rape and incest against each of his two daughters. The Court of Appeal in *DPP v P* had allowed an appeal against conviction on the ground that the evidence did not disclose any features of similarity that were striking or that went beyond "the incestuous father's stock in trade"[47] and that, accordingly, the trials should have been separated. The prosecution had appealed to the House of Lords, asking specifically whether there had to be "striking similarities" before similar fact evidence could be admitted in a case of alleged sexual abuse by a father of a daughter. Lord Phillips observed:

> "31. […] Lord Mackay of Clashfern LC, who gave a speech with which the other members of the House agreed, advanced principles which, thereafter, were rightly treated by courts as being of general application. After considering at length the speeches in *Boardman* he propounded at p 460 a simple test of admissibility:
>
> > "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."
>
> 31. Lord Mackay went on to say that while such probative force may be derived from the striking similarity of the similar fact evidence this was not a precondition of admissibility, pp 460-461:
>
> > 'Once the principle 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.'"

5.48 The test of admissibility advanced by Lord Mackay in *DPP v P* still requires similar fact evidence to have an enhanced relevance or substantial probative value before it is admissible against a defendant in a criminal trial. This is because such evidence usually shows that the defendant is a person of bad character and thus risks prejudicing a jury against the defendant in a manner that English law regards as unfair.

5.49 It would appear that the courts in England were well able, even prior to the passing of the 2003 Criminal Justice Act, to make appropriate judgments as to the correct balance to be struck in particular cases.

5.50 In December 2009, following the passing of the 2003 Act, Peter Tobin was convicted in England of the murder of Dinah McNicol. During the trial his previous conviction, in Scotland, for the murder of Vicky Hamilton was introduced as evidence to explain the crime scene and establish his behaviour patterns.

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[45] [2005] UKHL 26; [2005] 2 AC 534 at para 28.
[46] [1991] 2 AC 447.
[47] In the rather unfortunate words of Lord Lane CJ, giving the opinion of the Court of Appeal, quoted ibid at 452.

5.51 Similarly, in Northern Ireland, during the trial in 2011 of Robert Black, accused of murdering a schoolgirl 30 years before, it was revealed that his criminal past included the murder of three children, abduction and an attempted kidnapping. At trial, Toby Hedworth QC, prosecuting, told the jury:

> "What you certainly must not do is say, 'well, he's done those other ones, he's a thoroughly bad man so we'll find him guilty in this case as well' … What you have to do is look at what he has been proved to have done in respect of those other girls and see whether it assists you in deciding whether you can be sure that it was Robert Black rather than some other individual who abducted and killed Jennifer Cardy."[48]

5.52 But we note that the courts' discretion is not always exercised in favour of allowing such evidence. In the trial of Vincent Tabak – convicted of the murder of Joanna Yeates – prosecutors attempted to reveal videos and pictures found on his laptop and work computer depicting violent pornographic scenes with a man holding the neck of a woman during sexual intercourse and other violent images. The prosecution believed that this showed why Tabak held Yeates by the neck which led to her death. The prosecution claimed that Tabak favoured films showing submissive women and others being bound and gagged. Counsel for Mr Tabak argued that such evidence could have unduly influenced the jury:

> "The decision was taken that it was entirely prejudicial and probative of nothing … Sometimes people think because there is some bad character or reprehensible behaviour, it must go in. it doesn't follow that it must go in – it has to go in to prove a point."[49]

In the event, Mr Justice Field refused to allow the evidence. His Lordship also said that it would be inappropriate for the jury to hear how Tabak had cheated on his girlfriend by paying for sex with a prostitute he had contacted through an escort website.[50]

5.53 Finally, in a recent Court of Appeal decision[51] in England, the appellant appealed against convictions for attempted buggery and indecent assault on a male and sexual activity with a child. During a police interview the appellant admitted that he had had a homosexual relationship during his marriage. The prosecution sought to admit that evidence at trial on the grounds that it was relevant that the appellant was interested in males and that the jury would assume that the appellant, as a married man, was heterosexual. The trial judge admitted the evidence ruling that it was highly relevant and would correct a false impression – but that it was not relevant to establish a propensity.

5.54 The Court of Appeal held that the evidence would not be admissible if its prejudicial effect outweighed its probative value. The Court of Appeal appreciated that the probative value was modest but that the trial judge's decision to admit it had not been wrong. An explicit warning was given that the jury should not conclude that the appellant's homosexual activities showed a propensity to commit the acts alleged, and in particular that it did not show that he had an interest in committing forceful sexual acts with boys.

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[48] http://www.guardian.co.uk/uk/2011/oct/07/child-killer-robert-black-trial?INTCMP=ILCNETTXT3487.
[49] http://www.bbc.co.uk/news/uk-england-bristol-15522185.
[50] http://www.independent.co.uk/news/uk/crime/tabak-guilty-of-joanna-yeates-murder-2377119.html.
[51] *R v H* [2011] EWCA Crim 2734.

Propensity

5.55 The next, related issue is that of propensity. Propensity is not an abstruse technical term. It is defined by the Oxford English Dictionary as:

> "Disposition or inclination to some action, course of action, habit, etc; bent of mind or nature …"

5.56 In *DS v HM Advocate,*[52] which we examine in more detail throughout Chapter 7 of this Report, Lord Hope of Craighead discussed the purpose and effect of section 275A of the 1995 Act:[53]

> "42. […] evidence of a previous conviction may have a bearing on propensity to act in a particular way as well as on credibility. A jury which is told that the accused has a previous conviction for a sexual offence can be expected to regard it as relevant to his propensity to commit other offences of that kind as well as to his credibility. […] The fact that the Executive's proposal had as much, if not more, to do with propensity as it did with credibility is underlined by the fact that section 275A applies irrespective of whether the accused has given evidence or made any statement before trial. It is underlined further by the fact that the only convictions which are treated as relevant are convictions for an offence to which section 288C of the 1995 Act applies or those in which a substantial sexual element was present: section 275A(10). Convictions for perjury, for example, which would have an obvious bearing on the accused's credibility, are excluded.
>
> 43. I would hold therefore that section 275A must be approached on the basis that the main reason why previous relevant convictions are to be disclosed or taken into consideration is because they may be regarded as relevant to the accused's propensity to commit other sexual crimes. A further reason is that they may have a bearing on the accused's credibility, if this is put in issue, as compared with that of the complainer. It is in the light of these aims that the question whether it is in the interests of justice for the convictions to be disclosed or taken into account must be addressed.
>
> […]
>
> 53. […] *A jury in Scotland would, of course, be told that propensity to commit offences cannot provide corroboration in support of the Crown's case*." (emphasis added)

5.57 This *dictum* goes to the *effect* of evidence of propensity, and, taken with his Lordship's observations on the relevance of evidence of previous convictions to propensity, produces a curious result. It would appear that the evidence – which the legislature has provided must be admitted in the circumstances contemplated by the section – is actually relevant to the accused's propensity to commit sexual crimes, but that it, or at least the propensity which it demonstrates, cannot corroborate other evidence that he in fact committed such crimes.

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[52] 2007 SC (PC) 1.

[53] S 275A was inserted by s 10 of the Sexual Offences (Procedure and Evidence) (Scotland) Act 2002. Broadly, section 274 of the Act prohibits an examination of the complainer's sexual history. Section 275 allows such examination if it can be shown to be in the interests of justice. Section 275A provides that where such examination is allowed all the accused's previous convictions for sexual offences are to be put before the jury unless he can show, in relation to any particular conviction, that that would not be in the interests of justice. The matter is fully discussed in Chapter 7.

5.58 As a matter of common sense, it is odd that an established propensity, on the part of an accused person, to commit crimes of a particular sort cannot support direct evidence that he committed the crime of that sort with which he is currently charged. This raises in an acute form the question of what is the point of adducing the evidence. If it has no bearing on the credibility of the accused (at least in a case where he does not give evidence) and cannot support other evidence that he committed the crime with which he is charged, it is difficult to see why it is admitted at all. The effect of this finding is that when the Scottish Parliament enacted the provisions of section 275A, they were essentially beating the air: the evidence led by virtue of the legislation has no practical effect on the outcome of the criminal proceedings in which it is admitted.

5.59 In any event, and having regard to other aspects of corroboration in Scots criminal law, it is not clear upon what basis evidence of previous examples of a person's conduct cannot corroborate evidence of a present allegation. That is, after all, precisely what happens in a case to which the *Moorov* doctrine applies. In the paradigm case there is credible, but unsupported, evidence from Lucy that the accused has raped her. Without corroboration that case would fail. Corroboration is supplied by credible, but unsupported evidence from Alice that the accused has also raped her, the circumstances of the two assaults being similar. The effect of the evidence of the two women is to demonstrate a tendency, or propensity, of the accused to rape women in particular circumstances.

5.60 In England, too, there is judicial caution as to the extent to which evidence of propensity can support evidence that an accused person has committed the crime with which he is currently charged. The matter is now covered by the Criminal Justice Act 2003, but even prior to the coming into force of that statute it was recognised that evidence of propensity may provide support for the direct evidence in criminal proceedings.

5.61 In *R v Randall*[54] two men, Randall and Glean, were accused of murder. They blamed each other for the crime. By virtue of the operation of the Criminal Evidence Act 1898, the previous convictions of both accused were led in evidence. Randall had relatively minor convictions. Glean had convictions for theft, going equipped for theft and burglary, including one in which the occupier had been threatened with violence. In cross-examination he admitted being involved in a gang robbery involving threats with a knife to the victim; he also admitted having threatened a witness with violence. The trial judge had directed the jury that Glean's previous convictions were relevant only to the question of his credibility, and that his convictions and character were irrelevant to the likelihood of his having attacked the deceased. On appeal by Randall, the Court of Appeal held that in the particular circumstances of the case Glean's previous convictions were relevant to the likelihood of his having committed the offence. In the House of Lords, Lord Steyn, with whose judgment the other members of the Committee agreed, said:

> "20.[…] A judge ruling on a point of admissibility involving an issue of relevance has to decide whether the evidence is capable of increasing or diminishing the probability of the existence of a fact in issue. The question of relevance is typically a question of degree to be determined, for the most part, by common sense and experience (*Keane: the Modern Law of Evidence,* 5th Ed. (2000) at 20).
>
> […]

[54] [2003] UKHL 69; [2004] 1 WLR 56; [2004] 1 Cr App R 26.

22. It is difficult to support a general proposition that evidence of propensity can never be relevant to the issues. Postulate a joint trial involving two accused arising from an assault committed in a pub. Assume it to be clear that one of the two men committed the assault. The one man has a long list of previous convictions involving assaults in pubs. It shows him to be prone to fighting when he had consumed alcohol. The other man has an unblemished record. Relying on experience and common sense one may rhetorically ask why the propensity to violence of one man should not be deployed by the other man as part of his defence that he did not commit the assault. Surely such evidence is capable, depending on the jury's assessment of all the evidence, of making it more probable that the man with the violent disposition when he had consumed alcohol committed the assault. To rule that the jury may use the convictions in regard to his credibility but that convictions revealing his propensity to violence must otherwise be ignored is to ask the jury to put to one side their common sense and experience. It would be curious if the law compelled such an unrealistic result."

5.62 His Lordship went on to quote from Archbold, *Criminal Pleading Evidence and Practice*:[55]

"[…] Where questions as to character are put to a witness (especially if he is the defendant), the standard view is that their relevance is to credibility. The reality, however, is that where the defence to a charge of murder is self-defence and it is elicited that the deceased had a series of convictions for serious offences of violence, the relevance of this evidence is that it goes to disposition. […]"

His Lordship continued with a reference to the English practice of requiring a judge, in appropriate circumstances, to make a direction as to the good character of the accused:

"25. My noble and learned friend, Lord Bingham of Cornhill, also raised with counsel for the Crown the rules requiring a judge, in appropriate cases, to direct a jury that the good character of an accused is relevant not only to credibility but also to the likelihood that he would commit the offence in question: R v Vye [1993] 1 WLR 471; R v Aziz [1996] AC 41. Why then should the bad character in the form of a propensity to violence of a co-accused always be irrelevant? Acknowledging the force of the point counsel for the Crown said that this was simply one of the illogicalities of the criminal law. It is much more. The point demonstrates that the character of a co-accused, depending on the evidence, may be logically relevant.

26. While the case before the House does not involve similar fact evidence, the rules permitting the leading of such evidence by the Crown in certain circumstances provides some assistance. In Director of Public Prosecutions v P [1991] 2 AC 447 the House held that the essential feature of evidence under this heading is that its probative force is so great as to make it just to admit it notwithstanding that it is prejudicial to an accused in that it shows that he committed other offences. It is no answer to admitting such evidence that it is evidence of the propensity of the accused to commit certain crimes. On the contrary, that is often the very reason for admitting such evidence. While these rules are not applicable in this case their rationale illustrates that propensity to commit certain crimes may sometimes be relevant to the fact in issue."

[55] (2003) para 8.244, p 1161.

What inference can be drawn from similar fact evidence, or evidence of propensity?

5.63 The strength of this inference will depend on a number of factors. These will include how frequently the accused has acted in that way on other occasions, how recently he has so acted, the similarity of the circumstances and the distinctiveness of the conduct.

5.64 Depending upon the circumstances, any of the factors mentioned above may make the inference stronger or weaker. For example, where the fact finder is a jury, and the charge is one of extreme physical violence, and especially towards women or children, there must be a feeling that the conduct is so out of the ordinary course of human behaviour that it is difficult to believe that any person would act in that way. That feeling would work in favour of an accused person, and would tend to make the jury accept that person's denial, if plausible. In such circumstances evidence that the accused had in fact acted in a similar way on other occasions would counter-balance that natural disinclination, and would enable the jury to take a more balanced view of the other evidence against the accused.

5.65 There will be cases in which the inference will be compelling. As we mentioned in the Discussion Paper, and earlier in this Chapter, in 1995 Robert Black was charged in England with three counts of kidnapping, murder and preventing the burial of a dead body, and evidence was led that he had been convicted in Scotland of abducting, assaulting and indecently assaulting a young girl. In 2011 he was prosecuted in Northern Ireland for the murder of Jennifer Cardy, in which the prosecution also founded upon Black's record of having committed a number of similar murders. Further, an English court trying Peter Tobin on a charge of murdering a girl admitted evidence of his conviction in Scotland of murdering another girl in similar circumstances.

5.66 In other cases there may be no direct evidence of criminal conduct, but the general circumstances will make it difficult to believe that the repeated events could be merely coincidental. George Joseph Smith (of "brides in the bath" infamy) was convicted of the murder of only one of his three deceased wives; it was the fact that they were all said, by him, to have died in the same way that persuaded the jury of his guilt.[56]

5.67 Finally, on this matter, we should mention the case of *R v Straffen*.[57] Straffen had been charged with the murder of two young girls in particular circumstances – the crimes were motiveless, neither victim had been sexually molested, and the bodies had been left in plain view – and had been committed to Broadmoor after being found unfit to plead. He escaped from Broadmoor for a period of four hours on 29th April 1952. During that period a third girl was murdered, the circumstances being exactly similar to those of the earlier two crimes. Straffen admitted having seen the third girl but denied having murdered her. There was no direct evidence that he had murdered her. The evidence of the two earlier crimes was admitted for the purpose of identifying Straffen as the person who murdered the third girl. The Court of Appeal, having acknowledged the principle laid down in *Makin v Attorney General of New South Wales,* that:

> "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

[56] [1914-15] All ER 262; Discussion Paper para 5.77.
[57] [1952] 2 QB 911; [1952] 2 All ER 657; Discussion Paper para 6.25.

> 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 charged in the indictment were designed or accidental, or to rebut a defence which would otherwise be open to the accused."[58]

The Court went on to find that:

> "Here the evidence was admitted by Cassels J. on the latter ground, namely, that it tended to rebut a defence which was otherwise open to the accused, that is, that he was not the person who committed the murder. […]
>
> In the opinion of the court that evidence was rightly admitted, not for the purpose of showing, to use Mr. Elam's words, that the appellant was 'a professional strangler,' but to show that he strangled Linda Bowyer; in other words, for the purpose of identifying the murderer of Linda Bowyer as being the same individual as the person who had murdered the other two little girls in precisely the same way. […]
>
> I think one cannot distinguish abnormal propensities from identification. Abnormal propensity is a means of identification. […] It is an abnormal propensity to strangle young girls and to do so without any apparent motive, without any attempt at sexual interference, and to leave their dead bodies where they can be seen and where, presumably, their deaths would be detected. In the judgment of the court, that evidence was admissible because it tended to identify the person who murdered Linda Bowyer with the person who confessed in his statements to having murdered the other two girls a year before, in exactly similar circumstances."[59]

It appears to us that much of the English common law following *Makin* has been a process of whittling away at its *ratio.* It would seem that in *Straffen,* at least, that process got to the point where a simple plea of "not guilty" was sufficient to overcome the rule.

5.68 The net effect (although the Court of Appeal was careful *not* to analyse it in that way) was that the evidence of the two previous murders demonstrated a propensity on the part of Straffen to kill girls in that particular manner. The only direct evidence as to his involvement in the third crime was his presence in the area at the appropriate time. Essentially the jury were being asked to infer that, since he had committed the two previous crimes in that particular way, it could not be coincidental that a third crime had been committed in the same way, but by someone else, while Straffen was in the vicinity.

5.69 It is not immediately clear how a court in Scotland might have dealt with the matter. The evidence of the two previous murders was adduced by way of the statement which Straffen had made to the police before he was cautioned, the police taking the view, with which the trial judge concurred, that persons in Broadmoor were not "in custody" for the purposes of the Judges' Rules. Assuming, for the purposes of the argument, that such evidence could have been admitted in Scotland, it may well be that it could equally have been taken, as it was in England, as demonstrating, from the similarity of the circumstances, that the same person must have committed the third murder as committed the previous two. There would then be evidence placing Straffen at the place of the crime, evidence that the crime was committed in a particular way, and evidence that Straffen had committed the two

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[58] [1894] AC 57 (PC) at 65, per Lord Herschell LC.
[59] [1952] 2 QB 911 at 915-917 per Slade J.

previous murders in just that way. Taken together, that might amount to enough to put a case such as *Straffen* into the same kind of category as *Howden v HM Advocate*.

5.70 The cases we have mentioned above are cases in which the propensity demonstrated was of a particular nature, and where the crimes themselves were particularly horrific. In such cases it may be easy to ask the fact finder to infer that, so long as there is some direct evidence implicating the accused with the present crime, the propensity will support that evidence. In other cases the propensity may be less marked, and the support which it will provide will not be so great. In such cases much more will depend upon the direct evidence, if any, and the question of the extent to which the propensity evidence will support the direct evidence will be more difficult. But those questions are, in our view, for the fact finder.

5.71 In the light of these considerations we have concluded that evidence of propensity to commit crimes of a particular kind, as demonstrated by previous convictions, should be admissible in relation to the likelihood of an accused person's having committed a similar offence with which he is currently charged, whether or not it is also relevant in relation to his credibility. We recommend:

> **11. Evidence which demonstrates a propensity on the part of the accused to commit crimes of a particular nature should be admissible to support other evidence that he has committed a crime of that nature in the proceedings forming the subject of a current charge.**
>
> (Draft Bill, section 4)

5.72 We have considered whether the draft Bill appended to this Report should include a specific provision as to propensity. But, to return to the thought with which we began this discussion, propensity means no more than a disposition to act in a particular way. As we have noted, the *Moorov* doctrine could be analysed in terms of propensity, once the requirement – if it still is a requirement – for a "course of conduct" is set aside. Essentially, the jury is being asked to find that evidence that the accused has acted in a particular way on one occasion is corroborated by evidence that he has acted in a similar way on another occasion.

5.73 The draft Bill already provides that evidence relevant to a fact is capable of corroborating any other evidence relevant to that fact. Where that evidence consists of evidence of similar actings on the part of the accused on other occasions, the corroborative value of such evidence may be strengthened either by a close similarity of the conduct, or by the number of occasions on which the accused has acted in that way, or by both close similarity and frequency of repetition. That would be a matter for the fact finder, and will be open to the fact finder if legislation is passed in line with the draft Bill. It is certainly the case that, if there is evidence that the accused has so acted on a number of occasions, that evidence may be said to demonstrate a propensity on his part to act in that way.

5.74 But it is not necessary, as a matter of logic, to find that the accused has a propensity in order to find that evidence of repeated similar actings on his part corroborates evidence that he has acted in that way in relation to the current charge. The increased corroborative value does not derive from the use of the word "propensity". We doubt whether juries will go through that particular logical hoop in order to evaluate the evidence. And we are conscious

that if we introduce the concept of propensity into the legislation we leave open the possibility of argument as to how many similar actions will constitute proof of "propensity", and whether there is a difference between cases where there is a propensity, and cases in which there are only two instances of similar conduct. Against that background, the only reason for inserting a further provision on propensity would be to prevent what happened in *DS v HM Advocate*, where the court found that evidence as to the accused person's previous convictions went to propensity, but that evidence of propensity could not corroborate other evidence that he had committed the crime.

5.75 If legislation is passed along the lines of the draft Bill appended to this Report, we do not think that there is any risk of a court coming to that conclusion in the future. We have accordingly not included a specific provision as to propensity, even on an "avoidance of doubt" basis.

Chapter 6 The *Moorov* and *Howden* doctrines

6.1 In this Chapter we examine the history, and current operation of, the *Moorov* and *Howden* doctrines.

6.2 As we noted in Chapter 1 of this Report, the *Moorov* doctrine permits the credible but uncorroborated evidence of a single witness to an offence to corroborate, and to be corroborated by, the credible but uncorroborated evidence of a single witness to another offence. Such mutual corroboration is only permitted where the crimes are sufficiently connected in time, character and circumstance.

6.3 *Howden v HM Advocate*[1] is authority for the proposition that corroboration of one charge (A) may be found in the evidence of another, similar, charge (B) even where there is no positive identification of the accused in relation to charge A. This will be the case where the similarities between A and B are such that the jury is able to find that the two offences must have been committed by the same person, and there is corroborated evidence of identity in relation to charge B.

6.4 While, at the end of the day, this Report recommends a statutory framework under which *Moorov* and *Howden* would be subsumed into general statutory rules, the former doctrine has been part of the law of Scotland, particularly with reference to sexual offences, for a considerable period. It is therefore appropriate that we should analyse in some detail how it is currently applied, and how we suggest that its features will be preserved under our proposed statutory scheme. We shall also, in this Chapter, similarly analyse the doctrine in *Howden v HM Advocate*.[2]

Moorov

6.5 In Part 5 of the Discussion Paper, we summarised the development of the *Moorov* doctrine. We started by observing that the principle that evidence of one crime might support the prosecution case in relation to another charge was recognised prior to the High Court's decision in *Moorov*. The possibility of this mutual support between related charges was recognised by Hume, Alison and Dickson, and it appears that, in cases of sexual assault upon children, juries were, even prior to *Moorov*, routinely directed that they could take into consideration the evidence of one child as to her experience as sufficient corroboration of the evidence of another child as to her similar experience.[3] Rather than establishing an entirely new doctrine, *Moorov* merely represented the first opportunity for the then-recently-established appeal court to consider an existing feature of Scots criminal procedure.

6.6 As we observed, the rationales which were advanced by the various judges of the appeal court in *Moorov* were not entirely consistent. The majority of the judges expressed

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[1] 1994 SCCR 19.
[2] Ibid.
[3] *Moorov v HM Advocate* 1930 JC 68 at 81, Lord Justice Clerk Alness commenting, with approval, upon the direction of Lord Blackburn in *HM Advocate v McDonald* 1928 JC 42 at 44.

the view that evidence of the separate incidents could be considered together because they demonstrated a "course of conduct". Lord Justice General Clyde was of the view that the separate charges gained their mutual relevance from the fact that each was merely an incident of a larger underlying criminal project, and thought the "course of conduct" language potentially misleading, "for it might correctly enough be applied to the everyday class of case in which a criminal recurs from time to time in the commission of the same kind of offence in similar circumstances."[4]

6.7 Regardless of the language used, the ratio of *Moorov* was that the evidence of a single witness to one incident, when taken together with that of a single witness to another similar incident, would prove the existence of some underlying state of affairs the existence of which would be capable of corroborating the evidence in relation to each of the incidents. This is an ingenious way of finding corroboration in circumstances where it would otherwise be absent; but even in *Moorov* itself, it is unclear whether this underlying state of affairs was really anything other than a disposition of the accused to behave in a certain way when afforded the opportunity to do so. It is interesting, as we note at paragraph 6.76 below, that the original indictment in *Moorov* had set out allegations of a course of conduct on the part of Moorov, and these had been comprehensively dismissed during the trial. The "course of conduct" upon which the judges founded was accordingly a matter of inference from the evidence of the individual offences.

The development of Moorov

6.8 The Discussion Paper went on to consider, in outline, the development of the *Moorov* doctrine in relation to the requirements of similarity in time, character and circumstance.

6.9 So far as time is concerned, we noted[5] that while the courts routinely denied that there was any fixed limit on the time over which *Moorov* might apply between charges, they had in practice long been thought to apply a maximum limit of three years. We observed (at paragraphs 5.30 to 5.32) that recent years had seen a substantial relaxation in courts' attitude to the time requirement of the *Moorov* doctrine, citing the cases of *Cannell v HM Advocate*[6] (in which it was held that a period of 4 years and 4 months between two charges of sexually assaulting children would not bar the operation of the doctrine) and *Hussain v HM Advocate*[7] (4 years and 7 months). Decisions since the publication of the Discussion Paper have demonstrated that *Moorov* may be applied over even longer periods: in the exceptional circumstances of *AK v HM Advocate,*[8] discussed in more detail below, *Moorov* operated in respect of incidents which were 13 years apart.

The need to show a "course of conduct"

6.10 So far as similarity of characteristics and circumstances is concerned, we noted that the tendency in the case law had been to focus upon the similarity in conduct, rather than upon the name under which it is charged. There might be cases in which charges which appeared under the same name were insufficiently similar upon their facts to allow for

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[4] 1930 JC 68 at 73, per Lord Justice General Clyde.
[5] Following Fiona Raitt, "The evidential use of similar facts in Scots criminal law" (2003) 7 Edin LR 174 at 188.
[6] [2009] HCJAC 6; 2009 SCCR 207; 2009 SCL 484.
[7] [2009] HCJAC 105; 2010 SCCR 124; 2010 SCL 441.
[8] [2011] HCJAC 52; 2011 SLT 915; 2011 SCCR 495.

mutual corroboration,[9] while there might be others in which conduct was sufficiently similar despite being charged under a different name. We suggested that the present attitude of the courts appeared to be to focus very much upon similarity of the conduct: if the conduct was sufficiently similar, then this was likely to be held to amount to a course of conduct, without any need to take the further step of identifying an underlying unity of intent, project, campaign or adventure. (See Discussion Paper paragraphs 5.46 to 5.52) We concluded our discussion by saying:

> "It appears that the High Court now regards it as unnecessary to consider whether the evidence shows the charges to demonstrate an underlying unity of intention, provided that the conduct itself was sufficiently similar, the offences committed sufficiently closely together in time (having regard to the degree of similarity of conduct) and the other circumstances of the offences were sufficiently comparable."[10]

6.11 Subsequent decisions suggest that we were perhaps premature in our conclusion that the High Court had abandoned the necessity to show a course of conduct. In *AK v HM Advocate,*[11] Lord Justice Clerk Gill reasserted the requirement to demonstrate a course of conduct or, in Lord Justice General Clyde's formulation (which Lord Gill treats as equivalent), "some particular and ascertained unity of intent, project, campaign or adventure which lies beyond or behind – but is related to – the separate acts".[12]

6.12 *AK* concerned the appellant's convictions in relation to two charges of using lewd and libidinous practices towards his nephews. The first charge related to his nephew M, who was around 10 years old when the conduct started; the second related to similar conduct committed at the same locus some 13 years later. The complainer on the second charge was the appellant's younger nephew, D, who was aged 12 at the time of the offence. The evidence showed that the last time D had visited the appellant's house before the date of the offence was when he was 5 years old. As Lord Justice Clerk Gill observed, "The offence against [D] occurred at the first realistic opportunity that the appellant had had to abuse [D]." The evidence also showed, in a most disturbing detail, that as the appellant was abusing D, he had whispered "I've missed you, [M]."

6.13 The appeal court noted that the time lapse between the two charges was far longer than the court had been called upon to consider in any prior *Moorov* appeal. They reaffirmed that there was no time limit for the application of the *Moorov* doctrine, but added that where the interval is a long one, it is necessary to consider whether there are any special features in the evidence that make the similarities compelling. Lord Gill noted with approval the Advocate Depute's concession that the similarities in age of the complainers, in their relationship to the appellant and in the locus of the crimes would not have been sufficient to overcome such an exceptionally long gap.[13] But he considered that the evidence that the appellant had addressed D as M, saying "I've missed you, M," was an extraordinary feature in the evidence which entitled the jury to conclude that there was a course of conduct notwithstanding the lengthy interval between the incidents.[14]

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[9] For example, *O'Neill v HM Advocate* 1996 SLT 1121; 1995 SCCR 816 (armed robbery).
[10] Discussion Paper, para 5.52.
[11] [2011] HCJAC 52; 2011 SLT 915; 2011 SCCR 495.
[12] Ibid, at para 10, quoting Lord Justice General Clyde in *Moorov v HM Advocate* 1930 JC 68 at 73.
[13] Ibid, at para 14.
[14] Ibid, at para 15.

6.14 Given the degree of similarity between the offences and the existence of a convincing explanation of the gap in time between them – Lord Gill observing that the accused had re-offended at the earliest opportunity – it would clearly have been artificial to consider each charge in isolation. But we think that to treat two such widely-separated incidents as forming a "course of conduct" is to stretch the meaning of the term beyond its natural breaking point.

6.15 We shall return to this case in considering our proposals for reform. For the moment, it is sufficient to note that - contrary to the view which we expressed in the Discussion Paper - the High Court may still require evidence not only of similarity in time, character and circumstance, but also an inference that these similarities demonstrate that the separate incidents formed part of a single course of criminal conduct.

The use of evidence relating to charges of which the accused has been acquitted

6.16 Another of our tentative conclusions as to the current state of the *Moorov* doctrine may also have been undermined by a recent appeal court decision. At paragraphs 5.81 to 5.84 of the Discussion Paper, we suggested, under reference to *Cannell v HM Advocate,*[15] that it might be possible at present to find corroboration via *Moorov* in evidence relating to charges of which the accused was not convicted. We quoted with approval a passage from the Opinion of the Court:

> "It is well settled that evidence led principally in relation to a charge of which the accused is ultimately acquitted may nevertheless be relevant to the jury's consideration of other charges. For example, a charge may be included for what is known as 'evidential reasons'. In other words, it is recognised that the accused may not ultimately be convicted of the charge (because, for example, there is no jurisdiction; or because full legal proof cannot be achieved or the prosecutor withdraws the charge for tactical purposes); yet it is necessary or helpful to lead the evidence either as background, or to give a coherent sequence of events, or for some other reason: c.f. *Dumoulin v HM Advocate*; *HM Advocate v Joseph*. That latter category may, in certain circumstances, extend to providing corroborative evidence for another charge or charges. In the present case, had there been a charge of lewd and libidinous conduct on the part of the appellant against M said to have occurred during a holiday with her aunt J in England, the appellant could not have been convicted of that charge even if there had been no doubt about the precise date of the incident, because the Scottish criminal courts have no jurisdiction over events in England. Nevertheless evidence from M about the type of behaviour indulged in by the appellant towards her while she was visiting her aunt J and sleeping overnight in her aunt's premises would, in our view, be competent and admissible for the jury's consideration. The jury would be entitled to consider that evidence and to assess whether it demonstrated similarities in time, character and circumstances to the other evidence led in respect of charges 1 and 3, and if so, to apply the *Moorov* doctrine to both that and the other evidence. Thus M's evidence, if believed, would in our view properly be available to the jury in considering the chronology, character and circumstances of the conduct described by the complainers. [...] M's evidence in respect of charge 2 in the present case was available for the jury's consideration, even although the appellant was not ultimately convicted of that charge. It was, if believed, direct evidence going to proof of conduct underlying and connecting the several charges."[16]

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[15] [2009] HCJAC 6; 2009 SCCR 207; 2009 SCL 484.
[16] Ibid, at para 34 (Lady Paton).

6.17 We found this reasoning persuasive. But we should now mention the case of *PM v HM Advocate*[17] in which a differently constituted Appeal Court[18] went out of its way, in a forceful *obiter dictum*, to doubt *Cannell*. *PM* appealed against his conviction for rape. Corroboration of the rape charge (charge 5) had relied upon the use of *Moorov* in relation to evidence of a charge of assault and sodomy (charge 3). At the conclusion of the Crown case, the Advocate Depute, apparently recognising a lack of evidence, sought to amend charge 3 to remove all reference to assault. Leave was refused, the Crown withdrew the charge, and the trial judge formally acquitted the appellant on charge 3.[19] In his charge to the jury, the trial judge permitted the jury to have regard to the evidence on charge 3 in deciding whether there was corroboration in respect of charge 5.

6.18 An appeal against conviction was upheld on the basis of the Crown's concession that the trial judge's directions to the jury had been inadequate. The Court was therefore not required to reach a decision on the other issues in the appeal, namely:

> "1. Can *Moorov* apply where, following formal withdrawal of a charge and consequent acquittal of the accused, there is no longer any course of criminal conduct libelled on the indictment but only a single live charge standing by itself?
>
> 2. Where a charge has been formally withdrawn and followed by acquittal, can the jury nevertheless be invited to use any related evidence in order to find that the accused actually committed the crime of which he has been acquitted? "[20]

6.19 The court nevertheless felt moved to suggest its own answers to questions 1 and 2:

> "[12] […] [I]n considering the various authorities to which the parties made reference in their written submissions, we noted inter alia (i) that in *Moorov* v *HM Advocate* 1930 JC 68 the court's discussion concerned live charges only; (ii) that in *Ogg v HM Advocate* 1938 JC 152, where four out of eleven charges were withdrawn by the Crown, and three more rejected by the jury, the Lord Justice Clerk (Aitchison) at p. 157, with whom the other judges agreed, said "...The evidence of the offences of which the appellant was acquitted must be left out of account"; (iii) that an observation to similar effect was more recently made at para [13] of the court's opinion in *Danskin v HM Advocate* 2002 SLT 889; and (iv) that in *Thomson v HM Advocate* 1998 SCCR 657, the Lord Justice General (Rodger) at p.658 said this:
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> > 'In our opinion it was necessary for the sheriff to direct the jury that, in considering the various elements of similarity between the accounts of the two complainers, they had to consider whether they were satisfied beyond a reasonable doubt that they were instances of a single course of criminal conduct being carried on by the appellant. It was only if they were so satisfied that the jury would be entitled to treat the statements of the two complainers as providing sufficient evidence to convict the appellant of both charges. If they were not so satisfied, they would require to acquit him of both.'
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> These authorities are all arguably at variance with the recent decision in Cannell ... yet unfortunately none of them would appear to have been drawn to the court's attention in that case.

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[17] [2011] HCJAC 62; 2011 SCCR 500; 2011 SLT 1047.
[18] Lord Emslie, Lord Glennie and Lady Cosgrove.
[19] In terms of section 95(1) of the 1995 Act.
[20] [2011] HCJAC 62; 2011 SCCR 500; 2011 SLT 1047, at para 7.

> [13] Similarly, we noted that in *Dudgeon v HM Advocate* 1988 SLT 476 the court's decision was strongly adverse to the notion that once a charge has been formally withdrawn, and the accused duly acquitted, the Crown can still invite the jury to hold, on such evidence as has been led, that the accused nevertheless committed the relevant crime. The court in *Cannell* was not apparently referred to that case either, nor indeed to any authority vouching the contrary position.
>
> [14] It may be, of course, that *Cannell* could for present purposes have been distinguished, either by reference to the highly special feature discussed at para [6] above,[21] or on the ground that the decision dealt only with charges which went to the jury and not with charges of which an accused had previously been acquitted. Failing that, however, our preliminary inclination would have been to follow the consistent, and logically attractive, line of authority in *Moorov*, *Ogg*, *Danskin*, *Thomson* and *Dudgeon* rather than the more recent decision in *Cannell* where these earlier cases do not appear to have been considered."[22]

6.20 For our present purposes, it suffices to note that the judicial interpretation of *Moorov* remains uncertain. As the court in *PM* noted, there is authority which suggests that *Moorov* may only operate when there are at least two live charges remaining on the indictment, and that evidence relating to charges of which the accused has been acquitted (whether by the judge or the jury) must be left out of account in considering whether the requirement of corroboration has been satisfied. On the other hand, we find it difficult to agree with the view expressed at paragraph [14] of *PM* that this line of authority is logically attractive: if the jury has heard relevant evidence, and finds this evidence to be credible, why (as a matter of logic rather than of legal policy) should it have to be discounted?

6.21 The view is plainly understandable in the context of *Moorov,* which does depend upon the jury's accepting the evidence of each of the single witnesses. In the typical case, there will be a direct relationship between the jury's acceptance or rejection of the witnesses' evidence and conviction or acquittal on the charges to which they speak. The circumstances of *Cannell* were special, in that it was possible for the jury to accept the evidence of the complainer on the middle charge while still being compelled to acquit, by virtue of uncertainty as to her age at the time of the offence. But one might easily suggest that the same was true in *PM v HM Advocate:*[23] Where the accused is acquitted of one of a number of charges by a judge at the close of the prosecution case, there is no reason in principle why the jury should not be free to take into account the evidence which has already been heard and, if appropriate, to find in this evidence corroboration of one or more of the remaining charges.

6.22 As we observed at the beginning of our consideration of the question of relevance, in Chapter 3, the relevance of evidence is independent of its legal procedural history.

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[21] That is, that the appellant in that case may have been acquitted not on the basis that the jury was unpersuaded of the criminality of the conduct, but merely because it could not be certain of the age of the complainer at the relevant time and so of whether the offence was one at common law or at statute.

[22] In his commentary (2011 SCCR 500), Sheriff Alastair N Brown, who was the Advocate Depute in *Cannell,* reiterated that in order for *Moorov* to operate "two charges is the irreducible minimum" and described the view that a single charge spoken to by only one witness could go to a jury, with corroboration being found in evidence which was led in relation to a charge or charges on which the accused had been acquitted in the course of the trial as "a fundamental misunderstanding of *Cannell*". While the Appeal Court was correct to note that neither *Danskin* nor *Thomson* nor *Dudgeon* was considered in *Cannell*, it appears from the case report (2009 SCCR 207) that both *Moorov* and *Ogg* were cited.

[23] [2011] HCJAC 62; 2011 SCCR 500; 2011 SLT 1047.

Statutory restatement of Moorov *and* Howden*?*

6.23 Towards the end of Part 5 of the Discussion Paper, after considering *Moorov* and *Howden*, their development and potential reform, we asked whether it would be appropriate for these doctrines to be set out in statutory form and, if so, what features they should incorporate.[24] The "statutory form" envisaged by the question was that of a free-standing statement of each of the doctrines, without reference to wider principles.

6.24 A clear majority of those who responded to these questions were opposed to statutory restatement, with two partially-overlapping strands of opinion emerging. The first maintained that it was unhelpful to consider *Moorov* and *Howden* as separate doctrines, and - accordingly - that there would be no benefit in restating *Moorov* and *Howden* except in the context of a broader reform of the law of evidence. Thus, the judges observed (in their response to the Discussion Paper's first question,[25]) that:

> "*Moorov* is arguably one particular application of the general principle that evidence of similar facts relating to events other than those of the charge which are relevant to an issue in the case is admissible. Likewise *Howden* may simply be an example of the application of the principle to circumstantial evidence of similar facts."[26]

6.25 Similarly, the Law Society commented that:

> "the Committee questions the value of continuing to identify the *Moorov* doctrine as a discrete doctrine. The Committee suggests the type of evidence, to which this doctrine has been applied, should simply be regarded as an example of corroboration which is derived from relevant circumstantial evidence

6.26 The second strand of opinion held that restatement of the doctrines would be unhelpful since it might impede the continued development of the law by the courts. This latter view was advanced by the judges, Crown Office, the Faculty of Advocates, the Law Society, the Society of Solicitor Advocates and the Glasgow Bar Association, among others.

6.27 It is perhaps unsurprising that professional bodies who regard the *Moorov* and *Howden* doctrines as working well in practice should have little appetite for their statutory restatement. What is perhaps surprising (and, indeed, heartening) is the degree to which many of our consultees regard *Moorov* and *Howden* not as doctrines to be considered *sui generis*, but as examples of a broader principle regarding the use of evidence of other crimes. We have already mentioned the comments by the judges and the Law Society.

6.28 So far as the second strand of opinion is concerned, we are not persuaded that the statutory restatement of *Moorov* and *Howden* would necessarily inhibit the continued development of the law by the courts. All statutes are subject to judicial interpretation, and we consider that it would be perfectly possible to produce a statutory provision which set out the outlines of the *Moorov* doctrine while allowing the courts considerable flexibility in its application. But, that said, we accept that producing a rule with the right degree of flexibility would be a challenge. The Law Society remarked:

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[24] Questions 7 and 8, para 5.110.
[25] "Is the current law in relation to evidence of bad character, as set out in paragraphs 3.10-3.11 satisfactory?".
[26] At other points in their response, the judges did treat *Moorov* and *Howden* as distinct doctrines, and it would be wrong to characterise their response as straightforwardly in favour of subsuming the two doctrines within a broader principle relating to the admissibility and use of similar fact evidence.

> "Perhaps, the litmus test for such a proposal would be to pose the question would statutory parameters have allowed the majority of the Appeal Court to reach the decision it did in the case of *CAB v Her Majesty's Advocate* 2009 SCCR 106?[27] If the parameters would allow such a decision, then one might question what they would add; if the parameters would preclude such a decision, then one might question whether they would frustrate both the natural development of the common law and the public interest in securing the conviction of criminals."

6.29 Taken together, we think that the views of our consultees represent sound reasons for resisting the temptation to restate *Moorov* as it stands.

6.30 The answer is not, however, to leave the law as it is. We observe that while there has been considerable judicial development and expansion of *Moorov,* the result has not been a clear and consistent body of law. In spite of the frequency with which *Moorov* cases are considered in the Appeal Court, one need only consider the divergent interpretations which have been given to the doctrine in recent years, in order to see that it has been, and continues to be, applied inconsistently. We also observe that the judicial development of *Moorov* has come in fits and starts: as recently as our 2007 Report on *Rape and Other Sexual Offences*, this Commission considered it "unlikely that the doctrine [would] be further extended by judicial development."[28] While there is much to be said for allowing the courts flexibility in applying the law to the facts of individual cases, the case by case basis which they must adopt is not particularly conducive to the development of coherent principles. Such systematic development is better suited to law reform bodies and to legislatures.[29]

6.31 In the context of the present Reference, we have set out, in Chapter 2 of this Report, our reasons for deciding to re-state the law of criminal evidence by reference to fundamental principles. The considerations we identified in that Chapter are certainly applicable to the *Moorov* and *Howden* doctrines. We agree with those of our consultees who suggested that these "doctrines" should be seen as particular instances in which the courts have identified the broader relevance of evidence of other offences as among the circumstances which might be relevant to the proof of a given charge. We recommend:

12. The *Moorov* and *Howden* doctrines should not be restated in statute as separate doctrines.

6.32 We now go on to consider the limitations on the application of *Moorov* which were addressed in the Discussion Paper and those which were raised by our consultees. Although we consider these in the context of *Moorov*, it should be borne in mind that the effect of our proposed general approach to similar fact evidence is that *Moorov* and *Howden* would cease to exist as separate doctrines. Many of the limitations which we discuss will be addressed simply by this move to a broader understanding of the significance of evidence of similar facts. In the case of others it may be sensible to make specific provision.

LIMITATIONS ON *MOOROV*

6.33 In our discussion of *Moorov* in Part 5 of the Discussion Paper, we noted a number of limitations on the application of the doctrine. One of the most significant of these was that

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[27] The circumstances of the case are discussed in Chapter 2.
[28] Scot Law Com No 209 (2007), para 6.18.
[29] Cf Michael Bohlander, "Battered Women and Failed Attempts to Kill the Abuser – Labelling and Doctrinal Inconsistency in English Homicide Law" (2011) 75 JCL 279 at 281-283.

the case law appeared to indicate that corroboration could be found via *Moorov* only as between charges which appeared on the same indictment or complaint: if Crime A did not appear as a live charge on the same complaint or indictment as Crime B - at least at the outset of the proceedings, and perhaps throughout - then evidence of Crime A could not corroborate evidence of Crime B.

6.34 We identified three scenarios in which *Moorov* might not presently apply, but in which we thought it arguable that it should. In the first, the person accused of Crime B has already been tried and acquitted of Crime A. This, the "previous acquittal case", was considered at paragraphs 5.74 to 5.90 of the Discussion Paper. In the second scenario, the person accused of Crime B has already been tried for Crime A, and convicted. We discussed this, the "previous conviction case", at paragraphs 5.91 to 5.102. The third scenario was what we termed the "no jurisdiction case": Crime B was the subject of a charge in Scotland, but Crime A had been committed outside the jurisdiction of the Scottish courts, and so could not be made the subject of a charge in Scotland. This was discussed at paras 5.103-5.107.

The "previous acquittal case"

6.35 In relation to the previous acquittal case, we suggested that where the circumstances of the previous charge are sufficiently similar to those of a present charge that, had the two charges been contained in the same indictment, *Moorov* would have been available, it should be competent to lead evidence in relation to the earlier charge in order to contribute to the proof of the present charge (including, if necessary, by providing corroboration via the *Moorov* doctrine).[30]

6.36 With the exception of the Faculty, the Society of Solicitor Advocates and the Glasgow Bar Association, consultees were generally in support of this proposal. The judges recognised that there could be practical difficulties in presenting evidence which might be thought to contradict a previous verdict and in requiring witnesses to testify again, but considered that it was likely that such evidence was, in principle, admissible as matters stand. But the judges were alone in suggesting that this could be accommodated by the present law: all of the other consultees responded on the basis that such evidence could not presently be used as corroboration via *Moorov*, and a majority on the basis that it could not be admitted at all.

6.37 The Faculty pointed to a number of practical difficulties such as the lengthening of trials; the costs of transcription of evidence; the undesirability of sending vulnerable complainers back into court to face the same cross-examination as in an earlier trial; and the potential inadequacy of such cross-examination where the witnesses were aware of the potential lines of questioning and of the evidence given by other witnesses at the original trial. These practical objections aside, the Faculty sought to distinguish between cases in which the earlier acquittal had been on the basis of a lack of corroboration (in which case "that acquittal would seem more easily cured by better case marking, rather than by the measures under discussion here") and those in which the jury had acquitted despite there having been a sufficiency of evidence. In that case, they argued, "[w]here there was a sufficiency of evidence, and that earlier judge or jury left the accused's presumption of innocence intact, it follows that the evidence of the complainer or complainers was

[30] Discussion Paper, para 5.90, proposal 3.

unconvincing. If we have faith in our system of criminal trial then we should respect that decision." They also suggested that while finality of an acquittal focuses the mind of the Crown and the police on a single trial, "giving a second 'bite at the cherry' does not."

6.38 The Glasgow Bar Association described leading evidence of a crime of which the accused had been acquitted as "completely bizarre", since "[t]o lead evidence regarding the acquittal would be tantamount to saying that the original acquittal was suspect in some way."

6.39 The Society of Solicitor Advocates echoed the Faculty's distinction between previous acquittals based upon a lack of sufficient evidence and acquittals on the basis that the Crown evidence had been disbelieved by the jury. While they were opposed to leading evidence of the latter type of acquittal, they agreed that it could be appropriate to lead evidence of an earlier offence of which the accused had been acquitted on the basis of there being insufficient evidence in law or a libel being withdrawn by the Crown.

6.40 With the exception of the above, all of those who responded on this point were broadly in favour of our proposal. It attracted universal support from academic respondents.[31] It also drew the support of the Law Society, who reiterated their comment that it would be unhelpful to continue to identify *Moorov* as a distinct doctrine rather than merely an example of corroboration derived from circumstantial evidence.[32] Crown Office noted the overlap between this proposal and the changes introduced by the Double Jeopardy (Scotland) Act 2011, observing that it might often be appropriate, in a case where an accused had previously been acquitted of a similar offence, to seek to re-prosecute that offence in terms of the 2011 Act.

6.41 They recognised, however, that the 2011 Act imposed a high test for a second prosecution, and that such a prosecution would be possible only where the original offence had been tried in the High Court. Despite the potential practical difficulties, particularly where complainers might be required to repeat the traumatic process of giving evidence, Crown Office supported the proposal, observing that "it would allow the corroboration of an offence for which criminal proceedings might otherwise be impossible and has the potential to offer a clear benefit for the delivery of justice for victims of crime."

Discussion

6.42 There can be no doubt that there would be significant difficulties in leading evidence of previous acquittals. We recognised as much in paragraph 5.89 of the Discussion Paper, and we shall return to the practical issues below. Whatever the practical difficulties, we do not consider that there is any sound argument in principle against making use of evidence of previous acquittals in appropriate cases. The principle of finality of criminal verdicts is an

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[31] Those individuals voicing support were Professors Fiona Raitt and Pamela Ferguson, Sir Gerald Gordon QC, Professor Peter Duff, PW Ferguson QC and Professor Mike Redmayne. James Chalmers also agreed, but commented that the proposal illustrated why thinking within the confines of *Moorov* was unsatisfactory: whether or not required for corroboration, such evidence should be admitted if relevant. Findlay Stark qualified his support by suggesting that while such evidence should in principle be competent, it should be admitted only where the circumstances involved in each incident were extremely similar.

[32] The Law Society also raised a number of practical points for consideration, including whether, in a trial for sexual offences, the complainer at the first trial would be protected, under s 274 of the 1995 from cross-examination as to sexual character where the accused was not actually charged with an offence against that complainer, and whether it would be compatible with the accused's Article 6 rights to allow evidence of past alleged offences without the opportunity of cross-examination.

important one, but it is not absolute. We considered this topic in considerable detail in our project on Double Jeopardy.[33] One of our conclusions was that Scots law's protection against double jeopardy extended only to preventing subsequent criminal proceedings in respect of the same acts: as the High Court observed in *Diamond v HM Advocate*[34]: "*HM Advocate v Cairns* shows that, even though the accused may have been acquitted of a charge based on certain evidence, that does not prevent the Crown leading that evidence in support of a different charge."

6.43 The criticism that allowing the use of such evidence would be to allow the Crown a second bite at the cherry is misconceived. The Crown would get its second bite only if it were able to bring a new prosecution which might result in the accused's being convicted of the offence of which he or she had previously been acquitted. As Crown Office pointed out, this might often be possible in the circumstances which we considered in paragraph 5.74 of the Discussion Paper, since the evidence of the second offence might well amount to significant new evidence in relation to the first, sufficient to justify a new prosecution in terms of section 4 of the Double Jeopardy (Scotland) Act 2011. There may, however, be cases in which it is not appropriate to re-try the original offence or in which this would not be possible under the provisions of the 2011 Act. The most obvious example would be where the first trial had taken place in the Sheriff Court. If so, then no further trial could take place in terms of section 4 of the 2011 Act, which applies only to crimes originally prosecuted in the High Court. In any event, it strikes us as incoherent to accept that someone might be tried again for an offence of which he or she has previously been acquitted while simultaneously maintaining that it could never be appropriate to rely upon evidence of the earlier alleged offence where it is relevant to the proof of an entirely separate charge.

6.44 It should not be thought that the only reason why the use of such evidence should be acceptable in practice is that the finality of an acquittal has been undermined by a recent statute. The use of relevant evidence of incidents in relation to which an accused had already been acquitted was already recognised as competent at common law. In *HM Advocate v Cairns*,[35] the accused was tried for murder and acquitted after having given evidence denying that he had stabbed the victim. After his acquittal, he boasted of having committed the offence, selling his story to a daily newspaper. At his subsequent trial for perjury, objection was taken to the leading of evidence with a view to demonstrating that the accused had, in fact, killed the deceased, on the basis that this was incompatible with the verdict in the original trial. The High Court rejected this argument, instead approving the Lord Advocate's submission to the effect that "where a supervening event takes place which could form the subject of a radically different charge, then that latter charge can be competently laid notwithstanding that this involves inquiry into the previous crime for which the panel has been tried and either convicted or acquitted."[36] A person's acquittal does not prevent the Crown from arguing, in a subsequent trial for a different crime, that the accused did in fact commit the act alleged in the prior prosecution. We note that English law, prior to the Criminal Justice Act 2003, arrived at the same position, the House of Lords holding in *R*

[33] Discussion Paper on Double Jeopardy, DP No 141 (2009), Part 6; Report on Double Jeopardy, Scot Law Com No 218 (2009), Part 2.
[34] 1999 JC 244 at 247.
[35] 1967 JC 37.
[36] Ibid, per Lord Wheatley at 46.

v Z that it was competent, in support of a charge of rape, to lead the evidence of a number of prior instances in which the accused had been acquitted of similar offences.[37]

6.45 We see no reason, in principle or authority, for excluding relevant evidence merely on the ground that the jury is being asked to draw factual conclusions which may differ from those of an earlier jury. This is particularly so where there are new facts which, when taken together with the earlier evidence, would entitle the jury at the second trial to reach a different conclusion. It is in the nature of repeated, similar allegations that the first case becomes more persuasive when evidence of the second is added. To allow further consideration of evidence which may have been disbelieved by the original jury, who considered it in isolation from the other, similar accusation, need not call into question the validity of the original jury's decision on the original, limited evidence. For this reason, we doubt that a useful distinction can be made between cases where the original prosecution failed for want of corroboration and cases in which the acquittal resulted from the jury's disbelieving one or more elements of the Crown case. The effect of considering all of the alleged incidents together may be to present a stronger and more credible case in relation to each of them than that which was presented to the original jury. The facts of *R v Smith*, the "brides in the bath" case (discussed at paragraph 5.77 of the Discussion Paper) provide the clearest possible example.

6.46 We conclude that it would be appropriate to allow evidence of offences of which the accused has been tried and acquitted to support a present similar charge, and that it should be possible for a jury (or a judge in summary proceedings) to find, in such evidence (as in any other relevant evidence) corroboration of any fact to which it is relevant.

6.47 We recommend:

> **13. Where the circumstances of a charge of which an accused person has been acquitted are similar to those of a present charge, it should be competent to lead evidence in relation to that other charge in order to contribute to the proof of the present charge.**
>
> (Draft Bill, section 5(b))

The "previous conviction case"

6.48 If it is appropriate to allow evidence of previous acquittals where the alleged conduct is similar, then what about evidence of previous convictions?

6.49 In our discussion at paragraphs 5.91-5.102 of the Discussion Paper, we noted that there was a substantial degree of overlap between the arguments surrounding the use of evidence of previous acquittals and the use of previous convictions. So far as double jeopardy is concerned, the arguments are identical: a double jeopardy objection would arise only if the Crown sought to convict the accused of the offence which had been the subject of the earlier trial. We also highlighted the potential risk of diverting the trial into an investigation of collateral issues. This might be considered less of a risk with previous convictions than previous acquittals since it will not generally be necessary to prove the fact of a previous

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[37] *R v Z* [2000] UKHL 68; [2000] 2 AC 483. See too Fiona Raitt, "The evidential use of 'similar facts' in Scots Criminal Law" 2003 Edin LR 174 at 179-181, and Discussion Paper paras 5.79-5.84.

conviction, and may not always be necessary to lead evidence to establish the facts underlying a previous conviction. That is a matter which we discuss in more detail in Chapter 7.

6.50 As with the "previous acquittal case" discussed above, the judges broadly supported our proposal[38] and – alone among our consultees – considered that the use of such evidence would arguably be possible as the law stands, provided that the fact of the conviction itself was not referred to. They commented:

> "There is force in the view of the Commission that such evidence should be admitted unless there are good reasons for excluding it. We consider that that might well be what would happen today, were the matter to arise. The evidence might be considered relevant and admissible subject to the overriding question of fairness. The fact of conviction need not be admitted in evidence. The facts of the earlier incident are what matter and should be admitted. […] In spite of the apparent view of the Commission to the contrary, we consider it to be arguable that such evidence could be led."

The judges nevertheless expressed caution about the wisdom of allowing evidence of the fact of previous convictions given the "additional problem of … prejudicial effect".

6.51 The responses to the Discussion Paper were divided along similar lines to those in relation to previous acquittals. Crown Office supported our proposal, observing that there was "an overwhelming public interest in being able to refer or lead evidence of the previous conviction when the facts and circumstances are similar in nature". The Law Society agreed that it should be competent to lead evidence in relation to earlier charges of which the accused had been convicted, subject to a fairness test. They cautioned, however, that one could not conduct a *Moorov*-type analysis merely upon the basis of a previous conviction and without examining the evidence upon which that conviction proceeded.

6.52 The Society of Solicitor Advocates were completely opposed to this proposition. In their view, it leads to the removal of the presumption of innocence of an accused. If evidence were admitted of convictions which proved, in the context of the other evidence, not to be sufficiently similar in terms of *Moorov* or *Howden,* the jury would still have heard evidence of the previous convictions which would lead to unfairness which could not be cured by any direction of the trial judge. If, contrary to their recommendation, such evidence were to be allowed, the Society of Solicitor Advocates suggested that there would have to be robust statutory control, such as short time limits between the conviction and the new allegation; a list of specific crimes which can have use of this rule; and restrictions avoiding the use of generally similar convictions. The Faculty were also opposed to the use of previous convictions. The Faculty maintained that given the need within either the *Moorov* or *Howden* doctrines for a detailed appreciation of the circumstances of the crime, it was difficult to see how one could avoid rerunning the earlier charges to give context to the new trial.

6.53 The Glasgow Bar Association agreed with our suggestion that it would be perverse that evidence of offences which could perhaps have met the test in *Moorov* should be unavailable to the Crown merely because they happened to have resulted in a prior conviction. They considered that the use of evidence of previous convictions in this context

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[38] Discussion Paper, para 5.102, Proposal 4.

would be more palatable than that of charges upon which the accused had previously been acquitted, but stressed the difficulty in establishing that any prior conviction met the *Moorov* or *Howden* criteria without rehearing all of the evidence led at the original trial.

6.54 Most of those who responded stressed that there would be practical difficulties in relying upon the evidence of the previous conviction. We consider these questions, and the admission of previous convictions more generally, in Chapter 7.

Discussion

6.55 It is our view that no sound argument in principle has been made why this evidence, where relevant, should not be able to be made available to the fact finder. As the existing case law on *Moorov* has shown, the relevance of one charge to another depends upon their similarity in time, character and circumstances. It does not follow that a lesser degree of similarity will not suffice, in the mind of the fact finder, to support credible evidence as to the commission of an instant offence. We discuss in Chapter 7 how previous convictions might be proved. We recommend:

> **14. Where the circumstances of a charge of which an accused person has previously been convicted are similar to those of a present charge it should be competent to lead evidence in relation to that other charge in order to contribute to the proof of the present charge.**
>
> (Draft Bill, section 5(b))

The "no jurisdiction case"

6.56 We turn to consider the question of evidence of crimes allegedly committed beyond the jurisdiction of the Scottish courts. In the Discussion Paper we suggested that it was competent to lead evidence relating to a foreign offence, and that it should be possible to rely upon that evidence to gain corroboration via *Moorov* or *Howden*. We cited *HM Advocate v Joseph*[39] as authority for the proposition that it is open to the prosecution to libel an offence committed outwith the jurisdiction of the Scottish courts where evidence of that offence would be relevant to the proof of one of the other charges on the indictment. In that case, in dealing with a submission that evidence relating to an offence allegedly committed in Belgium should not be admitted, Lord Murray said:

> "It is said that, inasmuch as the incident in Belgium admittedly cannot proceed as a substantive charge, any evidence relating to this matter, which would be otherwise relevant and admissible, will now fall to be excluded. I am of the opinion that there is no warrant for this view, assuming the evidence in question be relevant and admissible as bearing on the first and second charges (see Macdonald's Criminal Law (3rd ed.), pp. 317, 318, and the case of Bell there cited). It is not disputed that our law does not allow proof of a crime other than that which is libelled merely to establish that it is probable or likely that the accused may have committed the crime charged. But I regard it as settled that evidence in regard to another incident of a similar character may be admitted in proof of a crime charged, notwithstanding that this evidence may incidentally shew, or tend to shew, the commission of another crime, provided there be some connection or 'nexus', which in the opinion of the Court is sufficiently intimate, between the two 'incidents'. There is ample authority for

[39] 1929 JC 55; 1929 SLT 414.

> the view that, if the connection between the incident sought to be proved and the crime libelled is very close in point of time and character, so that they can hardly be dissociated, the evidence will be admitted."[40]

6.57 The Appeal Court in *Cannell v HM Advocate*[41] suggested (albeit *obiter)* that it would be competent for evidence of offences committed furth of Scotland to be narrated in an indictment, as in *Joseph*, and, if sufficiently similar, to corroborate other substantive charges by means of the *Moorov* doctrine.[42]

6.58 We suggested in the Discussion Paper that there seemed no reason in principle why evidence in relation to a crime which did not form the subject of a substantive charge, because such a charge would not lie within the jurisdiction of the Scottish courts, should not be used to support a charge which did lie within those courts' jurisdiction, provided that there was the requisite degree of similarity in time, character and circumstance.[43]

6.59 Consultees unanimously agreed that this should be the law, and most, including the judges and the Faculty, agreed with our view that this represented the current law in any case. The only exception to the view that the use of such evidence was presently competent came from Crown Office, who expressed support for

> "any proposal that rectified the current position where it is not possible to lead evidence of an offence committed outwith the jurisdiction of the Scottish courts, that is relevant to the proof of another charge."

They added that

> "there are many examples of cases where if it had been possible to lead evidence of offences committed outwith the jurisdiction of the Scottish courts, and in particular in England and Wales, it would have provided the necessary proof of other charges committed in Scotland."

6.60 A number of consultees expressed concern about the use of foreign convictions. The Society of Solicitor Advocates agreed that evidence of crimes allegedly committed abroad should be admissible, but were opposed to admitting evidence of foreign convictions. The Glasgow Bar Association shared this concern about admitting evidence of foreign convictions, both on the basis that there might not be detailed information about their circumstances sufficient to allow the court to assess the relevant similarity, and upon the basis that foreign convictions might be based upon evidence which would not have been admissible in Scotland. PW Ferguson QC and Findlay Stark each pointed out that not all foreign convictions could be relied upon. Dr Stark stressed the need for there to be adequate records concerning the foreign offence for the Scottish court to take a proper view on the similarity of the circumstances, observing that this could be problematic in relation to some jurisdictions.

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[40] Ibid, at 56-57 and 416, respectively.
[41] [2009] HCJAC 6; 2009 SCCR 207; 2009 SCL 484.
[42] Ibid, at paras 34-35.
[43] Discussion Paper, para 5.106. The relevant issue is whether the conduct in question would have amounted to a crime according to the law of Scotland, since the doubt – if doubt there is – relates to the competence of leading evidence of crimes not charged.

Discussion

6.61 We were surprised to learn that Crown Office, alone among our consultees, consider that it is not competent to lead evidence of crimes allegedly committed beyond the jurisdiction of the Scottish courts. As we noted in the Discussion Paper, there is authority to the contrary, most notably *HM Advocate v Joseph.* If serious crimes are going unprosecuted because of this view of the law, then this is a matter of serious concern. Since everyone was agreed that the use of such evidence should be competent, it would make sense to put the matter beyond doubt by means of an appropriate statutory provision. We recommend:

15. It should be provided in statute that it is competent, in support of a charge competently made before a Scottish criminal court, to lead relevant evidence of other conduct, including crimes, allegedly committed outside Scotland.

(Draft Bill, section 10)

6.62 Regarding the use of foreign convictions there seems no reason in principle to treat these any differently, in terms of their potential admissibility and evidential effect, from domestic convictions. Indeed, that is already the position with regard to convictions in other Member States of the European Union,[44] where we are required by Community law to treat convictions in other Member States in the same way as convictions within the UK.[45] We consider the admission of previous convictions more generally in Chapter 7.

6.63 While the arguments surrounding the use of foreign convictions other than those from the EU may be the same in principle as those relating to convictions before the Scottish courts, we note consultees' concerns about the quality of foreign proceedings, convictions and records. PW Ferguson QC suggested that there should be a list, set out in a Scottish Statutory Instrument ("SSI"), of countries whose convictions could be accepted.

6.64 On balance, we do not think that this would be necessary or proportionate. The number of cases in which foreign convictions might be used would, we think, be small. The Scottish Government is unlikely to have readily available the information needed to identify which should be the favoured jurisdictions, and compiling and maintaining the list (through the passage of periodic amending SSIs – would demand significant resources, which would likely be out of proportion to the use which would be made of such evidence.

6.65 We considered similar issues in the course of our project on Double Jeopardy in relation to the question of which foreign convictions should bar further proceedings in Scotland. There, we suggested that the onus should be on the person relying on the foreign verdict to establish the existence and significance of that verdict as the basis of a plea in bar of trial.[46]

6.66 We considered whether a similar approach should be pursued here: the issue of the existence, reliability and significance of foreign convictions could be dealt with on a case by case basis, with the onus falling upon the Crown to satisfy the trial judge, in the face of

[44] Cf 1995 Act, s 307(5)(a).
[45] Council Framework Decision 2008/675/JHA of 24 July 2008.
[46] Scot Law Com 218 (2009), para 2.68.

whatever representations might be made by the defence, that the foreign conviction is reliable and recorded in sufficient detail to demonstrate its relevance to the instant charge. On balance, we thought that would not be necessary. Most foreign convictions will be in countries which are signatories to the Convention, or in countries with which the United Kingdom has an extradition treaty. In our view a conviction from any such country should be regarded as qualifying, without further inquiry. If the Crown seek to lead convictions from other jurisdictions, any objections could be dealt with in the particular case.

6.67 We recommend:

16. Where the Crown seek to rely upon evidence of a crime of which the accused has been convicted by a foreign court, being a court in a country which is a signatory to the Convention, or with which the United Kingdom has entered into an extradition treaty, the conviction should be admissible on the same basis as a conviction in Scotland.

(Draft Bill, sections 10 and 13(5))

Further limitations on *Moorov* - time limits, course of conduct, "generational offences", and corroboration of greater charges by lesser charges

Time limits

6.68 While it appears that the courts no longer recognise a *de facto* time limit for the application of *Moorov*,[47] it does seem that the application of the doctrine to charges separated by more than a few years will require the Crown to show an exceptional degree of similarity. This is surely correct: the greater the lapse of time, the more impressive the similarity must be in order to allow a reasonable fact-finder to infer that the two charges are mutually relevant.

6.69 Crown Office have pointed out that significant difficulties may arise in the prosecution of what they term "generational offences", such as sexual offences committed by a man against his daughters and then, after a gap of many years, against his grand-daughters. In such cases, the similarities in character and circumstance may be substantial, but *Moorov* may be excluded by the passage of time, even if the passage of time might be viewed as attributable wholly to the accused's limited opportunities to re-offend.

6.70 In this connection, it is worth examining the case of *AK v HM Advocate.*[48] We have set out the facts of this case at paragraph 6.12, and we do not repeat them here.

6.71 The appeal court noted that the time lapse between the two charges was far longer than the court had been called upon to consider in any prior *Moorov* appeal. They reaffirmed that there was no time limit for the application of the *Moorov* doctrine, but added that where the interval is a long one, it is necessary to consider whether there are any special features in the evidence that make the similarities compelling. Lord Gill noted with approval the Advocate Depute's concession that the similarities in age of the complainers, in their relationship to the appellant and in the locus of the crimes would not have been

[47] Discussion Paper, paras 5.26-5.32.
[48] [2011] HCJAC 52; 2011 SCCR 495; 2011 SLT 915.

sufficient to overcome such an exceptionally long gap.[49] But he considered that the evidence that the appellant had addressed D as M, saying "I've missed you, M," was an extraordinary feature in the evidence which entitled the jury to conclude that there was a course of conduct notwithstanding the lengthy interval between the incidents.[50]

6.72 We commented that this stretched the notion of a "course of conduct" beyond breaking point. The question which arises is whether it should be necessary to demonstrate a course of conduct – something which creates a barrier to the prosecution of "generational offences" which may only be overcome in exceptional cases such as *AK* – or whether it should be sufficient merely to show a degree of similarity between the two offences, leaving it to the fact finder to determine whether the evidence in relation to each offence is mutually corroborative.

The need to show a "course of conduct"

6.73 In *Moorov*, the majority of the appeal court judges referred to the various charges against Samuel Moorov as representing a course of criminal conduct. Lord Justice General Clyde referred to the need to show that the individual acts were "subordinates in some particular and ascertained unity of intent, project, campaign or adventure, which lies beyond or behind – but is related to – the separate acts."[51] It is not entirely clear whether there is a distinction to be drawn between the Lord Justice General's formulation and those of the other judges;[52] in practice, the courts have tended to treat them interchangeably.[53]

6.74 The decision in *Moorov* was taken against the background of a law of evidence which, at least in theory, rejected the admissibility of evidence of similar facts as demonstrating propensity. The appellant relied, among other authorities, upon the decision of the Privy Council in *Makin v Attorney General of New South Wales.*[54] In a passage which was to form the basis of the English common law of similar fact evidence, the Lord Chancellor, Lord Herschell observed:

> "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 is 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. The statement of these general principles is easy, but it is obvious that it may often be very difficult to draw the line and to decide whether a particular piece of evidence is on the one side or the other."[55]

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[49] Ibid, para 14.
[50] Ibid, para 15.
[51] *Moorov v HM Advocate* 1930 JC 68 at 73.
[52] Discussion Paper, paras 5.16-5.23.
[53] See, for example, *AK v HM Advocate* [2011] HCJAC 52; 2011 SLT 915; 2011 SCCR 495 at para 10 (Lord Justice Clerk Gill)
[54] [1894] AC 57 (PC).
[55] Ibid, at 65.

6.75 While the court in *Moorov* did not specifically adopt the rationale of *Makin*, they appear to have been motivated by a similar dislike of propensity evidence. In the result, the appeal court was faced with the task of explaining an established and highly useful feature of Scottish criminal evidence – the ability of one complainer's evidence to corroborate that of another complainer to a similar charge – on some basis other than that the complainers' evidence showed that the accused was a person likely from his criminal conduct or character to have committed the offence for which he is being tried.[56] Although Moorov's conduct might more readily be seen as an example of a man with particular tastes seeking to satisfy them at every opportunity than as evidence of an "underlying unity of intent, project, campaign or adventure", it was possible to justify the mutual relevance of the various complaints as part of a course of conduct without the need to employ the type of propensity argument which was deprecated by the Privy Council in *Makin.*

6.76 Consultees expressed a range of views on the present "course of conduct" requirements. Sir Gerald Gordon suggested that any reformulation of *Moorov* "should require proof of a single and reasonably persistent course of conduct, and not a mere propensity to commit sexual offences." Findlay Stark suggested that the courts had recently adopted an excessively broad interpretation of "course of conduct" and that it should be exceedingly difficult to establish the existence of such a course of conduct where there was a substantial gap between the charges. In contrast, Professors Fiona Raitt and Pamela Ferguson considered that where there was a distinctive modus, evidence of other crimes could be compelling regardless of time gaps. Our only respondent from outside Scotland, Professor Mike Redmayne of the LSE, suggested legislating to remove the requirement to demonstrate a course of conduct, suggesting that one should instead rely upon a test based on an assessment of relevance.

6.77 So far as *Moorov* itself is concerned, we note that the preamble to the indictment against Moorov initially alleged that "having formed a scheme of procuring women into his employment, and gaining domination over them through his relationship with them as their employer for the purposes of compelling them to submit themselves to acts of sexual intercourse with them, and permitting him to commit acts of indecency towards them, he did in furtherance of this scheme, on various dates …" commit the acts complained of.[57] The appellant noted that "The Crown had abandoned any attempt to prove a scheme," and argued that "The preamble of the indictment was now to be treated as written out of it; and all that remained were the separate counts charging unconnected crimes against different women ranging over a lengthy period."[58] In response the Crown admitted that, the preamble of the indictment having not been proved, the case must be taken on the footing that "the appellant was charged with a series of separate criminal acts". The Crown further argued that that "was not material to the present question, if, … those acts formed part of one and the same course of criminal conduct. The nexus between the several acts was sufficient to establish a course of criminal conduct."[59]

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[56] Lord Justice General Clyde was explicit about the need to avoid reasoning from propensity: "The fact that a person is naturally susceptible to a particular kind of temptation when it presents itself in similar circumstances, and in consequence commits a series of more or less cognate offences, is in itself irrelevant to the question whether he is proved guilty of a similar offence for which he is at the moment standing his trial – however the man in the street might be inclined to be against him on that account." 1930 JC 68 at 75-76.

[57] Ibid, at 68.

[58] Ibid, at 70.

[59] Ibid, at 71.

6.78 So the Lord Justice General's postulation of a requirement to show that the individual occurrences were "subordinates in some particular and ascertained unity of intent, project, campaign or adventure, which lies beyond or behind – but is related to – the separate acts" was against the background first, of a failed attempt to prove such unity of intent and, second, a concession by the Crown that the "the appellant was charged with a series of separate criminal acts".

6.79 We would suggest, as we have already proposed in Chapter 5, that Scots law should recognise that where an accused is charged with a number of similar offences, evidence of each of those offences is relevant to the proof of the others on the basis that, taken together, such evidence shows the accused to have a propensity (or even simply a willingness) to commit crimes of that nature. As the Canadian Supreme Court observed in *R v Handy*:

> "Similar fact evidence is sometimes said to demonstrate a 'system' or *'modus operandi',* but in essence the idea of *'modus operandi'* or 'system' is simply the observed pattern of propensity operating in a closely defined and circumscribed context.
>
> References to 'calling cards' or 'signatures' or 'hallmarks' or 'fingerprints' similarly describe propensity at the admissible end of the spectrum precisely because the pattern of circumstances in which an accused is disposed to act in a certain way are so clearly linked to the offence charged that the possibility of mere coincidence, or mistaken identity or a mistake in the character of the act, is so slight as to justify consideration of the similar fact evidence by the trier of fact. The issue at that stage is no longer 'pure' propensity or 'general disposition' but repeated conduct in a particular and highly specific type of situation. At that point, the evidence of similar facts provides a compelling inference that may fill a remaining gap in the jigsaw puzzle of proof, depending on the view ultimately taken (in this case) by the jury."[60]

Once this is recognised, then there seems no reason to insist that evidence demonstrate a "course of conduct" in every case before it can be admitted as relevant, and therefore as potentially corroborative.

6.80 We think that the requirement – if it is still a requirement – to demonstrate a course of conduct, rather than simply to show an appropriate degree of similarity or to demonstrate a propensity, unnecessarily distorts the present law. It is a strain on the ordinary use of language to suggest that there can be a "course of conduct" comprising two incidents separated by 13 years, as in *AK v HM Advocate.* It is artificial to suggest that such a course of conduct may be shown because of the existence of some exceptional similarity between the crimes: the similarity does increase the weight of the evidence, but it does not (at least in an ordinary use of the term) convert two incidents, widely separated in time, into a course of conduct.

6.81 We consider that, once it is recognised that evidence of similar offences may be relevant as showing a propensity, it should not be necessary, as an additional requirement, to situate the offences as elements in a course of criminal conduct, and still less as demonstrating a "particular and ascertained unity of intent, project, campaign or adventure, which lies beyond or behind – but is related to – the separate acts."[61] We recommend:

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[60] 2002 SCC 56; [2002] 2 SCR 908 at paras 90-91.
[61] *Moorov v HM Advocate* 1930 JC 68 at 73.

17. There should no longer be a requirement to demonstrate a course of conduct, in order to enable evidence of similar conduct on a number of occasions to be mutually corroborative.

(Draft Bill, sections 2 and 4(2))

Corroboration between greater and lesser charges

6.82 Crown Office drew our attention to another area of uncertainty in the existing law, and invited us to consider whether the position should be clarified. It is whether it is possible, where charges differ in seriousness, for evidence of the lesser charge to corroborate the greater. In *HM Advocate v WB*[62] Lord Justice Clerk Grant, sitting as a trial judge, considered the application of mutual corroboration between charges of lewd practices with the accused's three stepdaughters and charges of incest with two of them. His Lordship held that the evidence of incest could corroborate the charges of lewd practices, but that evidence of lewd practices could not corroborate a charge of incest. He explained the reasoning thus:

> "It is clear on the evidence, if one accepts it, that what happened on the occasions when incest is alleged involved what in the preliminaries was indecency and lewdness (the girls were, of course, under sixteen) and then went further to incest. Accordingly, in my opinion, the evidence in regard to incest can validly be used as corroboration in regard to the charges of lewd practices. The greater here includes the lesser. On the other hand, I do not think the contrary is true. Incest is a very much more serious crime than lewd practices, and I think that it would be dangerous to treat evidence that a man had committed lewd practices towards A as indicative of his guilt of incest with B. If an indictment libelled lewd practices in respect of one girl and incest in regard to another, the first girl's evidence could not, in my opinion, be used to corroborate the very much more serious charge in regard to the second girl. On the other hand, as I have already indicated, the *Moorov* doctrine could apply the other way round."[63]

6.83 This opinion contains an attractively straightforward and logical-sounding idea – the greater includes the lesser, but not the contrary. But this is potentially misleading. It does not matter for the purposes of the present project, but Lord Justice Clerk Grant is effectively saying that the corroborating evidence can only support the evidence of incest if it establishes that the accused has committed another crime of equal seriousness. It can be assumed that the fact finder accepts the evidence of the principal complainer. There is accordingly credible evidence that the accused has committed incest. The question is not whether there is evidence of the accused's having committed other crimes equally serious. It is whether evidence that he has committed other crimes of the same kind, albeit not so serious, can support, or corroborate, the accepted evidence of his having committed the more serious offence.

6.84 As we noted in the Discussion Paper, evidence of a completed offence may be corroborated by evidence of an attempt at a similar offence.[64] We also noted that there were

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[62] 1969 JC 72; 1970 SLT 121.
[63] Ibid, at 74 and 122 respectively.
[64] Discussion Paper, para 5.43; *PM v Jessop* 1989 SCCR 324.

cases – notably *Coffey v Houston*[65] and *B v HM Advocate*[66] – in which the court had appeared to accept that evidence of significantly less serious versions of similar charges might corroborate more serious charges. We noted also Lord Justice Clerk Gill's *obiter* comment in *Stewart v HM Advocate*[67] to the effect that although *HM Advocate v WB* had stood unchallenged for nearly 40 years, there might be a case in which the similarities were sufficiently compelling as to allow evidence on a lesser charge to corroborate a greater.

6.85 We doubt whether it is correct to regard *HM Advocate v WB* as laying down a firm rule that evidence of a less serious offence can never corroborate evidence of a more serious offence. *WB* concerned corroboration between charges of lewd practices and charges of incest. It appears from the report that in each case the misconduct had begun with lewd practices, and had then, in relation to one or two of the girls, developed into incest. If we bear this in mind, then the crucial issue is not seriousness but relevance, and in particular whether it would be legitimate to find support for the particular claim that sexual intercourse had occurred between A and B on the basis that A had acted in a lewd manner towards C. Given that the offences in each case involved sexual misbehaviour of the same nature, leading in one or two to actual sexual intercourse, we would suggest that whether or not the evidence of incest was supported, or corroborated, by the evidence of lewd practices was a matter for the jury.

6.86 Regardless of the correct reading of *HM Advocate v WB*, we think that it is clear that there should be no rule which prevents evidence of a greater crime from being corroborated by evidence of a lesser, but similar, crime. The focus should not be upon the seriousness of the charges, but upon the nature of the conduct, its similarity, and thus its relevance. Once this focus is adopted, the general rule should apply: evidence that is relevant to the proof of a fact should be capable of corroborating other evidence relevant to the proof of that fact.

6.87 We recommend:

18. It should be made clear that evidence of less serious conduct of a similar nature is relevant to, and capable of corroborating, evidence of more serious conduct.

(Draft Bill, sections 2 and 5(c)(ii))

HOWDEN V HM ADVOCATE

6.88 One significant limitation of *Moorov* is that it may only operate where there is positive identification of the accused in respect of each offence. In the typical *Moorov* case, this will be the evidence of each complainer positively identifying the accused. But the courts have recognised that the identification need not come from an eyewitness: all that is required is some evidence that, if believed by the jury, would amount to evidence identifying the accused as the perpetrator of each offence.[68]

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[65] 1992 JC 80; 1992 SCCR 265; Discussion Paper para 5.45 (charge of indecent assault involving handling of child's private parts corroborated by evidence of sexual assault against other child consisting of causing her to expose herself and handling her breasts).
[66] [2008] HCJAC 73; 2009 JC 88; 2009 SCCR 106; 2009 SCL 266; Discussion Paper paras 5.47-5.52.
[67] [2007] HCJAC 32; 2007 JC 198; 2007 SCCR 303; Discussion Paper para 5.44.
[68] *Lindsay v HM Advocate* 1994 SLT 546 at 549 (Opinion of the Court, per Lord Justice General Hope).

6.89 We have set out the definition of the *Howden* doctrine at the beginning of this Chapter. In the case itself, the appellant had been charged with the attempted robbery of a building society and with the robbery of a bank. The two offences were committed within two weeks of one another. In relation to the attempted robbery of the building society, there was clear and sufficient evidence of identification; in relation to the bank robbery, the evidence of identity was only tentative: three eyewitnesses said that the accused resembled the robber, but none was able positively to identify him. In each case, witnesses described the perpetrator as having worn a baseball cap, a Barbour-type jacket, sunglasses and light training shoes. The trial judge directed the jury that if they could conclude that both incidents occurred, and could conclude beyond reasonable doubt that the perpetrator of each of these separate incidents was necessarily the same person, then evidence as to the identity of that perpetrator would be available to them, whether it related to the first or second incident. The appellant was convicted, and appealed against his conviction in relation to the bank incident on the basis that there was insufficient evidence to identify him as the perpetrator. Counsel for the appellant maintained that in order for there to be mutual corroboration, it was necessary to have a positive identification on each charge and that without such a positive identification, the exercise of looking to the similarities between the charges was misconceived.

6.90 Refusing the appeal, the High Court said:

> "In our opinion the present case has nothing to do with the *Moorov* doctrine, and the approach which the trial judge invited the jury to follow was a sound one and there was no misdirection. The jury had available to them the evidence from which they could conclude, based on the identifications given by the three employees there, that the appellant was the perpetrator of the incident in the building society. They were warned that the evidence of the employees in the bank was not of that character and that for this reason they could not convict the appellant of the second offence without some other evidence. What the trial judge then invited them to do was to look to the circumstantial evidence to examine the question of whether it was proved beyond reasonable doubt that it was the same person who committed both offences. The strength or otherwise of the identifications of the person who committed the offence in the bank was not of any importance in these circumstances, so long as the jury were satisfied beyond reasonable doubt by the circumstantial evidence that it was the same person who was responsible for both of them, and so long as they were satisfied beyond reasonable doubt that the appellant was the perpetrator of at least one of these offences. That approach was the one which the jury were told they could follow, and it is to be presumed from their verdict that they followed it."[69]

6.91 While in *Howden* there was some evidence, albeit tentative, which identified the accused as the perpetrator of the second crime, there is nothing in the logic of the case which demands that there be any independent evidence of identification. This has been recognised in subsequent cases: in *Townsley v Lees*,[70] a woman was charged with three thefts from elderly ladies who were induced to enter their gardens on the same pretext while the theft was committed in their houses by an accomplice. There was sufficient evidence (taking into account the operation of the *Moorov* doctrine) to identify the accused as the perpetrator of two of the three incidents, and the Appeal Court held that the sheriff was

[69] *Howden v HM Advocate* 1994 SCCR 19, at 24 (Opinion of the Court, per Lord Justice General Hope).
[70] 1996 SLT 1182; 1996 SCCR 620.

entitled, on the basis of *Howden,* to find that the accused was also guilty of the third, even in the absence of any independent evidence of identity in relation to that charge.[71]

6.92 The principle was neatly stated by the Appeal Court in *Gillan v HM Advocate*:

> "In a straightforward case involving two similar charges, the problem that we are now considering arises where there is full legal proof of identification on one charge, but a lack of any identification on the other. In our view, if the evidence shows that the two crimes were committed by the same person, then the evidence that the first was committed by the accused entitles the jury to convict him of the second.
>
> Counsel for the appellant referred to the basic principle of corroboration in relation to identification, namely that there must be evidence from two separate sources both of which point to the identification of the accused. She argued that in *Howden v HM Advocate,* as in this case, there was simply no identification that could be corroborated by any other evidence. In our view, this argument is unsound. In cases such as *Howden v HM Advocate* and *Townsley v Lees* there is identification. It comes from circumstantial evidence that the perpetrator on one charge was the same person who is identified as having been the perpetrator on the other.
>
> Counsel for the appellant has failed to persuade us that there is any flaw in the reasoning on which both of these decisions depend. In our view these cases were correctly decided. They establish a cogent and logical principle and we can see no need for it to be reconsidered."[72]

6.93 We agree that the principle identified in *Howden* is coherent and logical. Where the fact finder can be satisfied that two crimes were committed by the same person, evidence of identity in relation to one of the crimes is also evidence of identity in relation to the other. While the circumstances of application are different, the underlying principle is just the same as *Moorov*: where charges are similar, evidence in relation to one charge is also relevant to proof of the other. The only mystifying feature of the *Howden* line of authority is the Appeal Court's insistence that it "has nothing to do with the *Moorov* doctrine." On the contrary, we suggest that each is merely an example of the relevance of evidence of similar facts.

6.94 In the Discussion Paper we referred with approval to Peter Duff's view that it makes little sense to speak of "the *Howden* principle", since both *Howden* and *Moorov* are fundamentally concerned with the same principle; that is, identifying the circumstances in which evidence of one crime is relevant to the proof of another. We observed, however, that the practice of the courts did not prevent a jury from taking the evidence on one charge into account in considering another in circumstances where each charge was adequately corroborated: the tests in *Moorov* and *Howden* were applied only where corroboration was in issue. As such, we thought that it made sense to continue to regard *Moorov* and *Howden* as relating specifically to corroboration. As we said in paragraph 5.69, "*Moorov* and *Howden* do not set out the lower threshold of relevance for evidence to be taken into account by the jury, but they do define the standard of evidence which the court must look for in determining whether the evidence on one charge is of sufficient relevance to amount to corroboration."

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[71] Peter Duff is right to note that the High Court was rather disingenuous in attributing to the sheriff a two-stage analysis which applied *Moorov* to one pair of charges before separately considering the application of *Howden* to the remaining charge – Peter Duff, "Towards a unified theory of 'similar facts evidence' in Scots law: relevance, fairness and the reinterpretation of *Moorov*" 2002 JR 143 at 164.

[72] 2002 SLT 551; 2002 SCCR 502, at paras 19-22.

Conclusion

6.95 We were impressed by the comments of a number of our consultees who saw *Moorov* and *Howden* as examples of a broader principle of the relevance of similar fact evidence. In that regard, we have already remarked (at paragraph 6.24) upon the judges' comment that:

> *"Moorov* is arguably one particular application of the general principle that evidence of similar facts relating to events other than those of the charge which are relevant to an issue in the case is admissible. Likewise *Howden* may simply be an example of the application of the principle to circumstantial evidence of similar facts."

This observation of the judges, in response to the Discussion Paper, is wholly in line with the principle set out by Lord Mackay of Clashfern in *DPP v P*,[73] that:

> "Although there is a difference between the law of Scotland, which requires corroboration generally in criminal cases, and the law of England, which does not, the principles that determine whether one piece of evidence can corroborate another are the same as those which determine whether evidence in relation to one offence is admissible in respect of another."

6.96 In the light of the discussion above, and of the comments we have received, we are persuaded that what are known as the *Moorov* and *Howden* doctrines are simply particular manifestations of the general rules which we recommend should be set out in statute. Whether evidence of crime A is relevant to crime B is a matter of logic and common sense. If such evidence is relevant, it is in principle admissible. If it is admissible then it can support, or corroborate, the evidence in relation to crime B. The extent to which it corroborates is a matter for the fact finder. If general provision to that effect is made in statute, then it is entirely capable of adapting to any particular circumstances which may be thrown up in individual cases.

6.97 Accordingly, we recommend:

> **19. The *Moorov* and *Howden* doctrines should be subsumed into the general rules in relation to the relevance of evidence of similar conduct.**
>
> (Draft Bill, section 4)

[73] [1991] 2 AC 447 at 461.

Chapter 7 Use of Previous Convictions

Introduction

7.1 The use of previous convictions, as demonstrating the propensity of an accused person to commit crimes of the kind with which he is currently charged, is one of the most contentious issues which has arisen in our consideration of this Reference.

General

7.2 In this Chapter we consider the particular kind of evidence of similar facts which is represented by the previous convictions of the accused person. In our Discussion Paper, at Part 4, we analysed the current law relating to the leading of evidence of previous convictions. In Part 7 we identified six issues relevant to the consideration of the question, whether evidence of previous convictions should be admitted more generally. They were:

Issue 1 **General effect of a change on the right to a fair trial**

Issue 2 **What would evidence of previous convictions prove?**

Issue 3 **What practical difference would a change make?**

Issue 4 **Which previous convictions would be relevant?**

Issue 5 **What would be involved, in practical terms, in the proof of previous convictions?**

Issue 6 **Would it be necessary to balance probative value against prejudicial effect?**

In this Chapter we consider each of those issues again, in the light of the responses to the Discussion Paper, and set out our conclusions. But we start with an analysis of the current statutory framework.

BACKGROUND

7.3 Until the late nineteenth century, evidence of previous convictions was routinely led before juries. There was then a series of statutory interventions in the system. When the most recent of those developments – the passage by the Scottish Parliament of the Sexual Offences (Procedure and Evidence) (Scotland) Act 2002 – was being considered by the Judicial Committee of the Privy Council[1], several of the judges made comments which bear closer investigation. In particular, however, Lord Rodger of Earlsferry set out the various stages in the legislative progress, and briefly analysed their effect. Since any consideration of the use to which previous convictions might be put has to take place in the context of the statutory history, we gratefully quote the relevant passages from his judgment:

[1] *DS v HM Advocate* 2007 SC (PC) 1.

"63. It is as well to remember not only that article 6 [of the ECHR] does not rule out reference to an accused's previous convictions before the court reaches its verdict, but also that the common law of Scotland did not do so either. Until 1887, evidence was routinely led before juries to prove both that the accused had committed the crime libelled against him and that he had committed the same crime on one or more previous occasions - and so deserved a more serious punishment. The Crown evidence for the aggravation would take the form of an extract of the accused's previous convictions. In a trial for theft, evidence of the accused's previous convictions for theft was also led before the jury where the Crown had libelled that he was habit and repute a thief – another aggravation for purposes of punishment. See Alison, *Principles of the Criminal Law of Scotland* (1832), pp 296-307. In relation to such aggravations, Dickson, *The Law of Evidence in Scotland* (third edition, 1887), para 15, refers to the general rule against admitting evidence of an accused's bad character and comments:

> "In principle, the admission of such evidence is not an exception to the general rule; and the Court frequently directs the jury to disregard it in determining upon the main charge. But in practice juries attach considerable weight to this kind of evidence as bearing on the whole case."

64. Parliament changed all this by enacting Lord Advocate Macdonald's Criminal Procedure (Scotland) Act 1887 ("the 1887 Act"). Section 67 provided inter alia:

> "Previous convictions against a person accused shall not be laid before the jury, nor shall reference be made thereto in presence of the jury before the verdict is returned; but nothing herein contained shall prevent the public prosecutor from laying before the jury evidence of such previous convictions where, by the existing law, it is competent to lead evidence of such previous convictions as evidence *in causa* to support the substantive charge, or where the person accused shall lead evidence to prove previous good character..."

From that time onwards, it was no part of the jury's function when considering their verdict to decide whether the Crown had proved the accused's previous convictions. The judge now dealt with that matter after the jury had returned their verdict. So Scots law entered a new phase in which the accused's previous convictions were, on the whole, kept from the jury. In 1975 the relevant part of section 67 was re-enacted in section 160 of the Criminal Procedure (Scotland) Act 1975 ("the 1975 Act"). From there it found its way into section 101(1) of the 1995 Act which is in force today.

65. Of course, it has always been open to the accused and his representatives to introduce evidence of his previous good character in the hope of persuading the jury that he was not the kind of person who would have committed the crime in question. Where that evidence was misleading, the Crown could lead contrary evidence of the accused's previous bad character. Burnett, *Criminal Law* (1811), p 533, says:

> "neither is general character to be made the subject of evidence against the prisoner, unless where it is brought to meet a proof of general character offered on his part."

Dickson, The Law of Evidence in Scotland, para 15, says:

> "But the prosecutor is never permitted to attack the prisoner's character, unless the latter has set it up; and even then he *very seldom* goes beyond cross-examining the prisoner's witnesses on the point" (emphasis added).

In the 1887 Act Parliament clarified the position by positively providing in section 67 that the Crown could lead evidence of the accused's previous convictions where he led evidence to prove his previous good character. There was no requirement for the

Crown to obtain the leave of the court before doing so. This provision was retained in section 160(2) of the Criminal Procedure (Scotland) Act 1975.

66. The important thing to notice is that Parliament enacted this restriction to section 67 of the 1887 Act at a time when the accused could not himself give evidence and when his judicial declaration was only admissible as evidence against him. So Parliament could not have intended the evidence of the accused's bad character to be used for the purpose of assessing his credibility. Of course, the evidence was intended to help the jury to assess the credibility and reliability of the defence witnesses' evidence that the accused was of good character. But it was not simply designed to neutralise that evidence. *The sting of the provision – and, presumably, its intended deterrent effect – lay in the fact that the Crown evidence could go further and show that the accused was actually a man of bad character who had previously been convicted of crimes.* The jury must have been expected to take this evidence into account when considering all the other evidence in the case and deciding whether the Crown had proved that the accused had committed the crime in question. (emphasis added).

67. The Criminal Evidence Act 1898 introduced a wholly new question. Since the accused could now give evidence, could he be cross-examined so as to show that he was of bad character or had previous convictions? The general rule was that he could not. But section 1(f)(ii) allowed the prosecutor to apply to the court to cross-examine the accused on his previous convictions not only where he had led evidence of his good character but also where the nature or conduct of the defence had been such as to involve imputations on the character of the prosecutor or of the witnesses for the prosecution. This provision was consolidated as section 141(f)(ii) of the 1975 Act and again in section 266(4) of the 1995 Act.

68. In section 24(2) of the Criminal Justice (Scotland) Act 1995 Parliament, in effect, brought the power of the Crown to lead evidence of the accused's previous convictions under section 160(2) of the 1975 Act into line with the power in section 141(f)(ii). It did so by widening the former provision to cover cases where the defence led evidence or asked questions impugning the character of the prosecution witnesses or where the nature or conduct of the defence involved such an attack. At the same time the new section included a requirement for the Crown to obtain the permission of the court before leading this evidence. On consolidation, this wider provision became section 270 of the 1995 Act and was made an exception to section 101(1). For the same reasons as applied to the original provision in section 67 of the 1887 Act, evidence led under this extended provision – which comes into play even if the accused does not go into the witness box – cannot simply have a bearing on his credibility. It must also be intended to provide material for the jury to take into account in reaching their overall conclusion as to whether the Crown has established the accused's guilt.

69. The opinion of Lord Justice Clerk Ross in *Leggate v HM Advocate* 1988 JC 127 shows how the Scottish courts had adopted an interpretation of section 1(f)(ii) of the Criminal Evidence Act 1898 and section 141(f)(ii) of the 1975 Act which was more favourable to accused persons than the one adopted by the English courts. Although in *Leggate* the Full Bench changed that and adopted an interpretation which was in line with previous English and Commonwealth authority, experience and anecdotal evidence suggest that in practice remarkably little changed under section 141(f)(ii) of the 1975 Act or under its successor, section 266(4) of the 1995 Act. Presumably, as the Lord Justice Clerk confidently expected, at p 147, prosecutors exercised "a wise judgment" as to whether it was "really necessary in the particular circumstances to invite the court to exercise its discretion in favour of the Crown…." Similarly, little use was made of the Crown's power to apply to lead evidence of previous convictions under section 270 of the 1995 Act."

Effect of the legislation – 1887-1898

7.4 Following section 67 of the 1887 Act, it was competent for the prosecution to lead evidence of previous convictions where:

(a) it was competent, in terms of the pre-existing common law, to do so as evidence *in causa* in support of the substantive charge; or

(b) where the accused had led evidence as to his own good conduct.

7.5 As Lord Rodger points out, the second part of the exception to the general prohibition must have been intended to have a "deterrent" effect on any decision by the accused to lead evidence as to his own good character.

1898 - 1995

7.6 The 1898 Act permitted the accused to give evidence in his own behalf, and protected him by providing that, if he did so, he could not be cross-examined as to his bad character or previous convictions unless:

(a) he or his counsel had questioned prosecution witnesses as to his (the accused's) good character; or

(b) he had given evidence as to his own good character; or

(c) the nature or conduct of his defence was such as to make imputations as to the character of the prosecutor or the prosecution witnesses.

7.7 This was the first mention in statute of the sanction against the accused in relation to imputations on the character of the prosecutor or the prosecution witnesses. And it will be noted that it applied only in the context of the 1898 Act, that is, where the accused had given evidence and was accordingly liable to be cross-examined. Otherwise, the 1898 Act did not repeal section 67 of the 1887 Act, which accordingly remained in force.

1995-2002

7.8 Section 24 of the Criminal Justice (Scotland) Act 1995 completed the picture, by permitting the leading of evidence as to the accused's previous convictions where the nature or conduct of the defence was such as to make imputations on the character of the prosecutor or the prosecution witnesses, but where the accused had not given evidence personally. That provision now appears as section 270 of the 1995 Act.

2002-date

7.9 In a fasciculus of sections which were inserted as sections 274-275B of the 1995 Act, Parliament inserted a general prohibition of the cross-examination of a complainer in a sexual assault case as to his or her character, sexual or otherwise, or as to his or her previous sexual behaviour. But the court was given a discretion to allow such questioning under certain conditions, one of which was that the court considered that the probative value of the evidence sought to be led would be likely to outweigh the prejudicial effect of the evidence on the proper administration of justice. In this context, the "proper administration of justice" included consideration of the complainer's rights to dignity and privacy under

Article 8(1) of the Convention. Finally, the sections provided that, where such evidence was allowed, any evidence of convictions for sexual offences by the accused person should be presumed to be relevant, and should be disclosed to the jury unless the court were persuaded that such disclosure would not be in the interests of justice. In this instance, too, the "interests of justice" were not further defined.

Summary

7.10 Leaving aside the particular provisions of the 2002 Act, the statutory position, as consolidated in the 1995 Act, was that legislation provided for similar possibilities whether the accused had or had not given evidence.

Cases where evidence of previous convictions is admissible in proof of current offence

7.11 Whether or not the accused gave evidence, evidence of previous convictions could be led where that was competent to support the substantive charge against the accused. Those provisions are to be found in sections 101(2)(b)[2] and 266(4)(a).[3] These provisions have been interpreted by the courts as applying only to cases in which the proof of a previous offence is an integral part of the proof of the current offence. For instance, where a person is charged with driving while disqualified, it is necessary to prove the disqualification. The judges, in their response to the Discussion Paper, confirmed that this was indeed their approach, while very fairly adding:

> "We readily acknowledge that interpretations of these provisions may be advanced to support attempts to refer to previous convictions for other purposes …".

Cases where accused has given evidence

7.12 The courts have also considered the case where the accused has given evidence, and has either sought to set up his own good character, or has made imputations against that of the prosecutor or the prosecution witnesses. These relate to what was originally enacted as section 1(f)(ii) of the 1898 Act, and is now section 266(4) of the 1995 Act. In this case it is also clear what line the courts have taken. This is as a result of the leading case of *Leggate v HM Advocate*.[4] (This case was mentioned in the Discussion Paper, but in view of its importance in this area of the law, we rehearse here what we said there.)

7.13 Mr Leggate was accused of robbery, and was alleged to have admitted the crime, and to have taken police officers to the place where he had hidden the gun. His position was that the police had taken him to that place, and had fabricated his admission. The trial judge accepted a submission from the advocate depute that this amounted to an imputation on the character of the Crown witnesses, and allowed the advocate depute to cross-examine the accused on his previous convictions. Having been convicted, the accused appealed on the basis that the attacks on the conduct of the police officers were made wholly and

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[2] "… nothing in this section … shall prevent evidence of previous convictions being led in any case where such evidence is competent in support of a substantive charge."

[3] "(4) An accused who gives evidence on his own behalf … shall not be asked … any question tending to show that he … has been convicted of … any offence other than that with which he is then charged … unless –

(a) the proof that he has committed or been convicted of such other offence is admissible evidence to show that he is guilt of the offence with which he is then charged."

[4] 1988 JC 127.

necessarily for the purposes of his defence, and should not attract the exception in what was then section 141(1)(f)(ii) of the 1975 Act.

7.14 The appeal was heard by a Full Bench, whose opinion was delivered by the Lord Justice Clerk (Ross). The Court found, first, that "merely" to assert that Crown witnesses had committed perjury was not enough to constitute an imputation on their character, for the purposes of the section:

> "Parliament cannot have intended that the subsection would come into play as soon as it was suggested on behalf of an accused person that a Crown witness was lying, because if that were so, it would be impossible in most cases for an accused person to conduct any real defence without losing the protection of the Act. Accordingly, in our opinion, it must be assumed that Parliament did not intend that the subsection should apply merely because it was asserted that a Crown witness was lying. The imputations on the character of a Crown witness which are referred to in the subsection must mean something more than mere assertions of perjury on the part of the Crown witness."[5]

7.15 This is a remarkable proposition. The relevant witnesses were police officers, tasked with apprehending criminals, and securing the safety of the general public. It is hard to imagine a more damaging attack on their honesty or, in the words of the statute, a more serious imputation on their character, than to allege that they were perjuring themselves in order to secure the conviction of a man who was, *ex hypothesi,* innocent.

7.16 The Court did not go on to specify in what extraordinary circumstances the conduct of the defence might amount to an imputation on the character of a Crown witness. This has had the expected result with regard to at least one other group of practitioners. In their response to the Discussion Paper, Crown Office indicated that:

> "In terms of sections 266 and 270 of the 1995 Act, it is not particularly clear what is necessary to amount to "impugning" the character of the complainer or witnesses or evidence to establish the good character of the accused. For that reason, there is clearly potential to further clarify the application of these provisions."

7.17 Second, the Court found that it did not matter, for the purposes of the section, whether it was "necessary" for the defence to make such imputations. If the conduct of the defence had indeed amounted to such imputations, then that was sufficient to bring the case within the terms of the subsection:

> "We agree with the advocate-depute that where the nature or conduct of the defence is such as to involve imputations on the character or Crown witnesses, the case falls clearly within the terms of the subsection, and that it matters not whether it has been necessary for the accused to conduct his defence in this way to enable him fairly to establish his defence. Whether or not cross-examination on behalf of an accused person is necessary to enable the accused fairly to establish his defence is irrelevant to the question of whether or not he is liable to cross-examination upon his character in terms of the subsection."[6]

7.18 Third, and having taken one pace towards giving some content to the section, the Court then took two paces backward. The judgment went on to assert:

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[5] Ibid, at 142 (Opinion of the Court per Lord Justice Clerk Ross).
[6] Ibid.

> "We agree, however, that even where a case is shown to fall within the terms of the subsection, it is still for the court to decide whether cross-examination of the accused about his character should be allowed, and that in exercising its discretion on this matter the fundamental consideration must be to ensure that there is a fair trial."[7]

7.19 This assertion is without any foundation in the statute. There is nothing in section 141 about the Court's exercising a discretion, where the requirements of the statute are met, as to whether or not the evidence should be put before the jury. Indeed, it is noteworthy that when section 24 of the 1995 Criminal Justice Act completed the picture (as mentioned above, at paragraph 7.8), it specifically conferred a discretion on the Court. The fact that Parliament considered it necessary to take such action may reasonably indicate that – at least in the view of Parliament – it was not open to the Court to infer that a discretion would in any event exist.

7.20 Finally, the Court made another assertion, again not obviously justified by the legislation:

> "In cases where cross-examination of an accused on his previous convictions or character is permitted the reason is that these may have a bearing upon his credibility. Such evidence is not, however, relevant to his guilt of the offence charged on the indictment. It may therefore be necessary to consider whether allowing cross-examination of the accused might be unduly prejudicial to him so far as proof of the offence charged is concerned."[8]

Contrary to the usual position in Scotland, that the weight and significance of evidence, once admitted, is for the finder of fact (cf. Chapter 3, at paragraph 3.53), the Court in *Leggate* asserts that evidence as to previous convictions, when admitted for the purposes of what is now section 266(4) of the 1995 Act, goes only to the credibility of the accused. As we have noted, there is nothing in the statute to justify this limitation on the purpose to which such evidence can be put. And the *dictum* applies even where the previous convictions of which evidence is led have no bearing upon credibility.

7.21 There can be little doubt that, in general terms, informing the fact finder, in this case, the jury, that the accused has previous convictions will be a factor in the judgment they form as to the likelihood of his having committed the offence with which he is charged. Elsewhere in this Report we have argued that such evidence, being relevant, should nevertheless be placed before the jury. It would be for the judge to direct the jury as to the significance and value of the evidence. And there will no doubt be cases in which the prejudicial effect of evidence of previous convictions will outweigh their probative value. But if the only use to which evidence of previous convictions can be put, in cases where the accused has given evidence, is in relation to his credibility, then it is easy to understand the Court's final observation, that:

> "We … confidently expect that prosecutors will exercise a wise judgment as to whether it is really necessary in the particular circumstances to invite the court to

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[7] Ibid.
[8] Ibid, at 146.

> exercise its discretion in favour of the Crown and thus to allow cross-examination of the accused about his character."[9]

The result of the Full Bench judgment in *Leggate* is, accordingly, that the statutory provisions relating to the disclosure of the previous convictions of the accused have been effectively emasculated. The Court's comment above, that:

> "Parliament cannot have intended that the subsection would come into play as soon as it was suggested on behalf of an accused person that a Crown witness was lying …"

together with their other assertions as to the meaning of the statute, have effectively rendered it a dead letter. We doubt whether that was Parliament's intention. In any event, it appears to us that there is no reason why Parliament should not express its intention again.

Cases where the accused does not give evidence

7.22 We have focused on the legislative provisions relating to cases where the accused has given evidence, because those are the provisions which have been most frequently examined by the courts. There is little or no judicial authority on the other side of the legislative package, i.e. the case where the accused does not give evidence, but the nature or conduct of the defence is such as to cast imputations on the character of the prosecutor or the prosecution witnesses. We consider below, at paragraphs 7.41-7.64, the value of evidence as to previous convictions, in a case where credibility does not arise, because the accused has not given evidence.

Relevance and presumption in favour of disclosure

7.23 Before turning to look at other approaches to this matter, there is one other aspect of the decision in *DS v HM Advocate* which we should mention.

7.24 One of the difficulties in allowing evidence of previous convictions is deciding which previous convictions are relevant. Since the fasciculus of sections inserted by the 2002 Act is aimed at the protection of the complainer in relation to allegations of sexual offences, section 275A deals with this difficulty by providing that all convictions for sexual offences, defined largely in terms of the list of such offences in section 288C of the 1995 Act, are to be considered to be relevant.

7.25 The substantive grounds for objection to the production of such previous convictions are that they do not in fact relate to the accused, or that to lay them before the fact finder would not be "in the interests of justice".[10] But if they relate to the accused, and fall within the terms of section 288C, then their disclosure is to be presumed to be in the interests of justice.[11]

7.26 It is against that background that the judge has to decide whether it is in fact in the interests of justice for disclosure to be made. It is instructive to compare subsection (7) with other cases in which the court has been given, or has asserted, a discretion. As we

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[9] Ibid, at 147.
[10] 1995 Act, s 275A(4),
[11] Ibid, s 275A(7).

observed, above, at paragraph 7.19, the court was willing, in *Leggate v HM Advocate,* to assert a discretion which did not appear in the statute. In section 270(2),[12] it is made clear that the court has a wide discretion.

7.27 It might have been thought that when Parliament put the matter as set out in subsection (7), its intention was to place a rather higher hurdle in the way of a decision not to allow such evidence than would have been the case had the subsection simply conferred a discretion on the court to consider whether or not to admit the evidence. The flavour of the provision is stronger than that.

7.28 In the event, that is not the approach which has been taken. At paragraph 48 of his judgment in *DS V HM Advocate,* Lord Hope states:

> "Turning to section 275A(7) in particular, I consider that it ought to be read, compatibly with the accused's article 6 Convention right, as doing no more than set out the default position that will apply if the accused does not make an objection on the ground mentioned in para (b) of subsection (4). *There is no burden on the accused to do more than make the objection.* If an objection is made the court must consider it on its merits as an objection made under that paragraph. Of course, the weight that is attached to it will depend on the issues raised and the information that is laid before the court to support it. *But the presumption should be disregarded by the court once it has reached the stage of deciding what weight it should attach to the objection.*"

7.29 If it was the intention of Parliament to set a higher standard for the treatment of evidence of previous convictions than applies in the other provisions of the 1995 Act which bear upon that matter, then it would appear that the language used has not secured the result desired.

7.30 Against that background, we turn to the considerations discussed in Part 7 of the Discussion Paper, in the light of the comments which we have received.

Issue 1 – General effect of a change on the right to a fair trial

7.31 None of the persons or bodies who commented upon the Discussion Paper challenged our conclusion (based upon the judgment of the Judicial Committee of the Privy Council in *DS v HM Advocate*[13]), that to lead evidence of previous convictions is not generally incompatible with an accused person's Convention rights. Accordingly, as we indicated at paragraph 7.24 *et seq* of the Discussion Paper, the matter is one of policy, of the precise point at which Parliament decides to balance the rights of the public in securing the conviction of persons guilty of crimes against the rights to be given to an individual charged with an offence.

7.32 In the Discussion Paper we referred to the current statutory structure as being "arbitrary, illogical and uncertain". Broadly, the academic respondents agreed with our criticism, as did PW Ferguson QC. On the other hand, bodies representing practitioners concerned with defending persons accused of crimes were generally of the view that the

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[12] "270(2) Where this section applies *the court may, … on the application of the prosecutor, permit the prosecutor to lead evidence* that the accused has committed, or has been convicted of … offences …" (emphasis added)

[13] 2007 SC (PC) 1.

current framework was satisfactory or, at least, in the view of the Law Society of Scotland, "not unsatisfactory". In particular, the Faculty described the present system as "elegant and eminently workable" and as having "stood the test of time". Crown Office, on the other hand, did not consider that the present system, under sections 266 and 270, worked well. In particular, they did not feel that it was clear what might amount to "impugning" the character of the complainer or witnesses, or evidence to establish the good character of the accused.

7.33 It is of course, upon one view, entirely laudable that those who are concerned with defending persons accused of crimes should understand how the system works, and be comfortable with its implications for their clients. But a familiarity with the present rules does not in itself amount to a justification for them.

7.34 The judges took exception to our view that it was not possible to see a clear policy running through the present provisions. They considered that the policy was fairly clear:

> "The main objective of each of the provisions [sections 270 and 266] is to level the playing field in relation to credibility and reliability. We readily acknowledge that interpretations of these provisions may be advanced to support attempts to refer to previous convictions for other purposes, but the original policy behind them seems to be clear ... "

We are not sure that all the elements of the current statutory framework can adequately be explained by that analysis. It seems to us that, whatever may have been the basis for section 1 of the 1898 Act (as replicated in section 266(4) of the 1995 Act), there can be little doubt as to the underlying policy of section 67 of the 1887 Act (as replicated in section 270 of the 1995 Act). As Lord Rodger of Earlsferry pointed out in *DS v HM Advocate:*

> "66. The important thing to notice is that Parliament enacted this restriction to section 67 of the 1887 Act at a time when the accused could not himself give evidence and when his judicial declaration was only admissible as evidence against him. So Parliament could not have intended the evidence of the accused's bad character to be used for the purpose of assessing his credibility. Of course, the evidence was intended to help the jury to assess the credibility and reliability of the defence witnesses' evidence that the accused was of good character. But it was not simply designed to neutralise that evidence. *The sting of the provision – and, presumably, its intended deterrent effect – lay in the fact that the Crown evidence could go further and show that the accused was actually a man of bad character who had previously been convicted of crimes.* The jury must have been expected to take this evidence into account when considering all the other evidence in the case and deciding whether the Crown had proved that the accused had committed the crime in question."[14]

7.35 In our view these provisions go beyond merely "levelling the playing field" in relation to credibility and reliability. And it is clear from the case of *DS v HM Advocate* that section 275 of the 1995 Act cannot be explained simply in terms of credibility or reliability. We consider the possible value of previous convictions, as evidence, below. For the present, we observe that even if the policy of sections 266 and 270 is to level the playing field in relation to credibility and reliability, that is a difficult policy to sustain upon logical grounds.

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[14] Emphasis added.

7.36 We note from Lord Rodger's comments, quoted above, that the restriction to section 67 of the 1887 Act might be assumed to have been intended to have a deterrent effect. If an accused person's defence took the form of an attack on the credibility of a prosecution witness, then his previous convictions would be laid before the jury. Another aspect of the same point appears in the opinion of Baroness Hale of Richmond in *DS v HM Advocate,* where her Ladyship puts the matter – of the justification for section 275 of the 1995 Act – in a wider context. At paragraph 95 she observes:

> "95. …The Convention is often about striking the right balance – usually between the interests of the community and the rights of individuals but sometimes between the rights of different individuals. There is a positive obligation under article 8 to protect the physical and moral integrity, including his or her sexual life, of every individual. As the Strasbourg court held in *X and Y v The Netherlands* (1985) 8 EHRR 235, para 27:
>
> > 'This is a case where fundamental values and essential aspects of private life are at stake. Effective deterrence is indispensable to this area and it can be achieved only by criminal law provisions; indeed it is by such provisions that the matter is normally regulated.'
>
> That case was about a legal system which denied effective protection to a mentally disabled young woman. *But a legal system which allows wide-ranging cross examination about the sexual history of a complainant, clearly aimed at prejudicing the jury against her, while prohibiting any attack upon the sexual history of the accused person, might one day be held to be incompatible with the effective deterrence required by article 8*."[15]

7.37 This raises the question, whether the Article 8 rights of complainers or other witnesses might justify some limitation on the Article 6 rights of accused persons. It remains to be seen whether the courts will develop this idea further. For ourselves, as we have already indicated in this Report, we are in no doubt that the right to a fair trial is absolute. The securing of a person's rights under Article 6 is one of the aspects of the public interest which justify a breach of the protection afforded by Article 8(1) of the Convention. In that regard, it appears to us that the provisions of section 275 of the 1995 Act go as far as it is legitimate to go, under the Convention, to protect the Article 8 rights of complainers and other witnesses.

7.38 In regard to the central issue, whether the aim of sections 266 and 270 is to "level the playing field" or to produce a "deterrent effect" on the handling of the accused's defence, we do not consider that either approach constitutes an adequate policy justification for these sections. We revert to the comment which we made in the Discussion Paper. If there is evidence that a prosecution witness is unreliable, then that evidence should be before the fact finder. Similarly, if an accused person's previous convictions are relevant either to the question of his reliability or credibility or more widely, then that evidence should be before the fact finder.

7.39 To link the two propositions is at best potentially to deny the fact finder access to relevant information which it is entitled to have. At worst, it may result in putting before the fact finder evidence which is not relevant to any issue which is of consequence in the

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[15] Emphasis added.

proceedings. That is either to waste the time of the court, or to prejudice the fact finder, or both. We recommend:

20. The existing statutory framework relating to the leading of evidence of previous convictions should be replaced with one which focuses on the relevance of the previous convictions to an issue which is of consequence in the proceedings.

(Draft Bill, sections 1 and 4)

7.40 This is not to say that there is no difficulty over the possibility that the accused will attack the credibility of the prosecution or its witnesses, without justification. But it would be possible to exercise some control over unjustified attacks, apart from the current, and ineffective, "*in terrorem",* approach. We are of the view – and the judges in our Reference Group agreed – that the ordinary standards of professional conduct of counsel and solicitors, together with the court's power to control proceedings before it, would suffice to solve any problem which may arise.

Issue 2 – What would evidence of previous convictions prove?

7.41 The second issue discussed in Part 7 of the Discussion Paper was what could be proved by evidence of previous convictions. This is of course a matter which we have already discussed, in general terms, in our passage on propensity, at paragraphs 5.55-5.75. But it is in many ways the most difficult issue in this Reference, and we make no apology for rehearsing the argument here, in the particular context of the present regime as to the leading of evidence of previous convictions.

7.42 The basic rule at present is that laid down by the Full Bench decision in *Leggate v HM Advocate,*[16] and it is to the effect that such evidence goes only to credibility, and cannot assist in relation to the crucial facts of the case. That decision was of course taken on the statutory structure prior to the passing of the Sexual Offences (Procedure and Evidence) (Scotland) Act 2002 ("the 2002 Act"), which inserted the new versions of sections 274-275B into the 1995 Act.

7.43 As we have seen, those provisions were the subject of an appeal to the Judicial Committee of the Privy Council in the case of *DS v HM Advocate.*[17] In that case the argument related to section 275A of the 1995 Act. That section provides that where, by virtue of section 275, an accused person is allowed to lead evidence as to the complainer's sexual history or conduct, any previous convictions of his which are for a sexual offence are to be laid before the fact finder, and it is to be presumed that all such convictions are relevant. Like the analogous provisions of section 67 of the 1887 Act, and section 24 of the Criminal Justice (Scotland) Act 1995, the procedure does not depend to any extent upon whether or not the accused gives evidence, and the evidence of previous convictions can have nothing whatsoever to do with his credibility or otherwise. (Of course, if his credibility *does* become an issue, because he decides to give evidence, his previous convictions may have a bearing also on his credibility, but that cannot be the basis upon which the evidence of those convictions is admitted.)

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[16] 1988 JC 127.
[17] 2007 SC (PC) 1.

7.44 This of course raises the question of why the evidence *is* to be admitted. For what purposes can the fact finder use it?

7.45 The object of the sections which provide for the admission of the evidence is characterised, by the judges in the Privy Council, as being "deterrence". Lord Rodger of Earlsferry referred[18] to the "intended deterrent effect" of the exception to the prohibition in section 67 of the 1887 Act (which was enacted at a time when the accused could not give evidence). But, if that deterrent does not work, and the evidence of previous convictions is led, what is its effect?

What is the effect of the evidence?

7.46 If the effect of the evidence cannot have a bearing on the credibility of the accused, then to what issue in the trial is it relevant? In *DS v HM Advocate,* Lord Rodger observed that, in terms of sections 274-275A:

> "83. […]The fact that sec 275A would operate even where there was no evidence or statement by the accused shows that his previous convictions would not be intended to have a bearing only on his credibility.
>
> 84. This conclusion is confirmed by another prominent feature of section 275A: the only previous convictions which would be laid before the jury would be previous convictions for sexual offences. As Lord Brown of Eaton-under-Heywood pointed out during the hearing, such a limitation would make little sense if the only purpose of adducing the previous convictions was to attack the accused's credibility. For that purpose previous convictions for dishonesty or for, say, perjury would be much more to the point. Yet they are quite deliberately excluded. The only sensible conclusion is that the jury are entitled to have regard to the accused's previous convictions when deciding whether the Crown has proved its case."

7.47 He then went on to say:

> "86. Of course, an accused's previous convictions are not evidence that he committed the crime with which he is charged. Nor could they ever constitute corroboration of the evidence given by the complainer and any other witness on whom the Crown relied to prove the crime. The presiding judge would require to make this clear in his directions to the jury. The previous convictions would simply be a factor which the jury would be entitled to take into account when deciding whether to accept the evidence led in support of the Crown's version of events. If this amounts to a limited departure from the usual Scottish rule against adducing evidence of similar facts, then it is one which the legislature is entitled to make."

7.48 This passage seems to have less internal consistency that one might expect, having regard to its author. It reflects a similar passage in the judgment of Lord Hope of Craighead, at paragraph 53. His Lordship was examining the guidance given by the (English) Court of Appeal in the case of *R v Hanson,*[19] in which the Court considered the way in which judges should advise juries as to how to approach evidence of previous convictions adduced by virtue of the Criminal Justice Act 2003. The Court had indicated that:

> "Our final general observation is that, in any case in which evidence of bad character is admitted to show propensity, whether to commit offences or to be untruthful, the

[18] At para 66 of his opinion.
[19] [2005] EWCA Crim 824; [2005] 1 WLR 3169; [2005] 2 Cr App R 299.

> judge in summing up should warn the jury clearly against placing undue reliance on previous convictions. Evidence of bad character cannot be used simply to bolster a weak case, or to prejudice the minds of a jury against a defendant. In particular, the jury should be directed: that they should not conclude that the defendant is guilty or untruthful merely because he has these convictions; that, although the convictions may show a propensity, this does not mean that he has committed this offence or been untruthful in this case; that whether they in fact show propensity is for them to decide; that they must take into account what the defendant has said about his previous convictions; and that, although they are entitled, if they find propensity as shown, to take this into account when determining guilt, propensity is only one relevant factor and they must assess its significance in the light of all the other evidence in the case."[20]

After quoting this passage, with approval, Lord Hope went on to say:

> "A jury in Scotland would, of course, be told that propensity to commit offences cannot provide corroboration in support of the Crown's case."

7.49 These *dicta* by Lords Hope and Rodger are reflected in the suggested direction from the Jury Manual, in relation to evidence admitted under section 275A. We were referred to that suggested direction by the judges in their response to the Discussion Paper. It says, *inter alia*:

> "The accused's record can't be used to bolster up a weak prosecution case; it can't be used to create prejudice against him. You can't conclude he's guilty of this crime just because he has these previous convictions. They may show his propensity to commit crimes of this sort, but they don't mean that he has committed the crime charged here. *They aren't proof of his guilt of the crime charged, or corroboration of other evidence pointing to his guilt. They only point to propensity.* Whether they do show that is something you have to decide. In doing that you will have to take into account what the accused has said about them. If your view is they do show that propensity, you can take that into account in deciding if you accept the Crown case. *But remember, it's only one relevant factor,* and its significance has to be looked at in light of the other evidence in the case."[21]

7.50 We would observe, in passing, that the suggested direction is itself somewhat ambiguous. The first passage which we have emphasised reflects the position taken by Lords Hope and Rodger. But the second emphasised passage indicates that the evidence is a "relevant factor". It is not explained to what it can be relevant, if it provides neither direct evidence of, nor corroboration of evidence of, the guilt of the accused.

7.51 It would appear, on the basis of these *dicta,* that the courts in Scotland are of the view that it is competent, in the light of the provision of section 275A, to lead evidence as to an accused person's previous convictions. It would further appear that that evidence may satisfy the jury that the accused person has a propensity to commit crimes of the kind with which he is charged. The jury would then be told that evidence of previous convictions is not evidence that the accused committed the crime with which he is charged. Thus far the position seems unexceptionable.

7.52 But the jury would also be told that previous convictions could never provide corroboration of the evidence of the complainer or any other witness to the crime. This last

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[20] Ibid, at para 18.
[21] Emphasis added.

step seems more difficult. It is clear that evidence of previous convictions cannot constitute direct evidence that the accused has committed the crime with which he is charged. But why should it not support other evidence that he has committed the crime? If that is in fact the position in Scots law, it is widely at variance not only with Scottish practice in other cases, but also with that in other jurisdictions. We refer to our discussion of propensity, at Chapter 5 of this Report.[22]

7.53 So far as Scottish practice is concerned, the position as set out in *DS v HM Advocate* seems inconsistent with the general principle set out in the Full Bench decision in *Fox v HM Advocate,*[23] in which the Lord Justice General, Lord Rodger of Earlsferry, set out the Scottish position with regard to circumstantial evidence. He observed, *inter alia:*

> "While evidence can provide corroboration only if it is independent of the direct evidence which it is to corroborate, the evidence is properly described as being corroborative because of its relation to the direct evidence: it corroborates because it confirms or supports the direct evidence. The starting point is the direct evidence. So long as the circumstantial evidence is independent and confirms or supports the direct evidence on the crucial facts, it provides corroboration and the requirements of legal proof are met."[24]

7.54 If that is the general rule, then it would appear that there must be something particular about the nature of evidence of propensity that makes it impossible to use it for the purposes of corroboration. That is a difficult proposition, in relation to other aspects of the law on corroboration. Essentially, evidence that the accused has been convicted of similar offences in the past is of the same nature as evidence that he has assaulted other complainers in a case to which the *Moorov* doctrine applies. Where *Moorov* is used, the prosecutor is asking the fact finder to find corroboration of the allegations made by one complainer in the similar allegations made by another complainer.

7.55 It is of course the case that some formulations of the *Moorov* doctrine still attribute value to the notion of an underlying course of criminal conduct, demonstrated and sufficiently established by the individual complaints spoken to by the individual victims. That is one of the aspects of the *Moorov* doctrine in relation to which the courts have taken a range of views in recent years. In that regard we note that persons are not normally accused of a course of criminal conduct, but with individual assaults or rapes. The interpolation of the *Moorov* doctrine with its requirement of a "course of conduct", as justifying the use of evidence of other assaults, is a device to satisfy the requirements of the law on corroboration. We have recommended, at paragraph 6.81, that that requirement should be abolished.

7.56 But it is just as coherent, and, we think, more in accordance with common sense, to treat the individual assaults as separate crimes, and to categorise the evidence of the individual complainer as direct evidence in relation to the attack on her, and circumstantial evidence in relation to the attacks on the other complainers.

7.57 Approaching the matter in that way, what is happening is that the fact finder is asked to find support for the direct evidence of each of the complainers in the circumstance of the

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[22] See paras 5.55-5.75.
[23] 1998 JC 94.
[24] Ibid, at 100.

accused's having assaulted another complainer in the same way. The evidence of each complainer is direct in relation to the assault against her, but indirect, or circumstantial, in relation to the assault against the others. It is the propensity of the accused to commit assaults of that sort, as shown by the evidence of the other complainers, which supports, or corroborates, the direct evidence of each of them. The extent of the corroboration afforded by the evidence of the other complainer will be a matter for the fact finder. Clearly, the requirement that the fact finder should believe the evidence of each of the complainers will remain.[25] If either (or any) of the complainers fails to persuade the fact finder that she is a truthful, reliable witness, her evidence will neither prove the alleged offence against herself nor corroborate the evidence given by the other complainer(s).

Similar fact evidence generally

7.58 The extent to which separate allegations by a number of complainers corroborate those made by any of them is a matter for the jury to determine. The jury may accept the evidence of the accused, that all, or some, of the complainers had consented to sexual intercourse. In that event the evidence of those complainers will not support that of the complainers whose evidence the jury accept. As Lord Justice General Rodger put the matter in *Fox v HM Advocate:*[26]

> "[…] [I]t is of the very nature of circumstantial evidence that it may be open to more than one interpretation and that it is precisely the role of the jury to decide which interpretation to adopt. If the jury choose an interpretation which fits with the direct evidence, then in their view - which is the one that matters - the circumstantial evidence confirms or supports the direct evidence so that the requirements of legal proof are met. If on the other hand they choose a different interpretation, which does not fit with the direct evidence, the circumstantial evidence will not confirm or support the direct evidence and the jury will conclude that the Crown have not proved their case to the required standard."

Other dicta as to corroborative value of evidence of previous convictions

7.59 In the case of previous convictions, there is an impressive array of judicial and other *dicta* to the effect that they can corroborate direct evidence in relation to a current charge. In relation to *DS v HM Advocate* itself, Sir Gerald Gordon observed, in his commentary on the decision:

> "[I]f it is relevant evidence it is difficult to see why it should not be available as corroboration. Lord Rodger says at para 86 that previous convictions are not evidence that the accused committed the crime charged, but would simply be a factor the jury would be entitled to take into account in assessing the Crown evidence. It is, of course, clear that in itself a previous conviction does not prove present guilt, but it does at least support the Crown case, or would be regarded by any layman or juror

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[25] Cf Lord Blackburn's charge to the jury in *McDonald v HM Advocate,* 1928 JC 42 at 44: "I cannot hold that a jury is not entitled in a case of this sort to take into consideration the evidence of one child as to her experience as sufficient corroboration of the evidence of another child as to her similar experience and to record a verdict of guilty against the panel on either or both of the charges. Accordingly, my charge to you is that in this case there is sufficient corroboration of each child's story in the story of the other – *if on consideration of the evidence you believe their stories* – to entitle you to find the panel guilty of one or all of the charges made against him." (emphasis added)

[26] 1998 JC 94 at 100-101.

as supporting the Crown case, and evidence which supports the Crown case is available as corroboration of a complainer."[27]

In *DPP v Boardman*[28] Lord Hailsham of St Marylebone said:

> "When there is some evidence connecting the accused with the crime, in the eyes of most people, guilt of similar offences in the past might well be considered to have probative value... Nonetheless, in the absence of a statutory provision to the contrary, the evidence is to be excluded under the first rule in Makin [1894] A.C. 57, 65 because its prejudicial effect may be more powerful than its probative effect, and thus endanger a fair trial because it tends to undermine the integrity of the presumption of innocence and the burden of proof. In other words, it is a rule of English law which has its roots in policy… "[29]

7.60 This observation reflects that of Lord Sands in *Moorov,* where his Lordship observes:

> "[I]n view of the fact that proof of previous convictions would in many cases be merely prejudicial, the law has established a general rule that it shall be inadmissible in evidence."[30]

7.61 In the Australian case of *B v R,*[31] which we have already mentioned, briefly, in Chapter 5, a father was charged on indictment before the Supreme Court of the Australian Capital Territory with committing acts of indecency upon and having sexual intercourse with his daughter between 1985 and 1988. He pleaded not guilty and gave evidence on oath denying the incidents of which the daughter had given evidence. He said that incidents similar to those alleged had occurred in and before 1984, and that he had pleaded guilty to charges in respect of those incidents and been convicted. He said that from about 1986 or 1987 the daughter had become very difficult to control, and when he attempted to control her she would accuse him of still "doing it" to her, and threaten to call the police. The trial judge gave the jury a warning that it was unsafe to convict on the uncorroborated evidence of the daughter. In the course of directing the jury as to corroboration the judge said that the accused's admission of his earlier conviction was "very strong corroboration if you accept it and there is no reason why you should not accept it, coming from his own lips". On appeal to the High Court of Australia, Mason CJ observed:

> "Once the prior convictions were admitted into evidence they could be used by the jury as evidence tending to establish the applicant's guilt of the offences charged. There was not, in my view, any basis on which the trial judge could legitimately instruct the jury that they were not evidence tending to establish guilt or were not capable of being corroborative when they had that probative value, despite their prejudicial effect. "[32]

7.62 We should at this point refer again to various *dicta* which we have already mentioned, in Chapter 3 above. In the case of *DPP V P,*[33] the Lord Chancellor, Lord Mackay of Clashfern, observed:

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[27] 2007 SCCR 222 at 257.
[28] [1975] AC 421
[29] Ibid, at 451.
[30] 1930 JC 68 at 87.
[31] [1992] HCA 68; (1992) 175 CLR 599.
[32] Ibid, at para 4.
[33] [1991] 2 AC 447.

> "Although there is a difference between the law of Scotland, which requires corroboration generally in criminal cases, and the law of England, which does not, the principles which determine whether one piece of evidence can corroborate another are the same as those which determine whether evidence in relation to one offence is admissible in respect of another."[34]

7.63 The matter was set out by another distinguished Scottish judge, Lord Reid, in a House of Lords case[35] in which the question was whether uncorroborated statements by one group of boys, that the accused had committed buggery on them, could corroborate, and be corroborated by, uncorroborated statements by another group of boys to the same effect. His Lordship said:

> "There is nothing technical in the idea of corroboration. When in the ordinary affairs of life one is doubtful whether or not to believe a particular statement one naturally looks to see whether it fits in with other statements or circumstances relating to the particular matter; the better it fits in, the more one is inclined to believe it. The doubted statement is corroborated to a greater or lesser extent by the other statements or circumstances with which it fits in."[36]

Conclusion

7.64 These various *dicta* seem to us to be entirely consistent with the general Scottish approach to circumstantial evidence and corroboration, as set out by Lord Rodger of Earlsferry in *Fox v HM Advocate.*[37] There seems no logical reason why evidence of previous convictions should not be available to corroborate direct or indirect evidence as to the guilt of the accused. Certainly, it would be necessary for appropriate directions to be given to the jury. The passage from the judgment in *R v Hanson,*[38] which we have quoted above, at paragraph 7.47, is a good example of what might be appropriate. And it might well be necessary for the judge to consider whether the prejudicial effect of such evidence outweighed its probative value, in the particular circumstances of the case. We discuss that matter below. But, in the light of the foregoing discussion, we recommend:

> **21. Evidence of relevant previous convictions should be available as evidence which can corroborate other evidence, whether direct or indirect, as to the guilt of the accused.**
>
> (Draft Bill, sections 2 and 5(b))

Issue 3 – What practical difference would a change make?

7.65 There would be little point in making a change in the law if nothing would in practice be gained. But if, as we recommend, the law is changed so as to enable evidence of previous convictions to be admitted, and if such evidence can support direct evidence as to the charge before the court, then it seems to us that there is potentially much to be gained. It is an unfortunate fact that the rates of recidivism are high. Where there is credible evidence, from a single source, but accepted by the fact finder, that a particular person has committed a crime, then the absence of corroboration may at present prevent not only a

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[34] Ibid, at 461.
[35] *Kilbourne v DPP* [1973] AC 729.
[36] Ibid, at 750.
[37] 1998 JC 94.
[38] [2005] EWCA Crim 824; [2005] 1 WLR 3169; [2005] 2 Cr App R 299.

conviction, but in many cases also a prosecution. But if it is open to the fact finder to find support for that evidence in the fact that the accused has committed similar crimes on other occasions, then the requirement for corroboration need not be a barrier to a prosecution.

7.66 We have already mentioned, in other contexts, the cases of Peter Tobin and Robert Black. When these men were being tried for assault and murder in, respectively, England and Northern Ireland, evidence of their previous convictions for very similar crimes was led before the jury, and proved to be compelling evidence in support of the other evidence of their guilt. In the *Straffen* case, to which we have already referred, there was no direct evidence of Straffen's guilt of the third murder. There was simply his presence in the vicinity, and his admission of guilt of the two previous, very similar, killings.

7.67 More particularly, we mentioned in our Discussion Paper (at paragraphs 7.76 *et seq.*), an example in which three girls, two twins and a friend visiting from France, were abused by their uncle while he was babysitting them. After a number of years the twins report the offence to their parents, and the uncle is charged with sexual offences and convicted, the jury finding mutual corroboration, in accordance with the *Moorov* doctrine, in the evidence of each of them. No-one thinks to mention the prosecution to the French girl. When she discovers that there has been a prosecution, she reports that she, too, has been molested. But, at present, since the previous convictions of the accused cannot be led before the jury to support her evidence, there is no competent corroboration, and the Crown Office would not prosecute. If the law were changed in accordance with our recommendations, it would be possible to find support for the French girl's evidence in the fact that the accused had been convicted of similar crimes in the past.

7.68 That would of course be a particularly extreme example. And it is not in every case that a jury would find corroboration in previous convictions for similar offences. They might feel that the convictions were too old, or that for other reasons, to do with the particular circumstances of the case, they were not minded to treat the previous convictions as supporting the other evidence in the case. That would be a matter for them. Our aim is simply to ensure that the jury have access to all relevant evidence. What they make of it is and must remain for them to decide.

7.69 Finally, on this point, we note the Faculty's response to our earlier question, as to why evidence of a previous conviction for rape should not be available to corroborate a new charge. They observed:

> "The present Crown marking system whereby a weak *Moorov* case is held unprosecuted unless and until such times as sufficient evidence or witnesses becomes available seems to us a sensible and efficient means of dealing with the question"

If that statement implies that someone else must be raped before a person who has already been previously convicted of rape can be tried again, we consider that it amounts, almost in itself, to a complete justification for the reform which we propose.

Issue 4 – Which previous convictions would be relevant?

7.70 In relation to this question, it may be useful briefly to look back at the practice prior to the passage of Lord Advocate Macdonald's Criminal Procedure (Scotland) Act in 1887, as well as at the provisions of the 1995 Act. We noted, in the Discussion Paper, that prior to

the 1887 Act judges were concerned that previous convictions of the accused, which were habitually placed before the jury, should not be used as evidence in proof of guilt. We also noted (at paragraphs 7.46-47) that contemporaneous commentators did not consider that to be a sensible approach. Thus, *Alison* observed:

> "No legal proposition is so frequently stated from the Bench, in criminal courts, as that proof of habite and repute cannot be legally taken into view as a make-weight of evidence against an accused party. The jury must be satisfied that the accused is guilty of an act of theft, before they approach the question whether he committed the crime under that aggravation of being an habitual thief. *Thus far the law is clear; but it is to be wished that this rule was as well founded in reason and justice as it is in authority.* Certainly it requires repeated admonitions from the highest legal quarter to convince a jury, that the same evidence is necessary to establish the guilt of an upright and virtuous man, who has never been known to commit a fault, as of a person who has for ten years lived by thieving; or that there is much equity in the rule which allows the prisoner, in doubtful cases, to cast the balance in his own favour, by adducing evidence of *good* character, and debars the prosecutor from rebutting that inference, by proof of the most systematic and long continued depravity, by one who has for years lived by the trade of thieving."[39]

As we noted, Dickson made the same point, as follows:

> "In principle, the admission of such evidence is not an exception to the general rule; and the Court frequently directs the jury to disregard it in determining upon the main charge. *But in practice juries attach considerable weight to this kind of evidence as bearing on the whole case*."[40]

7.71 These views reflect what we would see as the essentially common sense approach which juries would adopt to evidence of previous convictions.

7.72 We have also had regard to more recent statutory intervention. In the 2002 Act, the Scottish Parliament addressed the issue of what previous convictions should be treated as relevant. In the new section 275A of the 1995 Act, inserted by section 10 of the 2002 Act, it is provided (in subsection (2)), that "relevant convictions" shall be laid before the jury or judge. Since that provision is aimed at the accused person's previous convictions for sexual offences, subsection (10) provides that any offence mentioned in section 288C of the 1995 Act (which is essentially a list of sexual offences) is a "relevant" offence, as well as any other offence with a substantial sexual element in it. Section 275A does not distinguish between different levels of seriousness, nor does it sub-divide sexual offences.

7.73 We asked a question, in our Discussion Paper, as to how the relevance of evidence of previous convictions might be tested:

> "18. Should the relevance of evidence of previous convictions be tested:
>
> (a) on the basis (as currently set out in section 275A of the 1995 Act) that evidence of (all) cognate offences will be treated as relevant;
>
> (b) by extrapolating the principles underlying the application of the *Moorov* doctrine;

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[39] Alison, i, 302-303 (emphasis added).
[40] Dickson, i, para 15 (emphasis added).

(c) by requiring the prosecutor to say for what purpose the evidence of those convictions is to be led; or

(d) on some other basis (and, if so, what other basis)?"

7.74 There was, as might be expected, a variety of responses. The judges considered that cognate offences would generally be admitted as relevant, and that convictions demonstrating a propensity to be untruthful or to commit offences of the kind with which the accused is charged are the most likely to be relevant. PW Ferguson QC and Findlay Stark agreed that (a) was the best way forward. The judges also considered that extrapolating the principles of the *Moorov* doctrine would involve unnecessary complication. The Law Society, the Faculty, Sir Gerald Gordon, the Society of Solicitor Advocates and the Glasgow Bar Association on the other hand, favoured using the principles of the *Moorov* doctrine. There was general agreement that, in any case, it would be for the prosecutor to set out the purpose for which the evidence was being led.

7.75 Since we have elsewhere recommended that the principles underlying the *Moorov* doctrine should be subsumed into general rules as to the admissibility of evidence, it does not seem to us to be appropriate to re-invent them here (not least because there is no consensus, among those who commented upon the Discussion Paper, about what precisely those principles are). Moreover, to attempt to define relevance by reference to a pre-determined set of similar circumstances does not appear to us to be a helpful way to proceed. It simply provides opportunities for arguments as to "relevance", at a preliminary hearing, in relation to matters which are, at the end of the day, more about the weight to be given to evidence; and it would not preclude arguments about weight at the end of the day.

7.76 Nor are we attracted by the idea of returning to the position as it was prior to the 1887 Act, when *all* previous convictions were placed before the jury as a matter of routine. As we understand it, that is the practice in many Continental jurisdictions, and we infer that there is accordingly no objection to it as a matter of fairness in terms of Article 6 of the Convention. We also appreciate, as we have noted elsewhere in this Report, that, when previous convictions are admitted under the present statutory framework (other than under section 275A of the 1995 Act), all such convictions are admitted, irrespective of their direct relevance to the crime currently charged.

7.77 It would no doubt be possible to construct arguments to the effect that the commission of a wide range of criminal offences indicates a general propensity to break the law, and that such a general propensity may constitute corroboration in respect of particular allegations. But such arguments appear to us to be too diffuse, and we make no recommendation in that regard.

7.78 We are of course conscious, as we have acknowledged already, that many will consider that any revelation of previous convictions would be unfair (all considerations of Article 6 of the Convention aside). Even among those who favour the leading of evidence of relevant previous convictions, there will be concern that the approach we recommend will not exclude old, trivial instances of offences in the same category as those currently charged. One solution to that difficulty would be to leave the whole question of the relevance of previous convictions to the judiciary, so that the judge could evaluate the relevance of particular previous convictions on a case by case basis.

7.79 Three considerations made us reject that option. The first is the possibility that requiring case by case assessment by the judiciary in this area would simply risk the development of the same kind of confusion which currently marks the application of the *Moorov* doctrine. In that regard we have been informed that there was indeed just such confusion in the English courts following the less prescriptive approach taken in the 2003 Act. Second, even if it is the case that the categorisation approach will lead to various old, much less serious offences being included in the docket, it is difficult to see how that could influence the jury. In any event, that seems to us to be preferable to the much more uncertain alternative of leaving it to the judiciary to develop principles according to which previous convictions will or will not be admitted. Finally, on this matter, if the Parliament were to take the view that there should be some time limit (perhaps along the lines of those currently set out in the Rehabilitation of Offenders legislation), they could provide for that.

7.80 On balance, it therefore seems to us that the approach taken by the Parliament in section 275A of the 1995 Act, and approved by the judges in their response to our Discussion Paper, is a valid approach to the matter. If offences fall into a broadly recognisable category, it is reasonable to say that they are relevant to charges in relation to other offences falling within that category.

7.81 The consequence of our suggested approach would be that the accused person's past record of offending for offences of the kind with which he is currently charged would be before the fact finder; and the effect and evidential weight of those convictions would be for the fact finder to determine, in the light of representations by opposing counsel, and directions by the presiding judge.

7.82 Clearly there will be issues as to how much information is available as to the circumstances of previous cases. In that regard we have noted that, in cases where the use of previous convictions has been challenged as being incompatible with the current statutory provisions, the Appeal Court has had access to information sufficient for the purposes of reaching a decision on the question before them. No doubt, if our recommendations are adopted, it will be possible to develop a system of recording convictions which will meet the requirements of the new regime.

7.83 In some cases, it will perhaps be possible, and appropriate, for the Crown to lead direct evidence as to what occurred on the previous occasion(s) if, for example, it was thought necessary or desirable to demonstrate closer similarities between the cases.

7.84 Whatever level of proof is undertaken, it will be for the fact finder to determine how much support the evidence of those convictions can give to the allegations in the charge under consideration. In that connection we note that in the 1887 Act, when provision as made as to what previous convictions might be put in evidence as aggravations of current charges, Parliament adopted very broad criteria. (We have inserted the relevant provisions as Appendix B to this Report). On the whole matter, we are of the view that a similar approach could sensibly be adopted in relation to this current Report. But it would be sensible to allow for revision of the approach in the light of experience. (In that connection we note that there is such a power, which has been exercised, for the purposes of the Criminal Justice Act 2003 in England and Wales). We accordingly recommend:

22. Evidence of previous convictions for offences of a particular nature should be declared to be relevant in relation to current proceedings for offences of a similar nature.

(Draft Bill, sections 4 and 11)

23. It should also be possible to adduce evidence of a conviction of an offence of another kind from that being currently prosecuted, when that other conviction straddles more than one of the categories.

(Draft Bill, section 11(3))

24. Ministers should have the power, by subordinate legislation, to alter the categories of offence to which the foregoing recommendations apply.

(Draft Bill, section 11(4))

Issue 5 – What would be involved, in practical terms, in the proof of previous convictions?

7.85 This is clearly a matter of some importance, and consultees differed as to what might be required, or desirable. Most said that the amount of detail which would require to be supplied would depend upon the circumstances. The judges favoured a system which proved the previous conviction by reference to some "approved documentary form" rather than one which involved the rehearing of evidence. But they noted that, where the object was to identify similarities which, under the existing law, might enable the application of *Moorov,* then it might be necessary to go further into the facts of the case. They also noted that in some cases the accused might be disposed to agree the terms of the evidence, rather than have it highlighted in the course of the trial. Crown Office too saw a difference between the case where the impact of the previous conviction could be inferred from its *nomen iuris*, as would be the case where a previous conviction for perjury was prayed in aid to attack the accused person's credibility, and a case where the circumstances of the previous case were of importance.

7.86 Professors Raitt and Ferguson of Dundee, and James Chalmers of Edinburgh, were firmly against the idea of rehearing evidence, as being cumbersome, creating delay, and causing an additional burden on complainers. Crown Office, too, were fully aware of the practical implications for previous complainers of rehearing evidence. The Faculty, the Glasgow Bar Association and the Society of Solicitor Advocates, on the other hand, saw no alternative to the rehearing of evidence.

7.87 By way of general comment, we note that this does not appear to have caused insuperable difficulties in England and Wales, following the passage of the Criminal Justice Act 2003. This was confirmed by Professor Mike Redmayne, who indicated that the English system worked without the rehearing of evidence. He raised another issue, as to whether or not a previous conviction was challengeable, to which we return, below.

7.88 So far as the practical implications are concerned, we have no information as to the current practice of clerks of court as regards what information is routinely recorded in relation

to convictions. We have, however, noted some comments by Lord Hope of Craighead in *DS v HM Advocate,*[41] where his Lordship was considering how the provisions of section 275A of the 1995 Act (accused person's previous convictions for sexual offences to be placed before the jury) might operate in practice. After considering the point at which information as to previous convictions might be placed before the jury, his Lordship said:

> "51. … Section 275A is silent as to what information, if any, may be taken into account apart from the facts set out in the notice served under section 69(2) or section 166(2) of the 1995 Act and those set out in an extract of the conviction which has been served on the accused or to which reference may be made under subsection [275A](5). Current practice suggests that this information is likely to fall short of providing the judge with what he needs to decide whether it would be in the interests of justice for the conviction to be disclosed or taken into consideration. The notice gives the date, place of trial, the court where it took place, the offence and the sentence. But no details of the offence are given, other than the nomen juris in the case of a common law offence or the statutory provision by which it was constituted. The Board was shown an example of an extract conviction which indicates that here too the practice is not to include any part of the narrative of the offence of which the accused was convicted. The matter depends entirely on practice, as the Acts of Adjournal do not provide what an extract conviction must contain.
>
> 52. I do not read section 275A as prohibiting the judge from asking for further information about the nature and circumstances of the conviction if he thinks that he needs to have this to rule on the objection. The Advocate Depute accepted that the Crown would have no interest in withholding any information in its possession that might be asked for. I do not think that there can be any objection to providing the judge with a copy of the charge, as amended after trial if amendments have been made to it, narrating the offence of which the accused was convicted. Nor can there be any objection to including this narrative in an extract of the conviction, based on the court's own records, which has been prepared for the purposes of section 275A. For the purposes of this case, therefore, I assume that practice will be developed to allow this to be done."

7.89 Much would depend upon the extent to which the Crown sought to rely upon the evidence of previous convictions. As we have noted in Chapter 5, evidence that an accused person has committed a number of offences of the same kind as that with which he is currently charged may reasonably be taken as establishing that he has a propensity to commit crimes of that sort. Whether the Crown seeks to set out more detail of individual instances of the previous convictions, for the sake, perhaps, of demonstrating a *Moorov*-like similarity, will be a matter for their judgment in the particular case. Clearly, the more it can be shown that the accused person's actings in the present case are similar to his actings in previous cases, the greater the impact which the evidence will have on the fact finder. As we have already said (in this Chapter), much will also depend upon the frequency of the previous convictions, upon how recently the previous offences have been committed, and upon the nature and seriousness of the offences with which the accused is currently charged, and to which the previous convictions relate. These will all be matters which will form the basis of argument by opposing counsel, and guidance by the Judge.

7.90 But, at the end of the day, the weight to be accorded to particular pieces of evidence is for the fact finder. It will be for the jury, in solemn cases, to decide whether the evidence of previous convictions establishes that the accused has a propensity to commit offences of the

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[41] 2007 SC (PC) 1.

kind with which he is currently charged, and whether that propensity, once established, sufficiently supports the other evidence that he committed the instant offence. It seems to us that it would not be appropriate to attempt to set out in primary legislation precisely what information as to previous convictions should routinely be recorded. We recommend:

25. Rules as to the recording of information as to convictions, and the amount of detail which such records should include, should be set out in an Act of Adjournal.

Should it be competent for the accused to challenge the validity of the conviction?

7.91 The other important issue which emerged in the responses to our question as to previous convictions was whether it should be competent for the accused to challenge the validity of the conviction. This was an issue which was raised by some members of our advisory group, prior to the issuing of the Discussion Paper. In response to that paper, the Law Society wondered whether the defence would be prevented from seeking to lead some of the other evidence from the earlier trial, particularly evidence which undermined the prosecution case. They wondered whether, if that were not possible, the jury in the instant case would be being presented with an evidential *fait accompli.*

7.92 Similarly, Professor Redmayne was concerned that the accused should not be denied the opportunity of challenging the accuracy of the previous conviction. He observed that defendants in England could do that, although it appeared to happen rarely. Sir Gerald Gordon also doubted whether there was any rule of law which presumed a previous conviction to prove itself in criminal proceedings.

7.93 In the Discussion Paper we had drawn attention[42] to the provisions of section 124(2) of the 1995 Act, which says:

> "124(2) Subject to Part XA of this Act and paragraph 13(a) of Schedule 6 to the Scotland Act 1998, every interlocutor and sentence pronounced by the High Court under this Part of this Act shall be final and conclusive and not subject to review by any court whatsoever and, except for the purposes of an appeal under paragraph 13(a) of that Schedule, it shall be incompetent to stay or suspend any execution or diligence issuing from the High Court under this Part of this Act."

As we pointed out in the Paper, Part XA of the 1995 Act relates to the Scottish Criminal Cases Review Commission, which may, in certain circumstances, refer cases back to the High Court even after the ordinary appeal processes have been exhausted; and Schedule 6 to the Scotland Act enables appeals to be taken to the Supreme Court in relation to devolution issues as defined in that Schedule. Otherwise, we said, section 124(2) amounts to a conclusive statement that, as between the Crown and an accused person, the issue of guilt following a conviction is *res judicata.* That seemed clear from the words of the statute, but had been expressly confirmed, if confirmation were needed, by the decision of the Judicial Committee of the Privy Council in the case of *Hoekstra and Others v HM Advocate*, in which Lord Hope of Craighead observed:

> "Except in regard to devolution issues as defined by paragraph 1 [of Schedule 6 to the Scotland Act], the position remains that every interlocutor of the High Court of

[42] At para 7.82.

> Justiciary is final and conclusive and not subject to review by any court whatsoever; see [section 124(2)]."[43]

7.94 It is certainly the case that section 124(2) appears in the Part of the 1995 Act which deals with appeals. Its origin, however, is in section 72 of the 1887 Act which provides:

> "72. All interlocutors and sentences pronounced by the High Court of Justiciary under the authority of this Act shall be final and conclusive, and not subject to review by any court whatsoever, and it shall be incompetent to stay or suspend any execution or diligence issuing forth of the High Court of Justiciary under the authority of the same."

This is in our view a clear statement as to the finality of interlocutors and sentences of the High Court, sitting as a trial court. When the Criminal Appeal (Scotland) Act was passed in 1926, section 17 of that Act provided:

> "17. – (1) Subject to the provisions of the immediately preceding section of this Act, all interlocutors and sentences pronounced by the Court under this Act shall be final and conclusive and not subject to review by any Court whatsoever and it shall be incompetent to stay or suspend any execution or diligence issuing from the Court under this Act.
>
> (2) Section seventy-two of the Criminal Procedure (Scotland) Act, 1887, shall have effect subject to the provisions of this Act."

Accordingly, as at 1926, appropriate provision was made as to judgments made on appeal (section 16 dealt with the exercise of the Royal Prerogative of mercy, and with the power of the Secretary of State (and now the Scottish Criminal Cases Review Commission) to refer matters to the High Court). But the finality of interlocutors etc. made at first instance was recognised by section 17(2). So, in 1968, when, as Sir Gerald points out, section 10 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1968 provided for the admissibility of criminal convictions in civil proceedings, that was against the background of an extant provision providing for finality in criminal proceedings.

7.95 The 1975 consolidation had two provisions in relation to finality, sections 262 and 281. According to the tables of derivations and destinations, section 262 is said to consolidate section 17(1) of the 1926 Act, and section 281 is said to consolidate section 72 of the 1887 Act. They are in almost identical terms. Section 17(2) of the 1926 Act was not consolidated in terms. We do not know why not. But the fact that the terms of section 72 of the 1887 Act were preserved by section 262 of the 1975 Act rendered a replacement for section 17(1) superfluous.

7.96 Finally, both sections 262 and 281 were consolidated into section 124(2) of the 1995 Act. Both the 1975 and 1995 Acts were pure consolidation. Although, in the case of the 1995 Act, substantive amendments had been made to the law by another Act immediately prior to the consolidation, sections 262 and 281 of the 1975 Act were not amended in that process. Section 124 was seeking to replicate the law as it had been since 1926. It seems reasonably clear that the draftsman of the 1995 Act considered that it was unnecessary to have two provisions saying almost exactly the same thing, in a situation where it was clear that, subject to the statutory means of setting aside a conviction, any interlocutor or sentence was final.

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[43] 2000 SCCR 1121 at 1125.

7.97 On the whole matter, we do not think that it could reasonably be inferred that the absence of reference to decisions at first instance, in the 1995 Act, represents a change in the law as to the finality of convictions at first instance. The position is that such a conviction is final, subject to the various ways in which statute has provided for review.

7.98 We accordingly remain of the view that the effect of section 124(2) is to make a previous conviction unchallengeable, as a matter of legal fact, in the absence of recourse to one or other of the statutory challenges. So, in our view, and for the purposes of leading evidence as to previous convictions, such a conviction proves itself.

Issue 6 – Would it be necessary to balance probative value against prejudicial effect?

7.99 We have dealt with this matter fully in Chapter 5 of this Report, and it would be superfluous to repeat that discussion here.

7.100 Nevertheless, there is an issue as to how to deal with the matter in procedural terms. Once the prosecutor has established that certain previous convictions are relevant, within the meaning of the statute, our view is that the default position should be that those convictions are, at the prosecutor's discretion, admissible. That is consistent with our general position, that all relevant evidence should be admissible. But, as stated in Chapter 5, we accept that there may be circumstances in which, in spite of the evidence being relevant, it would not be in the interests of justice that the previous convictions should be laid before the jury.

7.101 For example, we could imagine a case in which a person charged with a minor offence of dishonesty had a conviction for a serious theft. It might well be possible for him to persuade the judge that the prejudicial effect of the previous conviction would outweigh its probative value. On the other hand, there might be circumstances in which the accused would be content to have a previous conviction revealed, where it was perhaps a long time in the past, since it would enable him to persuade the jury that the previous crime was an isolated incident, and of little evidential value.

7.102 Since that is a matter primarily for the accused, we suggest that it should be for the accused to persuade the court that, in spite of its being relevant, it is in the interests of justice that evidence of a particular previous conviction should not be admitted. We recommend;

> **26. Where it is established that evidence of previous convictions is relevant to an issue of consequence in the proceedings, it is for the accused to seek to satisfy the court that it would nevertheless not be in the interests of justice for that evidence to be led.**
>
> (Draft Bill, section 7(5)(b))

Procedure

7.103 We turn now to the question of how these matters should be dealt with in practical, procedural terms.

Notice of intention to lead evidence as to previous convictions

7.104 The prosecution is now under a general statutory duty to disclose information to the defence. Section 121 of the 2010 Act provides, so far as material:

> "(2) … [T]he prosecutor must … disclose to the accused the information to which subsection (3) applies.
>
> (3) This subsection applies to information if … the information is likely to form part of the evidence to be led by the prosecutor in the proceedings against the accused"

In relation to previous convictions, section 69(2) of the 1995 Act provides:

> "(2) If the prosecutor intends to place before the court any previous conviction, he shall cause to be served on the accused along with the indictment a notice in the form set out in an Act of Adjournal or as nearly as may be in such form, and any conviction specified in the notice shall be held to apply to the accused unless he gives, in accordance with subsection (3) below, written intimation objecting to such conviction on the ground that it does not apply to him or is otherwise inadmissible.

Accordingly, where, by virtue of section 275A of the 1995 Act, the prosecutor seeks to place before the court any relevant previous conviction of the accused, it is the procedure mentioned in section 69(2) which is used. That section gives the accused the opportunity to consider whether the conviction actually relates to him, or whether it is not admissible on some other ground, and to make representations to the court in that regard at a preliminary hearing.

7.105 We would propose that, under the new system which this Report proposes, relevant previous convictions should similarly be notified to the accused by means of a statutory notice, in the same way as currently occurs under section 275A. We recommend:

> **27. Where a prosecutor intends to lead evidence of any previous convictions of the accused, he should give notice of those convictions to the accused by means of a statutory notice.**
>
> (Draft Bill, section 6(1))

7.106 We would also, however, propose that the prosecutor should be under an obligation to say in the notice to the accused at what point in the proceedings he or she proposes to lead evidence of those convictions. Where, for example, a person is accused of a crime of violence, previous convictions for crimes of violence would normally be relevant, and it is likely that the prosecutor would wish to lead evidence of those as part of the prosecution case. In that event, other convictions of the accused, not for crimes of violence, would be irrelevant. If, in such a case, the accused had also been convicted of crimes of dishonesty, or of conspiracy to pervert the course of justice, those convictions would not normally be relevant to the allegation of violence, but might well be relevant to the credibility of the accused, should he choose to give evidence, or otherwise seek to set himself up as a respectable person.

7.107 The prosecutor's notification should therefore have to specify those convictions which he or she would intend to include in the docket attached to the indictment or complaint. Where other convictions became, in his or her view, relevant to the question of the credibility

of the accused, the prosecutor should have to apply to the court separately for permission to lead evidence of them. (All convictions would, as now, be laid before the court prior to sentencing.) We recommend:

28. A statutory notice as to previous convictions should specify

(a) the convictions which the prosecutor seeks to attach to the indictment or complaint, and

(b) (separately) those which might become relevant in the course of the proceedings

and the prosecutor should have to obtain the permission of the court before leading evidence of convictions mentioned in paragraph (b).

(Draft Bill, sections 6(1)-(4) and 9(2))

7.108 We note, in passing, that there may be factual issues as, for example, whether particular convictions are correctly attributed to the accused, or whether any conviction has been correctly classified in terms of the categories in the statute. Where issues of that sort are raised, it should be for the Crown to satisfy the court of the correct position – they, after all, hold the information upon which the schedule of previous convictions is based.

7.109 We would envisage, in practical terms, that issues as to the correctness of particular convictions, or questions as to prejudicial effect, would be dealt with under the existing provisions in the 1995 Act as to preliminary hearings.

Conclusion

7.110 In this Report we recommend a restatement of the fundamental rules of criminal evidence, with a clear focus on relevance. We recommend a coherent statutory framework for the use of similar fact evidence, which will subsume the *Moorov* doctrine. Further, we recommend a more logical basis for the use of evidence of previous convictions in criminal proceedings.

7.111 We are conscious that these recommendations, if implemented, would represent a major shift in the way in which similar fact evidence, and in particular evidence of previous convictions, are used in the criminal justice system. In particular, we are of the view that the more routine use of previous convictions as demonstrating similar conduct on the part of the accused on other occasions, or as demonstrating a more general propensity on his part to commit crimes of the sort with which he is charged, will in many cases increase the evidence available to the Crown as corroboration of the allegations in particular proceedings. That may well, in turn, result in more convictions.

7.112 In effect, our proposals will give juries more access to relevant information about the persons accused of crimes. This will change the balance in the criminal justice system from the current position, which in this respect is in our view weighted in favour of the accused, to one which better reflects the interest of the public in the prosecution of crime.

Chapter 8 List of recommendations

1. The law relating to the admission of evidence of similar facts, including evidence of bad character and previous convictions, is unclear and inconsistently applied. It should be clarified and restated in statute, with appropriate amendments.

(Para 2.28)

2. Any statute on similar fact evidence should include a restatement of the fundamental principles of the admissibility of evidence in criminal proceedings.

(Para 2.33; Draft Bill, section 1(2) and (3))

3. Any statute on similar fact evidence should include a definition of "relevance".

(Para 3.11; Draft Bill, section 1(1))

4. The definition should provide that evidence will be relevant if it tends to prove or disprove a fact which is at issue in the proceedings or is otherwise of consequence in the context of the proceedings as a whole.

(Para 3.11, Draft Bill, section 1(1))

5. Any statute on similar fact evidence should include a provision to the effect that all relevant evidence should *prima facie* be admissible.

(Para 3.15; Draft Bill, section 1(2))

6. There should be a general statutory prohibition on the admission of evidence which is not relevant.

(Para 3.20; Draft Bill, section 1(3))

7. It should be made clear that any evidence which is relevant to other evidence is capable of corroborating that other evidence.

(Para 3.61; Draft Bill, section 2)

8. Where aspects of the accused's character are relevant to an issue which is of consequence in the proceedings, evidence as to those aspects should be admissible.

(Para 5.4; Draft Bill, section 1)

9. Any statute on similar fact evidence should make it clear that evidence that the accused has acted in a similar way on other occasions (including evidence of convictions or acquittals in respect of similar offences) is relevant to the question of whether he has so acted on the occasion which is subject of the current criminal proceedings.

(Para 5.17; Draft Bill, sections 4 and 5)

10. In considering whether *ex facie* relevant evidence as to conduct on other occasions will have a prejudicial effect upon the interests of justice, the court should not assume that it will have such an effect unless the other conduct is very much more serious than that which is the subject of the current proceedings.

(Para 5.45; Draft Bill, section 7(4))

11. Evidence which demonstrates a propensity on the part of the accused to commit crimes of a particular nature should be admissible to support other evidence that he has committed a crime of that nature in the proceedings forming the subject of the current charge.

(Para 5.71; Draft Bill, section 4)

12. The *Moorov* and *Howden* doctrines should not be restated in statute as separate doctrines.

(Para 6.31)

13. Where the circumstances of a charge of which an accused person has been acquitted are similar to those of a present charge, it should be competent to lead evidence in relation to that other charge in order to contribute to the proof of the present charge.

(Para 6.47; Draft Bill, section 5(b))

14. Where the circumstances of a charge of which an accused person has previously been convicted are similar to those of a present charge it should be competent to lead evidence in relation to that other charge in order to contribute to the proof of the present charge.

(Para 6.55; Draft Bill, section 5(b))

15. It should be provided in statute that it is competent, in support of a charge competently made before a Scottish criminal court, to lead relevant evidence of other conduct, including crimes, allegedly committed outside Scotland.

(Para 6.61; Draft Bill, section 10)

16. Where the Crown seek to rely upon evidence of a crime of which the accused has been convicted by a foreign court, being a court in a country which is a signatory to the Convention, or with which the United Kingdom has entered into an extradition treaty, the conviction should be admissible on the same basis as a conviction in Scotland.

(Para 6.67; Draft Bill, sections 10 and 13(5))

17. There should no longer be a requirement to demonstrate a course of conduct, in order to enable evidence of similar conduct on a number of occasions to be mutually corroborative.

(Para 6.81; Draft Bill, sections 2 and 4(2))

18. It should be made clear that evidence of less serious conduct of a similar nature is relevant to, and capable of corroborating, evidence of more serious conduct.

(Para 6.87; Draft Bill, sections 2 and 5(c)(ii))

19. The *Moorov* and *Howden* doctrines should be subsumed into the general rules in relation to the relevance of evidence of similar conduct.

(Para 6.97; Draft Bill, section 4)

20. The existing statutory framework relating to the leading of evidence of previous convictions should be replaced with one which focuses on the relevance of the previous convictions to an issue which is of consequence in the proceedings.

(Para 7.39; Draft Bill, sections 1 and 4)

21. Evidence of relevant previous convictions should be available as evidence which can corroborate other evidence, whether direct or indirect, as to the guilt of the accused.

(Para 7.64; Draft Bill, sections 2 and 5(b))

22. Evidence of previous convictions for offences of a particular nature should be declared to be relevant in relation to current proceedings for offences of a similar nature.

(Para 7.84; Draft Bill, sections 4 and 11)

23. It should also be possible to adduce evidence of a conviction of an offence of another kind from that being currently prosecuted, when that other conviction straddles more than one of the categories.

(Para 7.84; Draft Bill, section 11(3))

24. Ministers should have the power, by subordinate legislation, to alter the categories of offence to which the foregoing recommendations apply.

(Para 7.84; Draft Bill, section 11(4))

25. Rules as to the recording of information as to convictions, and the amount of detail which such records should include, should be set out in an Act of Adjournal.

(Para 7.90)

26. Where it is established that evidence of previous convictions is relevant to an issue of consequence in the proceedings, it is for the accused to seek to satisfy the court that it would nevertheless not be in the interests of justice for that evidence to be led.

(Para 7.102; Draft Bill, section 7(5)(b))

27. Where a prosecutor intends to lead evidence of any previous convictions of the accused, he should give notice of those convictions to the accused by means of a statutory notice.

(Para 7.105; Draft Bill, section 6(1))

28. A statutory notice as to previous convictions should specify

(a) the convictions which the prosecutor seeks to attach to the indictment or complaint, and

(b) (separately) those which might become relevant in the course of the proceedings

and the prosecutor should have to obtain the permission of the court before leading evidence of convictions mentioned in paragraph (b).

(Para 7.107; Draft Bill, sections 6(1)-(4) and 9(2))

APPENDIX A

Criminal Evidence (Scotland) Bill

[DRAFT]

CONTENTS

Criminal Evidence (Scotland) Bill
[DRAFT]

An Act of the Scottish Parliament to make new provision as regards the law of criminal evidence; and for connected purposes

PART 1

RELEVANCE AND ADMISSIBILITY

Relevance and admissibility: general(1) In criminal proceedings evidence is relevant if it tends to prove or disprove a fact which is—

(a) at issue in the proceedings, or

(b) otherwise of consequence in the context of the proceedings as a whole.

(2) In criminal proceedings evidence which is relevant is admissible unless it is found to be inadmissible by virtue of—

(a) having been obtained unfairly,

(b) the common law rule that hearsay evidence is inadmissible,

(c) the common law rules as to legal professional privilege,

(d) section 7 or 8, or

(e) any other enactment.

(3) In criminal proceedings evidence which is not relevant is inadmissible.

NOTE

Section 1 sets out the basic propositions as to relevance and admissibility.

Subsection (1) defines relevance for the purpose of criminal proceedings (Recommendations 3 and 4, paragraph 3.11).

Subsection (2) states the general rule that relevant evidence is admissible (Recommendations 5, paragraph 3.15 and 20, paragraph 7.39). This is subject to the exceptions set out in paragraphs (a) to (e) which, together, form an exhaustive list of the grounds upon which relevant evidence may be found to be inadmissible (see paragraphs 3.21-3.27). The grounds are: (a) that the evidence in question has been unfairly obtained (see *Lawrie v Muir* 1950 JC 19); (b) that the evidence is hearsay (see *Morrison v HM Advocate* 1990 JC 299); (c) that it is subject to legal professional privilege; (d) that it is inadmissible by virtue of section 7 or 8 (see below) or (e) that the evidence is inadmissible by virtue of any other enactment.

Subsection (3) makes it clear that evidence which is not relevant is, on that basis, inadmissible (Recommendation 6, paragraph 3.20).

2 Corroboration

Evidence relevant to a fact is capable of corroborating any other evidence relevant to that fact.

NOTE

Section 2 implements Recommendation 7, paragraph 3.61. The purpose of this provision is to dispel the idea, suggested in *obiter* remarks of Lord Hope of Craighead and Lord Rodger of Earlsferry in *DS v HM Advocate* 2007 SC (PC) 1, that evidence of relevant previous convictions might be taken into account by a jury but could never provide corroboration (see paragraphs 3.57-3.61, 5.56-5.59 and 7.46-7.64). The question of what weight to assign to the evidence, and whether the evidence does in fact amount to corroboration, will be one for the finder of fact – the jury, or in summary cases the sheriff or justice.

3 Common law rules as to relevance or admissibility of evidence

Except in so far as is provided for by this Act, no common law rule as to the relevance or admissibility of evidence in criminal proceedings is to be applied so as to limit the admission or use of evidence.

NOTE

One of the principal aims of the draft Bill is to permit the leading of evidence of the accused's conduct on other occasions in circumstances where this may not be competent under the existing law. This aim could be frustrated were the courts to conclude that the pre-existing common law could be applied to limit its effect. **Section 3** prevents reliance upon the common law to limit the admission or use of evidence, except to the extent provided for elsewhere in the draft Bill.

4 Relevance of evidence of accused having committed a similar offence

(1) Evidence of an accused having committed an offence ("offence A") of the same nature as, or of a similar nature to, the offence with which the accused is charged ("offence B") is relevant to whether the accused committed offence B.

(2) Such evidence as is mentioned in subsection (1) is relevant irrespective of whether the similarities between offence A and offence B are such as to indicate a course of conduct on the part of the accused.

(3) Subsection (1) is without prejudice to the generality of section 1 (and in particular to any other basis on which evidence of an accused's having committed an offence or engaged in some other form of conduct is relevant).

NOTE

Subsection (1) provides for the relevance of evidence that an accused has, on another occasion, committed an offence of the same or similar nature as an offence with which he or she is now charged (Recommendations 9, paragraph 5.17 and 11, paragraph 5.71). Whether two offences are of the same or a similar nature is to be interpreted in accordance with section 11. Section 4(1) applies regardless of whether the evidence takes the form of a previous conviction (as to which, see section 5(b)) or forms evidence relating to another charge on the same indictment or complaint. As such, section 4 would apply to the types of situation which are presently dealt with under the *Moorov* and *Howden* doctrines (Recommendations 19, paragraph 6.97 and 20, paragraph 7.39).

The Report notes (at paragraphs 2.18-2.23 and 6.73-6.81) the present doubt regarding whether it is necessary, in a *Moorov* case, to show that the charges in question formed part of a course of conduct on the part of the accused. **Subsection (2)** addresses this point by providing that it is not necessary, in order for evidence to be relevant under section 4, for the offences to be shown to be part of a course of conduct (Recommendation 17, paragraph 6.81).

Subsections (1) and (2) provide for the relevance of evidence of similar offences. But evidence that the accused has committed an offence on another occasion may be relevant on other grounds: as a hypothetical example, it may be relevant in the trial of an accused charged with robbery on the basis of his involvement as a get-away driver to show that the accused had acted as a get-away driver on other occasions in relation to otherwise dissimilar crimes. **Subsection (3)** allows for the possibility that evidence of other offences might be relevant on a basis other than the similarity between the two charges, by providing that section 4(1) is without prejudice to the general rule in section 1 that all relevant evidence is admissible (subject to the exceptions set out in that section).

5 Further provision as to relevance

In determining (whether or not for the purposes of section 4) if evidence of an accused's having engaged in some form of conduct is relevant, it is immaterial—

(a) whether that conduct resulted in, or could have resulted in, the accused's being charged with an offence,

(b) if the accused was charged with an offence as a result of that conduct, whether the accused was acquitted or convicted of the charge,

(c) how widely that conduct and an offence with which the accused is charged—

(i) were separated in time, or

(ii) differed in seriousness or effect, or

(d) whether that conduct occurred before or after an offence with which the accused is charged.

NOTE

Section 5 abolishes a number of the present limitations on the admission of evidence of the accused's conduct on other occasions (see paragraphs 6.33-6.87).

Paragraph (a) provides that in assessing the relevance of evidence of an accused's conduct to the present charge, it is immaterial whether that conduct resulted in, or could have resulted in, the accused's being charged with an offence. This removes any doubt about the competence of referring to evidence relating to conduct which has previously formed the subject of a criminal charge (Recommendation 9, paragraph 5.17).

Paragraph (b) provides that it shall be immaterial, if the accused was charged with an offence as a result of that conduct, whether the accused was acquitted or convicted of the charge. The effect of this provision is to prevent previous conviction, or previous acquittal, from being a ground for the exclusion of evidence of relevant evidence of the accused's conduct on other occasions (Recommendations 9, paragraph 5.17; 13, paragraph 6.47; and 14, paragraph 6.55; and, more generally, Recommendation 21, paragraph 7.64).

Paragraph (c) deals with two present limitations: (i) separation in time; and (ii) difference in seriousness or effect. In relation to (i), although the courts no longer recognise a *de facto* time limit for the application of the *Moorov* doctrine, it appears that for the doctrine to apply to charges separated by more than a few years, the Crown will be required to show an exceptional degree of similarity (perhaps demonstrating a course of conduct: see *AK v HM Advocate* [2011] HCJAC 52 as discussed at paragraphs 6.70-6.72). **Sub-paragraph (i)** removes this requirement by providing that, in determining the relevance of the accused's

conduct, it is immaterial how widely that conduct and the offence with which the accused is charged were separated in time. The weight to be given the evidence, and whether or not it amounts to corroboration of other evidence, will be for the finder of fact**. Sub-paragraph (ii**) resolves the question of whether evidence of a lesser crime may corroborate evidence of a greater, by providing that differences in seriousness or effect of the conduct shall be immaterial in assessing its relevance (Recommendation 18, paragraph 6.87). Again, this does not prevent the finder of fact from considering these factors in assessing the weight to be given to the evidence once admitted.

Paragraph (d) provides, for the avoidance of doubt, that it is immaterial, in assessing the relevance of conduct, whether it took place before or after an offence with which the accused is charged.

PART 2

DISCLOSURE ETC.

Prosecutor's duty to disclose intention to lead certain evidence On an indictment or complaint being served on the accused (or at such later time as the court, on cause shown, may allow), the prosecutor must disclose any intention to lead evidence—(a) of the accused's having been convicted of an offence specified in the disclosure together with the circumstances of that offence,

(b) of the accused's having been convicted of an offence specified in the disclosure but not of the circumstances of that offence, or

(c) of the accused's having engaged in some form of conduct which has not resulted in (whether or not it could have resulted in) the accused's being convicted of an offence, being conduct other than what the accused is alleged in the charge to have done.

(2) The prosecutor must specify in the disclosure what evidence it is intended should be led (and in particular which of paragraphs (a) to (c) of subsection (1) applies).

(3) If it is intended that some or all of that evidence should be led only in the event of an application being granted under section 9(2), the prosecutor must so indicate in the disclosure.

(4) To the disclosure the prosecutor must attach—

(a) an authenticated copy of the indictment or complaint relevant to a conviction specified in the disclosure,

(b) an extract of that conviction, and

(c) any statement of facts agreed between the prosecutor and the accused in the proceedings which resulted in that conviction.

(5) A prosecutor who intends to lead evidence comprising information not revealed in the documents mentioned in paragraphs (a) to (c) of subsection (4), must also attach to the disclosure an account of the information in question.

(6) Subsection (1) does not apply in a case where it is essential to lead evidence of an accused's previous conviction in order to prove an offence with which the accused is charged.

NOTE

Section 6 imposes upon the prosecutor an obligation to disclose his or her intention to lead evidence of the accused's conduct on other occasions, including evidence of previous convictions (Recommendations 27, paragraph 7.105 and 28, paragraph 7.107). It is not intended that this should affect the existing obligation under section 121 of the Criminal Justice and Licensing (Scotland) Act 2010.

Subsection (1) specifies the types of evidence of which notice must be given. These are: evidence of any previous conviction, together with the circumstances of that offence (**paragraph (a)**); evidence of the fact of a previous conviction, but not of the circumstances of that offence (**paragraph (b)**); and evidence of the accused's conduct, criminal or otherwise, on occasions other than that charged (**paragraph (c)**). We consider that it would be appropriate for the disclosure to take the form of a docket attached to the indictment or complaint; but this is a matter which may better be dealt with by Act of Adjournal than in primary legislation. **Subsection (2)** requires the prosecutor to specify what evidence will be led, and which of paragraphs (a) to (c) of subsection (1) applies.

Subsection (3) requires the prosecutor to indicate in the disclosure any evidence which will only be led in the event of an application being granted under section 9(2). Such an application may be granted where the court is satisfied, on the application of the prosecutor, that the defence is being conducted in such a way (as for example by leading evidence with a view to establishing the accused's good character) as to render evidence of the offence relevant (Recommendation 28(b), paragraph 7.107).

Subsection (4) sets out the documents required to be appended to a disclosure. These are an authenticated copy of the indictment or complaint relevant to a conviction as specified in the disclosure; an extract of that conviction; and any agreed statement of facts. If any information which the prosecutor intends to rely on is not revealed by these documents, the prosecutor must attach an account of the information in question (**Subsection (5)**).

Subsection (6) prevents the disclosure requirement from applying where evidence of an accused's previous conviction is essential to proof of an offence with which the accused is charged. The typical example would be a charge of driving while disqualified, where proof of the disqualification is essential to proof of the charge. In such a case no further notice is required, since the charge itself gives adequate notice that reference will be made to the earlier conviction.

7 Grounds of objection to leading of evidence in respect of which there has been disclosure under section 6(1)

(1) This section applies where there has been disclosure, under section 6(1), of an intention to lead evidence and objection is made to its being led.

(2) In the case of evidence of the accused's having been convicted of an offence, it may be objected that the offence of which the accused was convicted was neither of the same nature as, nor of a similar nature to, the offence with which the accused is charged.

(3) In the case of evidence of the accused's having engaged in some form of conduct which did not result in the accused's being convicted of an offence it may be objected that taking into account the likely probative value of the evidence, to admit it—

(a) would introduce unjustifiable complexity, or

(b) could be expected to require the expenditure of a disproportionate amount of time.

(4) In the case of evidence of the accused's having been convicted of an offence (offence "A"), or having engaged in some form of conduct which has not resulted in the accused's being convicted of an offence, it may in solemn proceedings be objected that, because—

(a) offence A was much more serious than the offence with which the accused is charged (offence "B"), or

(b) as the case may be, the conduct in which the accused is alleged to have engaged was misconduct of a much more serious kind than that encompassed by offence B,

to admit the evidence could be expected to influence unduly the deliberations of a jury.

(5) If an objection is made on a ground mentioned in—

(a) subsection (2) or (3), it is for the prosecutor to satisfy the court that it should not be entertained, or

(b) subsection (4), it is for the objector to satisfy the court that it should be entertained.

NOTE

Section 7 sets out grounds upon which the accused may object to the admission of evidence of which notice has been given under section 6.

In the case of evidence of previous convictions, an objection may be made on the basis that the offence was neither of the same nature as, nor of a similar nature to, the offence with which the accused is charged (**subsection (2)**). The question of whether two offences are of the same or a similar nature is to be determined according to section 11. If the requirements of that section are satisfied, the evidence will be relevant (by section 4(1)), and so admissible (by section 1).

In the case of evidence other than previous convictions, **subsection (3)** allows for an objection on the basis that, taking into account the likely probative value of the evidence, to admit it would introduce unjustifiable complexity, or could be expected to require the expenditure of a disproportionate amount of time. This is a statutory reflection of the pre-existing rule excluding evidence of collateral issues, discussed at paragraphs 5.19-5.27.

Subsection (4) sets out an additional ground of objection which applies only in solemn proceedings (that is, in cases to be tried on indictment, before a jury). In such proceedings, it may be argued that the admission of the evidence could be expected to influence unduly the deliberations of a jury, or, in other terms, to be unfairly prejudicial. It is unlikely that such prejudice will result from the jury's learning of other conduct which is of a less serious character than that with which the accused is charged (paragraphs 5.28-5.44). An objection may only be made on this ground where the other offence or, as the case may be, the other conduct is much more serious than the offence with which the accused is charged (Recommendation 10, paragraph 5.45).

Subsection (5) places the onus upon the accused to justify an objection on the basis set out in subsection (4); otherwise, it is for the prosecutor to satisfy the court that the objection should not be sustained (Recommendation 26, paragraph 7.102).

8 Finding by court as to admissibility

On such grounds as are mentioned in section 7(3), the court may at any time, of its own accord, find that evidence of the accused's having engaged in some form of conduct which did not result in the accused's being convicted of an offence is inadmissible.

NOTE

Section 8 permits the court, on its own motion, to exclude evidence where, having regard to its likely probative value, its introduction would introduce unjustifiable complexity or could be expected to require the expenditure of a disproportionate amount of time. This power does not apply to evidence of previous convictions, as these are self-proving (paragraphs 7.91-7.98).

9 Accused as witness

(1) An accused who gives evidence is not to be asked, and if asked is not to be required to answer, any question tending to show that the accused has committed an offence other than—

(a) the offence with which the accused is charged, or

(b) an offence specified, in respect of the proceedings against the accused, in a disclosure under section 6(1).

(2) Where an offence is so specified by virtue of section 6(3), any such question may be asked only on the court being satisfied, on the application of the prosecutor, that the defence is being conducted in such a way (as for example by leading evidence with a view to establishing the accused's good character) as to render evidence of the offence relevant.

NOTE

At present, the cross-examination of the accused as to his or her bad character or previous convictions is limited by section 266(4)-(7) of the 1995 Act. These provisions are repealed by section 15 and the Schedule. **Section 9** replaces them with a rule that the accused may not be asked questions tending to show that he or she has committed an offence other than the offence with which the accused is charged or an offence of which notice has been given in a disclosure under section 6(1) (**subsection (1)**). It is recognised that there may be offences which may not be relevant as part of the Crown case, but which may become relevant by virtue of the way in which the defence is conducted (as, for example, where the accused seeks to establish his or her good character). Such offences will be specified under section 6(3), and questions in relation to them may only be asked where the court is satisfied, on the application of the prosecutor, that the conduct of the defence has made them relevant (**subsection (2)**) (Recommendation 20, paragraph 7.39).

PART 3

GENERAL

10 Offences committed and conduct engaged in furth of Scotland

(1) Any reference in this Act to an accused's having committed (or been charged with, convicted or acquitted of) an offence, includes a reference to that person's having committed (or been charged with, convicted or acquitted of) an offence furth of Scotland.

(2) Any reference in this Act to an accused's having engaged in a form of conduct, includes a reference to that person's having engaged in a form of conduct furth of Scotland.

NOTE

Section 10 makes it clear that evidence of relevant conduct, whether or not involving a charge and conviction or acquittal, may be admitted regardless of whether the conduct took place, or the offence was committed, outside Scotland (Recommendations 15, paragraph 6.61 and 16, paragraph 6.67).

11 Offences of the same or of a similar nature: interpretation

(1) For the purposes of sections 4 and 7(2), an offence is to be taken to be of the same nature as, or of a similar nature to, another offence if—

(a) both are offences of dishonesty,

(b) both are sexual offences (though a court may, if it considers it appropriate to do so, distinguish a sexual offence of a consensual kind from a sexual offence of any other kind),

(c) both are violent offences,

(d) both are offences of disorder,

(e) both are offences involving damage to property,

(f) both are offences against the course of justice,

(g) both are offences involving drug trafficking or the misuse of drugs, or

(h) both are road traffic offences.

(2) But an offence may be found to be of the same nature as, or of a similar nature to, another offence on some basis other than is provided for in subsection (1).

(3) An offence falling within the descriptions of more than one of the paragraphs of subsection (1) is to be taken to be of the same nature as, or of a similar nature to, an offence falling within either (or as the case may be any) of those descriptions.

(4) The Scottish Ministers may, by order subject to the affirmative procedure, modify subsection (1) so as to—

(a) vary or repeal a paragraph of that subsection, or

(b) add a further description of offences.

NOTE

Section 11 defines the circumstances in which an offence is to be taken to be of the same nature as, or of a similar nature to, another offence for the purposes of sections 4 and 7(2) (see discussion at paragraphs 7.70-7.84). It does so by setting out, in **subsection (1)** a list of categories of offences, and providing that if two offences fall within the same paragraph, they shall be taken to be of the same, or a similar, nature (Recommendation 22, paragraph 7.84). **Subsection (2)** provides that an offence may be found to be of the same or a similar nature to another offence on a basis other than that set out in subsection (1). Depending on the facts, it may be that the conduct involved in two offences was highly similar, although each was described by a different name. **Subsection (3)** makes it clear that where an offence falls within more than one of the categories in subsection (1) (as, for example, both a violent offence and a sexual offence), it shall be taken to be of the same nature as, or of a similar nature to, another offence falling within either of those categories (Recommendation 23, paragraph 7.84). **Subsection (4)** gives the Scottish Ministers power, by an order made by Scottish Statutory Instrument under the affirmative procedure, to modify subsection 1 to vary the list of categories of offence (Recommendation 24, paragraph 7.84).

12 The expression "evidence"

In this Act "evidence" means any evidence, direct or circumstantial.

13 Amendment of Criminal Procedure (Scotland) Act 1995

(1) The Criminal Procedure (Scotland) Act 1995 (c.46) is amended as follows.

(2) In section 69 (notice of previous convictions)—

(a) in subsection (1), at the end there is added "; but this subsection is without prejudice to section 6 of the Criminal Evidence (Scotland) Act 2012 (asp00) (prosecutor's duty to disclose intention to lead certain evidence)", and

(b) in subsection (2), after the word "If" there is inserted ", other than in pursuance of the provisions of that Act,".

(3) In section 101 (previous convictions: solemn proceedings)—

(a) in subsection (1), the words "and section 275A(2) of this Act" are repealed,

(b) in subsection (2)(b), at the end there is added "or in pursuance of the provisions of the Criminal Evidence (Scotland) Act 2012 (asp00)",

(c) in subsection (3), for the words "shall not, subject to section 275A(1) of this Act," there is substituted ", other than those specified, in respect of the proceedings against the accused, in a disclosure under section 6(1) of that Act, shall not".

(4) In section 166 (previous convictions: summary proceedings)—

(a) in subsection (1), at the end there is added "other than in pursuance of the provisions of the Criminal Evidence (Scotland) Act 2012 (asp00)", and

(b) in subsection (3), the words ", subject to section 275A(1) of this Act," are repealed.

(5) In section 286A(1) (proof of previous conviction by court in another member State of the European Union)—

(a) the words "another member State of the European Union" become paragraph (a), and

(b) after that paragraph there are inserted the following paragraphs—

"(b) another member State of the Council of Europe, or

(c) a State with which the United Kingdom of Great Britain and Northern Ireland has concluded an extradition treaty,".

NOTE

Section 13 makes a number of amendments to the 1995 Act. The amendments made by **subsections (2)-(4)** are consequential amendments. **Subsection (5)** amends section 286A(1) of the 1995 Act to apply the existing provisions regarding proof of convictions in another member State of the European Union to convictions obtained in another member State of the Council of Europe or a State with which the UK has concluded an extradition treaty (Recommendation 16, paragraph 6.67).

14 Ancillary provision

(1) The Scottish Ministers may, by order, make such incidental, supplemental, consequential, transitory, transitional or saving provision as they consider appropriate for the purposes of, in consequence of, or for giving full effect to, any provision made by, under or by virtue of this Act.

(2) An order under subsection (1) may modify any enactment (other than this Act).

(3) An order under subsection (1)—

(a) is subject to the affirmative procedure if it modifies any enactment, and

(b) is otherwise subject to the negative procedure.

15 Repeals

The enactments mentioned in the schedule are repealed to the extent shown.

NOTE

Section 15 repeals the provisions of the 1995 Act referred to in the Schedule.

Subsections (4)-(7) of section 266 of the 1995 Act are replaced by section 9.

Section 270 of the 1995 Act is superseded by section 6.

Section 275A of the 1995 Act is rendered otiose by sections 1, 4 and 11. Under these provisions, the relevant previous convictions of the accused will be admissible, except where excluded (in solemn proceedings) under section 7(4). There is no longer any scope for the "tit-for-tat" approach pursued by section 275A. The prohibition on referring to the character of the complainer in a sexual offence trial except with the permission of the court (sections 274 and 275) remains.

16 Commencement

(1) This section and section 17 come into force on the day after Royal Assent.

(2) The other provisions of this Act come into force on such day as the Scottish Ministers may by order appoint.

17 Short title

The short title of this Act is the Criminal Evidence (Scotland) Act 2012.

SCHEDULE
(introduced by section 15)

REPEALS

Enactment	*Extent of repeal*
Criminal Procedure (Scotland) Act 1995 (c.46)	Section 266(4) to (7). Section 270. Section 275A.

APPENDIX B Extracts from legislation

CRIMINAL PROCEDURE (SCOTLAND) ACT 1887

63 Previous convictions of dishonesty

Extracts of previous convictions obtained in any part of the United Kingdom of robbery, theft, stouthrief, reset, forgery and uttering forged documents, falsehood fraud and wilful imposition, housebreaking with intent to steal, assault with intent to rob, breach of trust and embezzlement, burglary, larceny, obtaining goods or money by false pretences, swindling, cardsharping, and of attempts to commit any of these crimes, and of crimes contrary to the Acts of Parliament relating to the Queen's coinage, and of crimes relating to the Queen's coinage at common law, and of crimes inferring dishonest appropriation by post office officials, or of attempts to commit such crimes, whether such convictions be under the Post Office Acts or at common law, and of all other crimes inferring dishonest appropriation of property by a person not the owner thereof, or attempts to commit such crimes, whether in contravention of any Act of Parliament or at common law, may be lawfully put in evidence as aggravations against any person accused on indictment of any of the crimes, or attempts to commit crimes above set forth, and any aggravation of the crime or attempt which such extract conviction bears to have been found proven, may be lawfully used in evidence to the like effect.

64 Previous convictions of violence

Extracts of previous convictions of any crime inferring personal violence obtained in any part of the United Kingdom may be lawfully put in evidence as aggravations of any crime inferring personal violence, and any aggravation set forth in such extract convictions may be lawfully used in evidence to the like effect.

65 Previous convictions of lewd conduct, &c

Extracts of previous convictions obtained in any part of the United Kingdom of any crime inferring lewd, indecent, or libidinous conduct may be lawfully put in evidence as aggravations of any crime of a lewd, indecent, or libidinous character, and any aggravation set forth in such extract convictions may be lawfully used in evidence to the like effect.

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. Provided as follows:

(a) A person so charged shall not be called as a witness in pursuance of this Act except upon his own application

(b) The failure of any person charged with an offence […] to give evidence shall not be made the subject of any comment by the prosecution

[…]

(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 has been such as to involve imputations on the character of the prosecutor or the witnesses for the prosecution.

CRIMINAL PROCEDURE (SCOTLAND) ACT 1995

101 Previous convictions: solemn proceedings

(1) Previous convictions against the accused shall not, subject to subsection (2) below and section 275A(2) of this Act, be laid before the jury, nor shall reference be made to them in presence of the jury before the verdict is returned.

(2) Nothing in subsection (1) above shall prevent the prosecutor—

(a) asking the accused questions tending to show that he has been convicted of an offence other than that with which he is charged, where he is entitled to do so under section 266 of this Act; or

(b) leading evidence of previous convictions where it is competent to do so under section 270 of this Act,

and nothing in this section or in section 69 of this Act shall prevent evidence of previous convictions being led in any case in which such evidence is competent in support of a substantive charge.

266 Accused as witness

(1) Subject to subsections (2) to (8) below, the accused shall be a competent witness for the defence at every stage of the case, whether the accused is on trial alone or along with a co-accused.

(2) The accused shall not be called as a witness in pursuance of this section except upon his own application or in accordance with subsection (9) or (10) below.

(3) An accused who gives evidence on his own behalf in pursuance of this section may be asked any question in cross-examination notwithstanding that it would tend to incriminate him as to the offence charged.

(4) 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, 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 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) In a case to which paragraph (b) of subsection (4) above applies, the prosecutor shall be entitled to ask the accused a question of a kind specified in that subsection only if the court, on the application of the prosecutor, permits him to do so.

(5A) Nothing in subsections (4) and (5) above shall prevent the accused from being asked, or from being required to answer, any question tending to show that he has been convicted of an offence other than that with which he is charged if his conviction for that other offence has been disclosed to the jury, or is to be taken into consideration by the judge, under section 275A(2) of this Act.

270 Evidence of criminal record and character of accused

(1) This section applies where—

(a) evidence is led by the defence, or the defence asks questions of a witness for the prosecution, with a view to establishing the accused's good character or impugning the character of the prosecutor, of any witness for the prosecution or of the complainer; or

(b) the nature or conduct of the defence is such as to tend to establish the accused's good character or to involve imputations on the character of the prosecutor, of any witness for the prosecution or of the complainer.

(2) Where this section applies the court may, without prejudice to section 268 of this Act, on the application of the prosecutor, permit the prosecutor to lead evidence that the accused has committed, or has been convicted of, or has been charged with, offences other than that for which he is being tried, or is of bad character, notwithstanding that, in proceedings on indictment, a witness or production concerned is not included in any list lodged by the prosecutor and that the notice required by sections 67(5) and 78(4) of this Act has not been given.

(3) In proceedings on indictment, an application under subsection (2) above shall be made in the course of the trial but in the absence of the jury.

(4) In subsection (1) above, references to the complainer include references to a victim who is deceased.

274 Restrictions on evidence relating to sexual offences

(1) In the trial of a person charged with an offence to which section 288C of this Act applies,[1] the court shall not admit, or allow questioning designed to elicit evidence which shows or tends to show that the complainer—

(a) is not of good character (whether in relation to sexual matters or otherwise);

(b) has, at any time, engaged in sexual behaviour not forming part of the subject matter of the charge;

(c) has, at any time (other than shortly before, at the same time as or shortly after the acts which form part of the subject matter of the charge), engaged in such behaviour, not being sexual behaviour, as might found the inference that the complainer—

(i) is likely to have consented to those acts; or

(ii) is not a credible or reliable witness; or

(iii) has, at any time, been subject to any such condition or predisposition as might found the inference referred to in sub-paragraph (c) above.

275 Exceptions to restrictions under section 274

(1) The court may, on application made to it, admit such evidence or allow such questioning as is referred to in subsection (1) of section 274 of this Act if satisfied that—

(a) the evidence or questioning will relate only to a specific occurrence or occurrences of sexual or other behaviour or to specific facts demonstrating—

(i) the complainer's character; or

(ii) any condition or predisposition to which the complainer is or has been subject;

(b) that occurrence or those occurrences of behaviour or facts are relevant to establishing whether the accused is guilty of the offence with which he is charged; and

(c) the probative value of the evidence sought to be admitted or elicited is significant and is likely to outweigh any risk of prejudice to the proper administration of justice arising from its being admitted or elicited.

275A Disclosure of accused's previous convictions where court allows questioning or evidence under section 275

(1) Where, under section 275 of this Act, a court (or, in proceedings before a commissioner appointed under section 271I(1) or by virtue of section 272(1)(b) of this Act, a commissioner) on the application of the accused allows such questioning or admits such evidence as is referred to in section 274(1) of this Act, the prosecutor

[1] S 288C of the 1995 Act includes a comprehensive list of sexual offences.

shall forthwith place before the presiding judge any previous relevant conviction of the accused.

(2) Any convict ion placed before the judge under subsection (1) above shall, unless the accused objects, be—

(a) in proceedings on indictment, laid before the jury;

(b) in summary proceedings, taken into consideration by the judge.

(3) An extract of such a conviction may not be laid before the jury or taken into consideration by the judge unless such an extract was appended to the notice, served on the accused under section 69(2) or, as the case may be, 166(2) of this Act, which specified that conviction.

(4) An objection under subsection (2) above may be made only on one or more of the following grounds—

(a) where the conviction bears to be a relevant conviction by virtue only of paragraph (b) of subsection (10) below, that there was not a substantial sexual element present in the commission of the offence for which the accused has been convicted;

(b) that the disclosure or, as the case may be, the taking into consideration of the conviction would be contrary to the interests of justice;

(c) in proceedings on indictment, that the conviction does not apply to the accused or is otherwise inadmissible;

(d) in summary proceedings, that the accused does not admit the conviction.

(5) Where—

(a) an objection is made on one or more of the grounds mentioned in paragraphs (b) to (d) of subsection (4) above; and

(b) an extract of the conviction in respect of which the objection is made was not appended to the notice, served on the accused under section 69(2) or, as the case may be, 166(2) above, which specified that conviction,

the prosecutor may, notwithstanding subsection (3) above, place such an extract conviction before the judge.

(6) In summary proceedings, the judge may, notwithstanding subsection (2)(b) above, take into consideration any extract placed before him under subsection (5) above for the purposes only of considering the objection in respect of which the extract is disclosed.

(7) In entertaining an objection on the ground mentioned in paragraph (b) of subsection (4) above, the court shall, unless the contrary is shown, presume that the disclosure, or, as the case may be, the taking into consideration, of a conviction is in the interests of justice.

(8) An objection on the ground mentioned in paragraph (c) of subsection (4) above shall not be entertained unless the accused has, under subsection (2) of section 69

of this Act, given intimation of the objection in accordance with subsection (3) of that section.

(9) In entertaining an objection on the ground mentioned in paragraph (d) of subsection (4) above, the court shall require the prosecutor to withdraw the conviction or adduce evidence in proof thereof.

(10) For the purposes of this section a "relevant conviction" is, subject to subsection (11) below—

(a) a conviction for an offence to which section 288C of this Act applies by virtue of subsection (2) thereof;

(aa) a conviction by a court in England and Wales, Northern Ireland or a member State of the European Union other than the United Kingdom of an offence that is equivalent to one to which section 288C of this Act applies by virtue of subsection (2) thereof; or

(b) where a substantial sexual element was present in the commission of any other offence in respect of which the accused has previously been convicted, a conviction for that offence,

which is specified in a notice served on the accused under section 69(2) or, as the case may be, 166(2) of this Act.

(10A) Any issue of equivalence arising in pursuance of subsection (10)(aa) is for the court to determine.

(11) A conviction for an offence other than an offence to which section 288C of this Act applies by virtue of subsection (2) thereof is not a relevant conviction for the purposes of this section unless an extract of that conviction containing information which indicates that a sexual element was present in the commission of the offence was appended to the notice, served on the accused under section 69(2) or, as the case may be, 166(2) of this Act, which specified that conviction.

CRIMINAL JUSTICE ACT 2003 (ENGLAND AND WALES)

98 "Bad character"

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.

99 Abolition of common law rules

(1) The common law rules governing the admissibility of evidence of bad character in criminal proceedings are abolished.

(2) Subsection (1) is subject to section 118(1) in so far as it preserves the rule under which in criminal proceedings a person's reputation is admissible for the purposes of proving his bad character.

100 Non-defendant's bad character

(1) In criminal proceedings evidence of the bad character of a person other than the defendant is admissible if and only if—

(a) it is important explanatory evidence,

(b) it has substantial probative value in relation to a matter which—

(i) is a matter in issue in the proceedings, and

(ii) is of substantial importance in the context of the case as a whole,

or

(c) all parties to the proceedings agree to the evidence being admissible.

(2) For the purposes of subsection (1)(a) evidence is important explanatory evidence if—

(a) without it, the court or jury would find it impossible or difficult properly to understand other evidence in the case, and

(b) its value for understanding the case as a whole is substantial.

(3) In assessing the probative value of evidence for the purposes of subsection (1)(b) the court must have regard to the following factors (and to any others it considers relevant)—

(a) the nature and number of the events, or other things, to which the evidence relates;

(b) when those events or things are alleged to have happened or existed;

(c) where—

(i) the evidence is evidence of a person's misconduct, and

(ii) it is suggested that the evidence has probative value by reason of similarity between that misconduct and other alleged misconduct,

the nature and extent of the similarities and the dissimilarities between each of the alleged instances of misconduct;

(d) where—

(i) the evidence is evidence of a person's misconduct,

(ii) it is suggested that that person is also responsible for the misconduct charged, and

(iii) the identity of the person responsible for the misconduct charged is disputed,

the extent to which the evidence shows or tends to show that the same person was responsible each time.

(4) Except where subsection (1)(c) applies, evidence of the bad character of a person other than the defendant must not be given without leave of the court.

101 Defendant's bad character

(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.

(2) Sections 102 to 106 contain provision supplementing subsection (1).

(3) The court must not admit evidence under subsection (1)(d) or (g) if, on an application by the defendant to exclude it, it appears to the court that the admission of the evidence would have such an adverse effect on the fairness of the proceedings that the court ought not to admit it.

(4) On an application to exclude evidence under subsection (3) the court must have regard, in particular, to the length of time between the matters to which that evidence relates and the matters which form the subject of the offence charged.

102 "Important explanatory evidence"

For the purposes of section 101(1)(c) evidence is important explanatory evidence if—

(a) without it, the court or jury would find it impossible or difficult properly to understand other evidence in the case, and

(b) its value for understanding the case as a whole is substantial.

103 "Matter in issue between the defendant and the prosecution"

(1) For the purposes of section 101(1)(d) the matters in issue between the defendant and the prosecution include—

(a) the question whether the defendant has a propensity to commit offences of the kind with which he is charged, except where his having such a propensity makes it no more likely that he is guilty of the offence;

(b) the question whether the defendant has a propensity to be untruthful, except where it is not suggested that the defendant's case is untruthful in any respect.

(2) Where subsection (1)(a) applies, a defendant's propensity to commit offences of the kind with which he is charged may (without prejudice to any other way of doing so) be established by evidence that he has been convicted of—

(a) an offence of the same description as the one with which he is charged, or

(b) an offence of the same category as the one with which he is charged.

(3) Subsection (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.

(4) For the purposes of subsection (2)—

(a) two offences are of the same description as each other if the statement of the offence in a written charge or indictment would, in each case, be in the same terms;

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

(5) A category prescribed by an order under subsection (4)(b) must consist of offences of the same type.

(6) Only prosecution evidence is admissible under section 101(1)(d).

[…]

104 "Matter in issue between the defendant and a co-defendant"

(1) Evidence which is relevant to the question whether the defendant has a propensity to be untruthful is admissible on that basis under section 101(1)(e) only if the nature or conduct of his defence is such as to undermine the codefendant's defence.

(2) Only evidence—

(a) which is to be (or has been) adduced by the co-defendant, or

(b) which a witness is to be invited to give (or has given) in cross-examination by the co-defendant,

is admissible under section 101(1)(e).

105 "Evidence to correct a false impression"

(1) For the purposes of section 101(1)(f)—

(a) the defendant gives a false impression if he is responsible for the making of an express or implied assertion which is apt to give the court or jury a false or misleading impression about the defendant;

(b) evidence to correct such an impression is evidence which has probative value in correcting it.

(2) A defendant is treated as being responsible for the making of an assertion if—

(a) the assertion is made by the defendant in the proceedings (whether or not in evidence given by him),

(b) the assertion was made by the defendant—

(i) on being questioned under caution, before charge, about the offence with which he is charged, or

(ii) on being charged with the offence or officially informed that he might be prosecuted for it,

and evidence of the assertion is given in the proceedings,

(c) the assertion is made by a witness called by the defendant,

(d) the assertion is made by any witness in cross-examination in response to a question asked by the defendant that is intended to elicit it, or is likely to do so, or

(e) the assertion was made by any person out of court, and the defendant adduces evidence of it in the proceedings.

(3) A defendant who would otherwise be treated as responsible for the making of an assertion shall not be so treated if, or to the extent that, he withdraws it or disassociates himself from it.

(4) Where it appears to the court that a defendant, by means of his conduct (other than the giving of evidence) in the proceedings, is seeking to give the court or jury an impression about himself that is false or misleading, the court may if it appears just to do so treat the defendant as being responsible for the making of an assertion which is apt to give that impression.

(5) In subsection (4) "conduct" includes appearance or dress.

(6) Evidence is admissible under section 101(1)(f) only if it goes no further than is necessary to correct the false impression.

(7) Only prosecution evidence is admissible under section 101(1)(f).

106 "Attack on another person's character"

(1) For the purposes of section 101(1)(g) a defendant makes an attack on another person's character if—

(a) he adduces evidence attacking the other person's character,

(b) he (or any legal representative appointed under section 38(4) of the Youth Justice and Criminal Evidence Act 1999 (c. 23) to cross-examine a witness in his interests) asks questions in cross-examination that are intended to elicit such evidence, or are likely to do so, or

(c) evidence is given of an imputation about the other person made by the defendant—

(i) on being questioned under caution, before charge, about the offence with which he is charged, or

(ii) on being charged with the offence or officially informed that he might be prosecuted for it.

(2) In subsection (1) "evidence attacking the other person's character" means evidence to the effect that the other person—

(a) has committed an offence (whether a different offence from the one with which the defendant is charged or the same one), or

(b) has behaved, or is disposed to behave, in a reprehensible way;

and "imputation about the other person" means an assertion to that effect.

(3) Only prosecution evidence is admissible under section 101(1)(g).

112 Interpretation of Chapter 1

(1) In this Chapter—

"bad character" is to be read in accordance with section 98;

"criminal proceedings" means criminal proceedings in relation to which the strict rules of evidence apply;

"defendant", in relation to criminal proceedings, means a person charged with an offence in those proceedings; and "co-defendant", in relation to a defendant, means a person charged with an offence in the same proceedings;

"important matter" means a matter of substantial importance in the context of the case as a whole;

"misconduct" means the commission of an offence or other reprehensible behaviour;

"offence" includes a service offence;

"probative value", and "relevant" (in relation to an item of evidence), are to be read in accordance with section 109;

"prosecution evidence" means evidence which is to be (or has been) adduced by the prosecution, or which a witness is to be invited to give (or has given) in cross-examination by the prosecution;

[…]

(2) Where a defendant is charged with two or more offences in the same criminal proceedings, this Chapter (except section 101(3)) has effect as if each offence were charged in separate proceedings; and references to the offence with which the defendant is charged are to be read accordingly.

(3) Nothing in this Chapter affects the exclusion of evidence—

(a) under the rule in section 3 of the Criminal Procedure Act 1865 (c. 18) against a party impeaching the credit of his own witness by general evidence of bad character,

(b) under section 41 of the Youth Justice and Criminal Evidence Act 1999 (c. 23) (restriction on evidence or questions about complainant's sexual history), or (c) on grounds other than the fact that it is evidence of a person's bad character.

CRIMINAL JUSTICE AND LICENSING (SCOTLAND) ACT 2010

63 Dockets and charges in sex cases

After section 288B of the 1995 Act insert—

"**Dockets and charges in sex cases**

288BA Dockets for charges of sexual offences

(1) An indictment or a complaint may include a docket which specifies any act or omission that is connected with a sexual offence charged in the indictment or complaint.

(2) Here, an act or omission is connected with such an offence charged if it—

(a) is specifiable by way of reference to a sexual offence, and

(b) relates to—

(i) the same event as the offence charged, or

(ii) a series of events of which that offence is also part.

(3) The docket is to be in the form of a note apart from the offence charged.

(4) It does not matter whether the act or omission, if it were instead charged as an offence, could not competently be dealt with by the court (including as particularly constituted) in which the indictment or complaint is proceeding.

(5) Where under subsection (1) a docket is included in an indictment or a complaint, it is to be presumed that—

(a) the accused person has been given fair notice of the prosecutor's intention to lead evidence of the act or omission specified in the docket, and

(b) evidence of the act or omission is admissible as relevant.

(6) The references in this section to a sexual offence are to—

(a) an offence under the Sexual Offences (Scotland) Act 2009,

(b) any other offence involving a significant sexual element.

288BB Mixed charges for sexual offences

(1) An indictment or a complaint may include a charge that is framed as mentioned in subsection (2) or (3) (or both).

(2) That is, framed so as to comprise (in a combined form) the specification of more than one sexual offence.

(3) That is, framed so as to—

(a) specify, in addition to a sexual offence, any other act or omission, and

(b) do so in any manner except by way of reference to a statutory offence.

(4) Where a charge in an indictment or a complaint is framed as mentioned in subsection (2) or (3) (or both), the charge is to be regarded as being a single yet cumulative charge.

(5) The references in this section to a sexual offence are to an offence under the Sexual Offences (Scotland) Act 2009.

288BC Aggravation by intent to rape

(1) Subsection (2) applies as respects a qualifying offence charged in an indictment or a complaint.

(2) Any specification in the charge that the offence is with intent to rape (however construed) may be given by referring to the statutory offence of rape.

(3) In this section—

(a) the reference to a qualifying offence is to an offence of assault or abduction (and includes attempt, conspiracy or incitement to commit such an offence),

(b) the reference to the statutory offence of rape is (as the case may be) to—

(i) the offence of rape under section 1 of the Sexual Offences (Scotland) Act 2009, or

(ii) the offence of rape of a young child under section 18 of that Act.".

APPENDIX C - Advisory Group and Judicial Reference Group

ADVISORY GROUP

Alison DiRollo, Advocate Depute, Crown Office and Procurator Fiscal Service

Professor Peter Duff, University of Aberdeen

Professor Burkhard Schafer, University of Edinburgh

JUDICIAL REFERENCE GROUP

The Rt Hon Lord Eassie

The Rt Hon Lord Bonomy

The Hon Lord Bracadale

The Hon Lord Kinclaven

Sheriff Kenneth Maciver

APPENDIX D – List of Respondents

Crown Office and Procurator Fiscal Service

Dr Finlay Stark, University of Cambridge

Faculty of Advocates

James Chalmers, University of Edinburgh

Professor Mike Redmayne, London School of Economics

Professor Peter Duff, University of Aberdeen

Professors Fiona Rait and Pamela Feguson, University of Dundee

PW Ferguson QC

Scottish Criminal Cases Review Commission

Sir Gerald Gordon QC

Society of Solicitor Advocates

The Criminal Law Committee of the Law Society of Scotland

The Senators of the College of Justice