

**EXPLANATORY MEMORANDUM TO THE
DRAFT CRIMINAL JUSTICE ACT 2003 (CATEGORIES OF OFFENCES)
ORDER 2004**

1. This Explanatory Memorandum has been prepared by the Home Office and is laid before Parliament by Command of Her Majesty.

2. Description

2.1 The above Order is made in exercise of the powers conferred under section 103(4)(b) of the Criminal Justice Act 2003 (“the Act”). The Order prescribes two categories of offences set out in the Schedule to the Order. Subject to approval by both Houses, the Order will come into effect fourteen days after the day on which it is made, or the day that sections 98 to 110 of the Act come into force, whichever is later.

3. Matters of special interest to the Joint Committee on Statutory Instruments

3.1 None.

4. Legislative Background

4.1 Chapter 1 of Part 11 of the Act sets out new provisions regarding the admissibility of evidence of bad character in criminal proceedings. This Chapter abolishes the old common law rules. The relevant provisions operate as follows.

4.2 Section 103(1)(a) provides that a matter in issue between the defendant and the prosecution includes the question whether the defendant has a propensity to commit offences of the kind with which he is charged. Section 103(2)(b) provides that a defendant’s propensity to commit offences of the kind with which he is charged may be established by evidence that he has been convicted of an offence of the same category as the one with which he is charged. Section 103(4)(b) provides that 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. Section 103(5) provides that a category prescribed by an order under subsection 4(b) must consist of offences of the same type.

4.3 This is the first use of the power under section 104(3)(b).

5. Extent

5.1 This instrument applies to England and Wales.

6. European Convention on Human Rights

In the Minister of State's view the provisions of the draft Criminal Justice Act 2003 (Categories of Offences) Order 2004 are compatible with the Convention Rights.

7. Policy background

7.1 As set out above, Chapter 1 of Part 11 of the Act sets out new provisions regarding the admissibility of evidence of bad character in criminal proceedings. This Chapter abolishes the old common law rules. Under the rules of the common law, there existed an exclusionary rule which prevented the prosecution from producing in a trial evidence of a defendant's previous misconduct. This rule was actually an exception to the general principle that all relevant evidence is admissible. Moreover, the exclusionary rule itself was subject to a number of exceptions. The most common was that of the 'similar fact rule'.

7.2 Chapter 1 of Part 11 to the Act now abolishes such rules and in its place sets out a statutory scheme for the admissibility of bad character evidence. The Act sets out the circumstances in which this evidence shall be admissible in order to clarify this area of the law and allow the admission of this evidence where it will properly assist the courts. The statutory approach to the admission of such evidence is now inclusionary, rather than exclusionary, but with safeguards to enable courts to exclude evidence where it appears that the admission of such evidence would have an adverse effect on the fairness of the proceedings.

7.3 Section 101 provides that in criminal proceedings evidence of the defendant's bad character is admissible if it falls within subsections (1)(a) to (g) of that section. Section 101(d) provides that such evidence is admissible if 'it is relevant to an important matter in issue between the defendant and the prosecution'. As set out above, section 103(1)(a) of the Act provides that a matter in issue between the defendant and the prosecution includes the question whether the defendant has a propensity to commit offences of the kind with which he is charged. Section 103(2)(b) provides that such a propensity may be established by evidence that he has been convicted of an offence of the same category as the one with which he is charged. Section 103(4)(b) provides that 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.

7.4 The categories prescribed by the Order are, therefore, intended to guide the courts when determining whether evidence of the defendant's bad character is relevant to an important matter in issue between the defendant and the prosecution. As required by section 103(5) of the Act, the categories of offences set out in the Schedule to this Order consist of offences that are of the same type.

7.5 The two categories prescribed by this Order are: Theft and Sexual Offences (Persons under the Age of 16). The categories have each been structured to contain offences which are closely related to each other and thus are of the same type.

7.6 The Theft Category consists of offences of the same type involving stealing from others. It includes handling stolen goods because this offence is so closely related that a conviction may well demonstrate a propensity to commit any other of those theft offences within this category.

7.7 The Sexual Offences (Persons under the Age of 16) Category consists of offences which involve sexual touching, penetration or activity, committed in relation to persons under the age of 16 (the legal age of consent).

7.8 The categories have been drawn up in consultation with the Attorney General and the Secretary of State for Constitutional Affairs.

8. Impact

8.1 A Regulatory Impact Assessment has not been prepared for this instrument as it has no impact on business, charities, or voluntary bodies.

8.2 The introduction of the bad character provisions of the Act, of which these categories form part, will require training for judges and others in the criminal justice system. The implementation of the categories in themselves, however, is not expected to impose new additional costs.

9. Contact

Ros Johnson at the Office for Criminal Justice Reform can answer any queries regarding the instrument. Her contact details are:

Ros Johnson
Office for Criminal Justice Reform—Trial Policy and Procedure Unit
50 Queen Anne's Gate
London SW1H 9AT
Tel: (020) 7273 2188
Email: ros.johnson16@homeoffice.gsi.gov.uk



**Joint / Select Committees on Statutory Instruments
Delegated Legislation Office
HOUSE OF COMMONS
7 Millbank
LONDON SW1P 3JA**

020 7219 2830 (*telephone*)
020 7219 2441 (*fax*)
jcsi@parliament.uk (*e-mail*)

Mr R J Clayton
Home Office
Legal Adviser's Branch
8th Floor, 50 Queen Anne's Gate
LONDON SW1H 9AT

09 November 2004

JOINT COMMITTEE ON STATUTORY INSTRUMENTS

Draft Criminal Justice Act 2003 (Categories of Offences) Order 2004

The Committee considered the above instrument at its meeting today and has instructed me to request you to submit a memorandum on the following points:

(1) Section 103(5) of the Criminal Justice Act 2003 requires that a category prescribed by an order under section 103(4) (b) must consist of offences of the same type.

(a) Does the Department agree that an offence of burglary or aggravated burglary does not involve stealing where the defendant's sole purpose in entering the building was, or is alleged to have been, to inflict grievous bodily harm, to rape or to do unlawful damage and he neither steals, nor attempts to steal, anything?

(b) If so, why are such offences considered to be of the same type as the other offences listed in paragraphs 1, 2 and 5 to 9 of Part 1 of the Schedule to the draft Order, which are all connected with stealing or taking?

(2) Paragraphs 1, 4 to 11, 14 to 18, 28 to 32, 34 and 35 of Part 2 of the Schedule to the draft Order each specify an offence “if it was committed in relation to a person under the age of 16”.

(a) Are these paragraphs intended to include offences of which the defendant has not been convicted but which are alleged to have been committed by him in relation to a person under the age of 16 (i.e. offences with which a person is charged for the purposes of section 103(2)(b))?

(b) If so, why is the wording considered apt to cover such cases?

(c) Why are paragraphs 26 and 27 worded differently?

(3) Articles 1 and 2(1) use the term “the 2003 Act”. Why is a definition contained only in the recital and not in the Order itself?

I should be grateful if you could submit an electronic version of the memorandum by e-mail to jcsi@parliament.uk, by noon on Monday 15 November 2004.

MICK HILLYARD
Commons Clerk of the Committee