

Has Blair misjudged law reforms?

By Joshua Rozenberg, Legal Editor

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The Prime Minister could not have been more clear. "From December, a jury will routinely have the right to know of a previous conviction or charge against someone in court for the same crime," he announced at his news conference this week.

But that is simply not what the law says.

Tony Blair was referring to clauses 98 to 113 of the Criminal Justice Act 2003, which the Government is bringing into effect from mid-December. But there is nothing there about giving juries the "right" to know of previous convictions.

Instead, it prescribes circumstances in which evidence of bad character is "admissible". That means someone needs to decide whether it is to be admitted in each case. The Police and Criminal Evidence Act 1984 gives judges power to refuse to admit prosecution evidence if it would make the proceedings unfair.

The 2003 Act prescribes circumstances in which evidence of bad character "would have such an adverse effect on the fairness of the proceedings that the court ought not to admit it".

So what difference will the new laws on admissibility of evidence make? Until judges start applying the legislation, we shall not know how widely they will use these get-out clauses to stop prosecutors telling jurors about a defendant's previous convictions. But the chances are that courts will continue to operate in pretty much the same way as at present.

In fact, judges have always had the power to admit evidence of bad character if its value in proving the charges outweighs the prejudice it would cause to the accused. There seems no reason to suppose that courts will suddenly begin to act in a way that they regard as unfair to defendants - in spite of Mr Blair's ringing conviction that "for too long, the scales of justice have been weighted in the defendant's favour".

Not that the judges yet know very much about the new powers they are expected to use. The Prime Minister candidly admitted that he is "accelerating the reform of the criminal justice system", which means, in effect, that the changes are coming in sooner than planned. The Judicial Studies Board had been told they would not come in until next spring, so all their training sessions for judges were due for February - two months too late.

As Russell Wallman of the Law Society said this week, there is a real danger that we will see an inconsistent and erratic approach if the rules are brought in before those who have to operate them have been trained. He added: "This rushed approach risks damaging the credibility of the new rules."

But why shouldn't judges and lawyers be able to understand the clear words of a statute, without any extra training? In theory, everyone with a reasonable command of English ought to be able to grasp modern legislation.

Let us take a closer look at the Act and see what it says.

If evidence of a defendant's bad character is to be admitted, it must come within one of seven "gateways". Some are pretty straightforward, and correspond to the existing common law - for example, if the defendant agrees to disclosure, or if it is to correct a false impression he has given the jury.

But the most controversial gateway allows evidence of bad character to be admitted if it is merely "relevant to an important matter in issue between the defendant and the prosecution". On the face of it, this seems to rule out nothing, since all evidence at a criminal trial must be relevant if it is to be put before a jury.

The statute goes on to say that "one important matter in issue" is "whether the defendant has a propensity to commit offences of the kind with which he is charged". How, though, can you establish such a likelihood? One way, understandably enough, is to show that the accused has been convicted of the same offence before. Another, adds the statute, is to show that he has been convicted of the same "category" of offence.

And that is what triggered this week's headlines on theft and paedophiles. A draft order laid before Parliament by the Home Secretary lists 10 offences in the theft category - robbery, burglary and so on - with a further 36 that are to be categorised as sexual offences with people under 16.

Here's an example. You are charged with sexual assault of a mental patient, aged under 16. You already have a conviction for incest with a child. Your earlier conviction may well help establish that you have a propensity to commit offences of the kind with which you are charged.

If your propensity to commit this type of offence is to be regarded as a matter in issue at your trial, evidence of your prior conviction may be admissible - but only if it is relevant to your propensity, and not if it would make your trial so unfair that the jury should not be told about it. Simple, really.

The effect of the draft order, said Home Office officials, is that in cases where a defendant has a conviction for an offence in the same category as the one with which he is charged, "this creates a strong presumption that the previous conviction should be admitted". That may be an admirable attempt to simplify this muddle, but I can find no such presumption in the legislation.



David Blunkett rightly said that the old common-law rules being swept away under the 2003 Act were "confusing and difficult to apply". But it is hard to see that the new provisions are any easier. So it may be wishful thinking for the Prime Minister to proclaim that the reforms will "end the situation where a defendant may have committed a string of similar offences, but they are not considered relevant or admissible in court".

In practice, I suspect that these reforms will make little change to the conviction rate. It's much easier to trumpet a change in the law than to put resources into catching and prosecuting criminals. We may see a few more cases in which a defendant's convictions are disclosed to a jury, but I would be surprised if, by this time next year, anyone has noticed much difference.

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