



# THE ROYAL COMMISSION ON CRIMINAL JUSTICE

Chairman: Viscount Runciman of Doxford CBE FBA

## REPORT





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## REPORT



# **The Royal Warrant**

**ELIZABETH R.**

**ELIZABETH THE SECOND**, by the Grace of God of the United Kingdom of Great Britain and Northern Ireland and of Our other Realms and Territories **QUEEN**, Head of the Commonwealth, Defender of the Faith, to

Our Right Trusty and Well-beloved Cousin Walter Garrison, Viscount Runciman of Doxford, Commander of Our Most Excellent Order of the British Empire;

Our Right Trusty and Well-beloved Counsellor Sir John Douglas May, Knight;

Our Trusty and Well-beloved:

Sir Robert Sidney Bunyard, Knight, Commander of Our Most Excellent Order of the British Empire, upon whom has been conferred The Queen's Police Medal for Distinguished Service;

Sir John Ivan George Cadogan, Knight, Commander of Our Most Excellent Order of the British Empire;

John Charles Gunn;

Yve Monica Newbold;

Usha Kumari Prashar;

Anne Judith Rafferty, One of Our Counsel learned in the Law;

Sir John Michael Wickerson, Knight;

Sir Philip John Woodfield, Knight Commander of Our Most Honourable Order of the Bath, Commander of Our Most Excellent Order of the British Empire;

Michael Zander;

Greeting!

**WHEREAS** we have deemed it expedient that a Commission should forthwith issue to examine the effectiveness of the criminal justice system in England and Wales in securing the conviction of those guilty of criminal offences and the acquittal of those who are innocent, having regard to the efficient use of resources, and in particular to consider whether changes are needed in:

- (i) the conduct of police investigations and their supervision by senior police officers, and in particular the degree of control that is exercised by those officers over the conduct of the investigation and the gathering and preparation of evidence;
- (ii) the role of the prosecutor in supervising the gathering of evidence and deciding whether to proceed with a case, and the arrangements for the disclosure of material, including unused material, to the defence;
- (iii) the role of experts in criminal proceedings, their responsibilities to the court, prosecution, and defence, and the relationship between the forensic science services and the police;

- (iv) the arrangements for the defence of accused persons, access to legal advice, and access to expert evidence;
- (v) the opportunities available for an accused person to state his position on the matters charged and the extent to which the courts might draw proper inferences from primary facts, the conduct of the accused, and any failure on his part to take advantage of an opportunity to state his position;
- (vi) the powers of the courts in directing proceedings, the possibility of their having an investigative role both before and during the trial, and the role of pre-trial reviews; the courts' duty in considering evidence, including uncorroborated confession evidence;
- (vii) the role of the Court of Appeal in considering new evidence on appeal, including directing the investigation of allegations;
- (viii) the arrangements for considering and investigating allegations of miscarriages of justice when appeal rights have been exhausted;

and to make recommendations:

NOW KNOW YE that We, reposing great trust and confidence in your knowledge and ability, have authorised and appointed, and do by these Presents authorise and appoint you the said Viscount Runciman of Doxford (Chairman); Sir John Douglas May; Sir Robert Sidney Bunyard; Sir John Ivan George Cadogan; John Charles Gunn; Yve Monica Newbold; Usha Kumari Prashar; Anne Judith Rafferty; Sir John Michael Wickerson; Sir Philip John Woodfield and Michael Zander to be Our Commissioners for the purpose of the said inquiry:

AND for the better effecting the purposes of this Our Commission We do by these Presents give and grant unto you, or any four or more of you, full power to call before you such persons as you shall judge likely to afford you any information upon the subject of this Our Commission; to call for information in writing; and also to call for, have access to and examine all such books, documents, registers and records as may afford you the fullest information on the subject and to inquire of and concerning the premises by all other lawful ways and means whatsoever:

AND We do by these Presents authorise and empower you, or any of you, to visit and personally inspect such places as you may deem it expedient so to inspect for the more effectual carrying out of the purposes aforesaid:

AND We do by these Presents will and ordain that this Our Commission shall continue in full force and virtue, and that you, Our said Commissioners, or any four or more of you may from time to time proceed in the execution thereof, and of every matter and thing therein contained, although the same be not continued from time to time by adjournment:

AND We do further ordain that you, or any four or more of you, have liberty to report your proceedings under this Our Commission from time to time if you shall judge it expedient so to do:

AND Our further will and pleasure is that you do, with as little delay as possible report to Us your opinion upon the matters herein submitted for your consideration.

GIVEN at Our Court at Windsor the twenty-first day of June 1991;

In the Fortieth Year of Our Reign.

By Her Majesty's Command.

Kenneth Baker.

To the Queen's Most Excellent Majesty

**MAY IT PLEASE YOUR MAJESTY**

We, the undersigned Commissioners, having been appointed by Royal Warrant on 21 June 1991 to examine the effectiveness of the criminal justice system in England and Wales in securing the conviction of those guilty of criminal offences and the acquittal of those who are innocent, having regard to the efficient use of resources, and in particular to consider whether changes are needed in

- (i) the conduct of police investigations and their supervision by senior police officers, and in particular the degree of control that is exercised by those officers over the conduct of the investigation and the gathering and preparation of evidence;
- (ii) the role of the prosecutor in supervising the gathering of evidence and deciding whether to proceed with a case, and the arrangements for the disclosure of material, including unused material, to the defence;
- (iii) the role of experts in criminal proceedings, their responsibilities to the court, prosecution, and defence, and the relationship between the forensic science services and the police;
- (iv) the arrangements for the defence of accused persons, access to legal advice, and access to expert evidence;
- (v) the opportunities available for an accused person to state his position on the matters charged and the extent to which the courts might draw proper inferences from primary facts, the conduct of the accused, and any failure on his part to take advantage of an opportunity to state his position;
- (vi) the powers of the courts in directing proceedings, the possibility of their having an investigative role both before and during the trial, and the role of pre-trial reviews; the courts' duty in considering evidence, including uncorroborated confession evidence;
- (vii) the role of the Court of Appeal in considering new evidence on appeal, including directing the investigation of allegations;
- (viii) the arrangements for considering and investigating allegations of miscarriages of justice when appeal rights have been exhausted;

and to make recommendations

**HUMBLY SUBMIT TO YOUR MAJESTY THE FOLLOWING REPORT.**

# REPORT OF THE ROYAL COMMISSION ON CRIMINAL JUSTICE

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# Chapter One

## Introduction

1. The establishment of a Royal Commission on Criminal Justice was announced by the Home Secretary in the House of Commons on 14 March 1991. A similar announcement was made by the Lord Chancellor in the House of Lords. These announcements were made on the same day that the Court of Appeal quashed the convictions for murder of the “Birmingham Six”—the six men who had been convicted following the bomb explosions in public houses in Birmingham in November 1974 and had in consequence served over 16 years in prison.
2. In making the announcement, the Home Secretary said that the case, together with others which had occurred, had raised a number of serious issues which must be a cause of concern to all. Public confidence was undermined when the arrangements for criminal justice failed to secure the speedy conviction of the guilty and the acquittal of the innocent. Although the cases that were the cause of concern represented only a tiny proportion of the work that was carried out to very high standards, the Government nevertheless believed that it was necessary to undertake a review of the criminal justice process in England and Wales.
3. The Home Secretary reminded the House of Commons that in October 1989 Sir John May had been appointed to inquire into the circumstances surrounding the convictions of the Guildford Four and the Maguires. The Government asked Sir John to complete his inquiry into these cases and in addition, as a member of the Royal Commission, to contribute his views on the wider issues to us. This he has done. It is, however, important to emphasise that he has reported separately<sup>1</sup> on the case of the Maguires and will do so on the Guildford Four. The Royal Commission was not appointed to look into individual cases.
4. We held our first meeting on 14 June 1991. We were, unusually, asked by the Home Secretary to report within two years and this we have done. We describe our work in Appendix 1.

## The terms of reference

5. Our terms of reference are far-reaching. In effect, they require us to examine the criminal justice system from the stage at which the police are investigating an alleged or reported criminal offence right through to the stage at which a defendant who has been found guilty of such an offence has exhausted his or her rights of appeal. But we must make clear that there are many important aspects of the criminal justice system which fall outside our remit including sentencing and sentencing policy, the causes of crime, the legal definition of criminal offences, police powers of both arrest and stop and search, and the granting of bail. Where we refer to these issues we do so only to the extent that they bear on the risks of an innocent defendant being convicted or a guilty defendant being acquitted.
6. We are, on the other hand, required to address the conduct and supervision of police investigations and the protection afforded to suspects who are held in

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<sup>1</sup> *Interim Report on the Maguire Case*, London, HMSO 1990 (HC 556) and *Second Report on the Maguire Case*, London, HMSO, 1992 (HC 296).

custody. This has led us to consider issues of training and also of sanctions against inadequate performance. Both are obviously relevant not only to the role of the police at the initial stage of investigation but also to the roles of solicitors, barristers and the judiciary. We have not, however, considered the structure of the police service, or the organisation of the legal profession, or the constitutional relationship between the judiciary and the executive. Our recommendations are in our view compatible with any organisational changes which may be under consideration in these areas, for example by the Inquiry into Police Roles and Responsibilities chaired by Sir Patrick Sheehy.

7. The events which led to the Commission being established, and much the greater part of the evidence which we received, have concerned serious criminal offences. Our recommendations are therefore addressed much more to the procedures of the Crown Court than of the magistrates' courts. We are well aware that over 93% of criminal cases are dealt with by magistrates. Indeed, this proportion may rise further if our recommendations are accepted. But most of our recommendations are directed to offences sufficiently serious to be tried before a jury.

8. Juries are not specifically mentioned in our terms of reference. This may seem an anomaly since convictions of the innocent and acquittals of the guilty in serious cases are always jury decisions. But we are conscious that the jury system is widely and firmly believed to be one of the cornerstones of our system of justice. We have received no evidence which would lead us to argue that an alternative method of arriving at a verdict in criminal trials would make the risk of a mistake significantly less. In any event, we were barred by section 8 of the Contempt of Court Act 1981 from conducting research into juries' reasons for their verdicts. We recommend, however, that such research should be made possible for the future by an amendment to the Act so that informed debate can take place rather than argument based only on surmise and anecdote. Such research might throw light on a variety of issues on which we have not felt able to make any recommendations—such as whether there is a case for raising the age limit for jury service, whether there is a case for a literacy requirement for jurors, whether the arrangements for majority verdicts should be changed or whether the disqualification rules require amendment. Nevertheless, as part of our research into the Crown Court through the Crown Court Study<sup>2</sup>, we were able to ask jurors questions about how well they understood and remembered the evidence, their opinion of the performance of the judge and counsel and their experience of jury service. By this means we did obtain some useful material that has informed such conclusions as we have been able to reach in chapter eight about juries.

9. All law-abiding citizens have a common interest in a system of criminal justice in which the risks of the innocent being convicted and of the guilty being acquitted are as low as human fallibility allows. For a person to be deprived of his or her liberty, perhaps for many years, on account of a crime which was in fact committed by someone else is both an individual tragedy and an affront to the standards of a civilised society. If innocent people are convicted, the real criminals, who may be very dangerous people, remain undetected. Conversely, justice is made a mockery in the particular case and the credibility of the system in general is undermined whenever a guilty person walks free because, for example, technical loopholes have been exploited, prosecution witnesses wrongly discredited, jurors improperly influenced, or victims intimidated. We recognise that there is no way of finding out, or even plausibly estimating, the frequency with which miscarriages of justice in either sense occur. It is widely assumed—and we are in no position to contradict it—that the guilty are more often acquitted than the innocent convicted. To some extent, an inevitable and

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<sup>2</sup> M Zander and P Henderson, *The Crown Court Study*, Royal Commission Research Study No. 19, London, HMSO 1993. The Study was based on questionnaires issued to the judge, the barristers, the defence solicitor, the Crown Prosecution Service, the police, the court clerks, the defendant and the jury in all cases in the Crown Court in the last two weeks of February 1992. In all there were some 22,000 questionnaires relating to over 3,000 cases. We shall refer to the Study in many places throughout this report as "the Crown Court Study" without further citation.

appropriate consequence of the prosecution being required to prove its case beyond reasonable doubt must be that not every guilty person is convicted. But there is only a handful of cases in which it is possible to be certain, with hindsight, that the jury's verdict was mistaken. We have simply to acknowledge that mistaken verdicts can and do sometimes occur and that our task is to recommend changes to our system of criminal justice which will make them less likely in the future.

10. Our terms of reference are not merely far-reaching, but closely interlinked. Any recommendation to change the rules and procedures governing one part of the criminal justice system will have a consequential effect on the others. It is not even possible to consider separately those which precede and those which follow the jury's verdict, since discussion of the rules and procedures of the Court of Appeal raises the question how far they could or should differ, particularly in respect of the rules of evidence, from those of the court of first instance. We accordingly decided at the very beginning of our deliberations that we would not divide ourselves into subcommittees to deal with different topics and that we would not issue any interim reports.

### Adversarial or inquisitorial?

11. The criminal justice system of England and Wales, in common with other jurisdictions which have evolved within the "Anglo-Saxon" or "common law" tradition, is often categorised as "adversarial". This is in contrast to the so-called "inquisitorial" system based on the "Continental" or "civil law" tradition. In this context, the term "adversarial" is usually taken to mean the system which has the judge as an umpire who leaves the presentation of the case to the parties (prosecution and defence) on each side. These separately prepare their case and call, examine and cross-examine their witnesses. The term "inquisitorial" describes the systems where judges may supervise the pre-trial preparation of the evidence by the police<sup>3</sup> and, more important, play a major part in the presentation of the evidence at trial. The judge in "inquisitorial" systems typically calls and examines the defendant and the witnesses while the lawyers for the prosecution and the defence ask supplementary questions.

12. It is important not to overstate the differences between the two systems: all adversarial systems contain inquisitorial elements, and vice versa. But it is implicit in our terms of reference that we should consider whether a change in the direction of more inquisitorial procedures might not reduce the risks of mistaken verdicts and the need for subsequent re-examination of convictions which may be unsafe. For the reasons set out below we do not recommend the adoption of a thoroughgoing inquisitorial system. But we do recognise the force of the criticisms which can be directed at a thoroughgoing adversarial system which seems to turn a search for the truth into a contest played between opposing lawyers according to a set of rules which the jury does not necessarily accept or even understand. In some instances, such as our approach to forensic science evidence, our recommendations can fairly be interpreted as seeking to move the system in an inquisitorial direction, or at least as seeking to minimise the danger of adversarial practices being taken too far. But we have not arrived at our proposals through a theoretical assessment of the relative merits of the two legal traditions. On the contrary, we have been guided throughout by practical considerations in proposing changes which will, in our view, make our existing system more capable of serving the interests of both justice and efficiency.

13. We have sought information from a wide range of other countries' criminal jurisdictions (both adversarial and inquisitorial) in order to see whether there are lessons to be learned from them that might be applied with advantage to the criminal justice system in England and Wales<sup>4</sup>. In particular, we have during two

<sup>3</sup> Although in practice this is rare. For example, in France the *juge d'instruction* plays a part in only some 10% of cases. See the Report of the French Commission Justice pénale et Droits de l'homme, *La Mise en Etat des Affaires Pénales*, Paris 1991.

<sup>4</sup> *Criminal Justice Systems in Other Jurisdictions*, N Osner, A Quinn and G Crown (eds) London HMSO 1993.

visits to Scotland looked in some depth at the Scottish system. We have not, however, found, either in Scotland or anywhere else, a set of practices which has so clearly succeeded in resolving the problems which arise in any system of criminal justice that it furnishes the obvious model which all the others should therefore adopt. Every system is the product of a distinctive history and culture, and the more different the history and culture from our own the greater must be the danger that an attempted transplant will fail. Hardly any of those who gave evidence to the Commission suggested that the system in another jurisdiction should be adopted in England and Wales; and of those who did, none argued for it in any depth or with any supporting detail. We have, accordingly, no evidence to suggest that there is somewhere a jurisdiction in which the rights and interests of the various parties involved are so uniquely well balanced as to give the system the best of all worlds<sup>5</sup>. In the relevant chapters of this report, we make occasional reference to the features of other jurisdictions by which we have been influenced in arriving at our conclusions. But we make no attempt to give them either an “adversarial” or an “inquisitorial” label.

14. Our reason for not recommending a change to an inquisitorial system as such is not simply fear of the consequences of an unsuccessful cultural transplant. It is also that we ourselves doubt whether the fusion of the functions of investigation and prosecution, and the direct involvement of judges in both, are more likely to serve the interests of justice than a system in which the roles of police, prosecutors, and judges are as far as possible kept separate and the judge who is responsible for the conduct of the trial is the arbiter of law but not of fact. We believe that a system in which the critical roles are kept separate offers a better protection for the innocent defendant, including protection against the risk of unnecessarily prolonged detention prior to trial. Moreover, there are “inquisitorial” jurisdictions in which the system is moving, or being urged to move, in an “adversarial” direction. For example, Italy has sought to introduce a more adversarial approach, and in France there has been widespread criticism of the role of the *juge d’instruction*<sup>6</sup>.

15. We in no way suggest, as is sometimes done, that “inquisitorial” systems presume suspects to be guilty until they are proved innocent. Nor do we suggest, as is also sometimes done, that “adversarial” systems are not concerned to unearth the facts on which the guilt or innocence of the suspect depends. Both recognise the principle of the “burden of proof”—that is, the obligation on the prosecution to establish the defendant’s guilt on the basis of evidence which the defence is entitled to contest. We regard this principle as fundamental. This, as will become apparent in later chapters, is not incompatible with changes to our system which would require the defence to disclose the outline of whatever case it intends to put forward at an earlier stage than at present, or remove from the defendant charged with an “either way” offence<sup>7</sup> the right to choose the mode of trial, or permit the judge to rule before the jury is empanelled on questions of admissibility of evidence or the production of statements of agreed facts. But defendants are always to be presumed to be innocent unless and until the prosecution has satisfied the magistrates or jury of their guilt beyond reasonable doubt.

## Resources and efficiency

16. We are required by our terms of reference to have regard to the efficient use of resources—not, that is, to cost either the existing system or the changes we propose to it, but rather to satisfy ourselves that if our proposed changes were to be implemented the taxpayer could be reasonably assured of getting value for

<sup>5</sup> See, for example, the sections headed “Criticisms” on pages 21–24 and 44–46 of L. H. Leigh and L. Zedner, *Report on the Administration of Criminal Justice in the Pre-Trial phase in France and Germany*, Royal Commission on Criminal Justice Research Study No. 1, London, HMSO 1992.

<sup>6</sup> See the report cited in paragraph 11, note 3.

<sup>7</sup> Offences in England and Wales are classified as summary, which means that they are triable only in a magistrates’ court, or as indictable only, which means that they are triable only in the Crown Court, or as triable either way. An offence triable either way may be tried either in a magistrates’ court or in the Crown Court. A defendant has a right in an either way case to elect trial on indictment. Subject to this the decision is for the magistrates—see chapter six, paragraphs 10 and 11.

money. Although, as we have earlier remarked, every law-abiding citizen has an interest in a system in which the risk of mistaken verdicts is as low as it can be, there will always be argument about how much public money should be spent on arriving marginally closer to that ideal. But we have pointed out the scope for cost reductions where these can be made without, in our view, undermining the interests of justice; and we have kept in mind, even if no accurate calculations can be made, the prospect that the costs of our recommendations might be offset by consequential savings elsewhere within the system. We have been struck by the paucity of reliable information about the cost of the criminal justice system at present. While we recognise that the introduction of effective and reliable procedures of financial appraisal, monitoring and control would itself impose on the system a heavy additional burden of cost, we believe that more should be done to establish that value for money is being obtained.

17. Despite the absence of reliable information about costs, we have, during our examination of the system, become aware that in many areas there is a lack of adequate resources. We have been told, for example, that because of budgetary constraints the police may decide not to send samples collected at the scene of a crime for scientific analysis, or they may send such samples to their own laboratories or private sector laboratories rather than make use of the Forensic Science Service, which is likely to have better facilities and more familiarity with the necessary requirements. There are also complaints about the quality of service provided by the Crown Prosecution Service (CPS). No one disputes that at its inception the CPS was seriously under-resourced and even now individual prosecutors may be required to undertake a heavier caseload than is consistent with the ability to prepare all cases thoroughly. There have also been well-aired complaints by the Law Society that the introduction of standard fees in the magistrates' courts is no more than an attempt to keep costs down. It is not within our remit to set levels of fees. But we think it worth noting that criminal work appears to be significantly less highly valued than civil work by those responsible for setting fees. We have also been told that legal aid does not always cover necessary correspondence with and visits to convicted defendants in order to complete applications for leave to appeal to the Court of Appeal. Furthermore, resource constraints are the major factor that prevents the training needs of the judiciary from being adequately met: there is too long a gap between refresher courses, and this in turn is because there are too few judges to allow the release of any greater number from their normal duties.

18. The number of defendants proceeded against in the magistrates' courts in 1991 was 1,960,000, (the great majority of whom had been prosecuted for minor motoring offences). The number of defendants whose trial was completed in the Crown Court in the same year was about 100,000<sup>8</sup>. The cost of the criminal justice system in that same year, excluding the prison and probation services, totalled £6.8bn, of which £5.4bn was attributable to the police and the Forensic Science Service. The Home Office Research and Planning Unit has estimated that the average cost of a contested trial in the Crown Court may be in the region of £13,500 while that of a guilty plea is about £2,500. The equivalent figures for magistrates' courts are £1,500 and £500<sup>9</sup>. In the Crown Court, according to the Information Management Unit of the Lord Chancellor's Department, every day in 1991/92 cost nearly £7,000 even on a conservative assessment of the indirect overheads.

19. It is immediately apparent from the published information that much the largest proportion of the total budget of the criminal justice system is spent on the police. In the Home Office Annual Report 1993<sup>10</sup> the expenditure on the police for 1991-92 is stated to have been £5,110m. In their evidence the Home

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<sup>8</sup> *Criminal Statistics*, London, HMSO, 1991, Cm 2134, paragraphs 6.2 and 6.11.

<sup>9</sup> These estimates, which are to be used with great caution, include costs to the Crown Court and magistrates' courts services (excluding capital costs in both cases), criminal legal aid costs, and costs to the Crown Prosecution Service, to the Probation Service by virtue of their work in the courts, and prison escort costs. The Crown Court trial costs include the cost of committal proceedings which have preceded the trial.

<sup>10</sup> London, HMSO Cm 2208.

Office told us that 80% of expenditure on the police is spent on police pay and allowances. Police pay is outside our remit, and has in any case been covered, along with structure, ranks, and conditions of employment, by the Inquiry into Police Roles and Responsibilities. But there are two points which we wish to make about the efficient use of police resources. The first is that if police officers are to be deployed as effectively as possible, every opportunity must be taken for replacing them with civilian employees in clerical, administrative or other tasks which do not require police powers or training. The second is that police officers need to be supported wherever possible by the most up-to-date technical aids. We have particularly in mind video cameras in custody suites, surveillance equipment at scenes of crime, computers in all areas of police work, and a fully automated national system of fingerprint recognition. No doubt there are other means also by which investment in equipment of this kind can enable better use to be made of scarce investigative skills.

## Training and sanctions

20. During our examination of the criminal justice system, we have been struck by evidence of a disquieting lack of professional competence in many parts of it. There is, for example, a clear need for the police to improve their skills in interviewing suspects. The CPS, although greatly improved since its inception, could do more to prepare cases better and, in particular, ensure that weak cases do not get before the court. The services provided by solicitors at the police station are often inadequate. Not every member of the Bar knows how to present a criminal case fairly, clearly and without unnecessary repetition. Lawyers advising defendants on appeal do not always give their clients proper advice. Nor do all members of the magistracy and judiciary take sufficiently firm control of the cases in their courts. A number of our recommendations are addressed directly to these issues.

21. Sanctions will only be effective if those empowered to apply them are willing to do so where necessary and the penalty is severe enough to function as a deterrent. Many of our recommendations will, if implemented, only succeed if these conditions are met. We accordingly look to chief constables to make full use of an amended discipline code covering police malpractice; to the Bar Council and Law Society to regulate the conduct of their members as well as to represent their collective interests; and to the judiciary to use their powers to implement wasted costs orders or refer cases to the taxing officer where lawyers have failed to perform to the minimum acceptable standard of conduct.

## Public confidence

22. The widely publicised miscarriages of justice which have occurred in recent years have created a need to restore public confidence in the criminal justice system. That need has not diminished since we were appointed. In addition to the terrorist cases where the convictions were quashed in 1990 and 1991, there has been since our appointment a fourth such case (Judith Ward) where the conviction was quashed in 1992. There has also been a number of cases not connected with terrorism, the most notable examples being those of the Broadwater Farm Three, Stefan Kiszko, and the Cardiff Three. We are particularly concerned that the last occurred after the implementation of the Police and Criminal Evidence Act 1984 (PACE) and its related codes of practice. There have also been a number of appeals allowed in cases which were originally based on evidence gathered by members of the West Midlands Police Serious Crime Squad as well as in cases where the convictions were said to arise out of alleged malpractice by officers based at Stoke Newington police station.

23. The great majority of criminal trials are conducted in a manner which all the participants regard as fair, and we see no reason to believe that the great majority of verdicts, whether guilty or not guilty, are not correct. The percentage of appeals against conviction both from the magistrates' courts and the Crown Court is very small. But the damage done by the minority of cases in which the

system is seen to have failed is out of all proportion to their number. The maintenance of law and order is critically dependent on public goodwill, not only in the need for the law as such to command general assent but in the dependence of the police, whose duty it is to enforce the law, on the willingness of individual citizens to cooperate with them. The proportion of crimes solved by the police without help of any kind from members of the public is negligible, and the ability of the police to perform their function is impaired twice over if victims and witnesses are unwilling to give evidence in court because they no longer believe that trials are conducted fairly.

24. Those who have given evidence to us from the police service, the Home Office, the Lord Chancellor's Department, and the CPS are all as well aware of this as we are. The police, in particular, have pointed out to us that public concern about the integrity of police conduct in criminal investigations has increased at the very time when they themselves are doing more than ever before to improve and monitor standards. We fully recognise the burden which is placed on the police by the expectations which we, the public, have of them. We expect them to conduct themselves properly at all times, even while we know that they are frequently subjected to obstruction, abuse, and physical assault in the routine exercise of their duties. In the many contacts which we have had in the course of our enquiries with police officers of all ranks and in all parts of the country, we have been impressed both by their sense of commitment to their task and by their awareness of their dependence on public support. We recognise that police malpractice, where it occurs, may often be motivated by an over-zealous determination to secure the conviction of suspects believed to be guilty in the face of rules and procedures which seem to those charged with the investigation to be weighted in favour of the defence. Police officers must, however, recognise that, whatever the motive, malpractice must not and will not be tolerated. The remedy lies in a better-trained, better-equipped and better-supervised police force, not in the tacit acceptance of procedural rule-bending. And if the police are to claim, as they rightly do, that the burden of proof must apply to police officers charged with criminal offences no less than to anyone else, they must also accept that their disciplinary procedures should be such as to provide, and to be seen to provide, prompt and effective action against officers whose conduct has brought their force into serious disrepute.

25. Any member of the public who becomes involved in the system of criminal justice, whether as victim, defendant, witness, or juror should be treated fairly, reasonably and without discrimination. We are, however, acutely aware that confidence in the criminal justice system needs particularly to be restored among certain sections of the community. We have received evidence on behalf of both minorities and women that they do not feel that they are either fairly or reasonably treated. They allege that the system is discriminatory against them. It is a matter of statistical fact that members of the Afro-Caribbean community are represented in the prison population disproportionately to their numbers in the population as a whole. Furthermore, there is evidence that in some Crown Court centres they may receive severer sentences if found guilty, and that discrimination may be a factor in this<sup>11</sup>. There is, however, no comprehensive information which would establish the extent to which members of the ethnic minority communities suffer discrimination within the criminal justice system<sup>12</sup>. This needs to be rectified by further research and we recommend that this should be carried out, even if, as we recognise, it may not be capable of providing a complete and conclusive explanation in so complex an area of behaviour.

26. In any event, our recommendations are designed to improve the criminal justice system for all who become involved in it. We make some specific recommendations which we believe will help to restore the confidence of minorities in the criminal justice system. We are, however, strongly of the view that the most important need is to introduce a system of ethnic monitoring in

<sup>11</sup> See R. Hood, *Race and Sentencing: A Study in the Crown Court*, Oxford, 1992.

<sup>12</sup> This is confirmed by M. Fitzgerald, *Ethnic Minorities and the Criminal Justice System*, Royal Commission on Criminal Justice Research Study No. 20, London, HMSO 1993. This Study reviews the key findings from existing research on ethnic minorities and the British criminal justice system.

order to establish how minorities are treated and thus to identify the measures which are needed to ensure as far as possible that the rules, procedures and practices of the criminal justice system are applied, and seen to be applied, in the same way to all. We so recommend. This should be seen as a means of enabling the Home Secretary to fulfil his statutory duty under section 95 of the Criminal Justice Act 1991 of publishing information annually to help those engaged in the administration of criminal justice to avoid discrimination against any person on the grounds of race, sex or any other improper ground.

27. It may be argued that however practical our recommendations, and however cogent the reasoning behind them, there is a potential conflict between the interests of justice on the one hand and the requirement of fair and reasonable treatment for everyone involved, suspects and defendants included, on the other. We do not seek to maintain that the two are, or will ever be, reconcilable throughout the system in the eyes of all the parties involved in it. But we do believe that the fairer the treatment which all the parties receive at the hands of the system the more likely it is that the jury's verdict, or where appropriate the subsequent decision of the Court of Appeal, will be correct. As will become apparent from our recommendations, there are issues on which a balance has to be struck. But we are satisfied that when taken as a whole our recommendations serve the interests of justice without diminishing the individual's right to fair and reasonable treatment, and that if they are implemented they will do much to restore that public confidence in the system on which its successful operation so much depends.

# Chapter Two: Police Investigations

## General

1. The manner in which police investigations are conducted is of critical importance to the functioning of the criminal justice system. Not only will serious miscarriages of justice result if the collection of evidence is vitiated by error or malpractice, but the successful prosecution of the guilty depends on a thorough and careful search for evidence which is both admissible and probative. In undertaking this search, it is the duty of the police to investigate fairly and thoroughly all the relevant evidence, including that which exonerates the suspect. The establishment of the Crown Prosecution Service (CPS) following the passage of the Prosecution of Offences Act 1985 means that there will now be an independent assessment of the evidence in the case before any prosecution proceeds, but this does not in any way relieve the police from their duty to investigate thoroughly. We discuss further the separation of the roles of investigator and prosecutor in chapter five.
2. If they are to meet this objective, police officers conducting investigations must be properly trained and supervised, and must have available to them the necessary scientific and logistic aids. Furthermore, they must operate within a set of rules and procedures which not only affords the necessary protection to witnesses and suspects but also guarantees that records are properly kept, mistakes so far as possible detected, and the lessons to be learned from completed investigations, whether or not they end in a conviction, disseminated in such a way as will improve the quality of investigations in future. At the same time such rules and procedures must strike a reasonable balance between the need to protect the suspect and the need to leave the police free to do the job they are called upon to do. A set of safeguards which prevented the police from bringing large numbers of offenders to justice would be unacceptable.
3. It is important that the police make the most effective use possible of the technical means at their disposal including forensic pathology, forensic science, fingerprinting, deoxyribonucleic acids (DNA) profiling, and electronic surveillance. We reserve for a later chapter our recommendations on the provision of expert advice by forensic scientists. In this chapter, we consider such questions as how forensic science facilities should be used by the police in support of their investigations, how witnesses should be interviewed, how notebooks and other records should be kept, how identification parades should be conducted, and what intimate samples the police should be entitled to request or require.
4. No recommendations that we make can wholly eliminate the risk that due to error or malpractice on the part of the police or for some other reason the wrong person may be prosecuted and found guilty. At the end of the following chapter, when we have completed our discussion of the protection of suspects in police custody, we make certain recommendations about the reform of police disciplinary procedures. We recognise that much can be, and is being, done by the police through improved training of investigating officers and closer monitoring of their performance to ensure as far as possible that investigations are conducted in accordance with the appropriate guidelines and codes of practice. But where, nevertheless, malpractice or culpable error occurs, it is essential that the perpetrators are swiftly, firmly and visibly dealt with, both as a deterrent to others and as a demonstration to the public at large of the

determination of the police service to observe the highest standards of behaviour and performance.

## General approach of the police to investigations

5. It was a strongly held view of certain individuals and organisations who gave evidence to us that police investigations were insufficiently thorough. The need for thoroughness must, however, be seen in context. In the majority of investigations the police rely heavily on the public, and in particular on victims, to notify them of crimes that have been committed and to provide the information necessary to identify the offender. Research indicates that between 80% and 90% of offences are brought to the notice of the police by victims, bystanders or other members of the public. Moreover, in most of the crimes that are cleared up (leaving aside offences taken into consideration) the offender's identity is obvious at the outset, or the offender is caught red-handed or is clearly implicated in some way<sup>1</sup>.

6. In a study<sup>2</sup> carried out in 1986–88 by Michael McConville and others in three police force areas the police were the initial source of information in a quarter of the sample of 1,080 arrests or reports for summons. In 13% they witnessed the offence, in 7% they apprehended the suspect following a stop and in 5% they saw the suspect at the scene of the crime. In 70% of arrests police action was the result of information received from a member of the public.

7. The phenomenon of false confessions to sensational crimes by persons seeking notoriety is now generally recognised, but there is much less recognition of the danger that the police may jump too quickly to the conclusion that they have arrested the offender. We accept that in minor cases where a suspect is quickly identified and readily confesses his or her guilt, further investigation may well be a wasteful diversion of resources from more difficult and serious cases whose solution requires extensive deployment of both manpower and technical support. But it is nevertheless important that the police should see it as their duty when conducting investigations to gather and consider all the relevant evidence, including any which may exonerate the suspect. In particular, where there is a number of possible suspects, it may well be dangerous to press too quickly for a confession, and supporting evidence will usually be needed if the jury is to accept as reliable a confession which the defendant has subsequently retracted. A greater emphasis, such as the police service itself now advocates, on thorough investigation will not only help to ensure that innocent people are not convicted of crimes which they did not commit but also that fewer guilty people are acquitted because the evidence against them fails when tested in court.

## Confession evidence

8. We note in chapter four the significance of confession evidence in police investigations and record there the view of the majority of us that confession evidence should not be subject to a new supporting evidence requirement. However, we expect as a result of our recommendations that it should be rare for a prosecution to proceed in the absence of some other evidence against the accused. We accordingly consider below the process of obtaining additional forms of evidence.

## Identification evidence

9. We received little evidence on the treatment of identification evidence, which has in the past been linked to actual and alleged miscarriages of justice. Since 1977, as a result of the Court of Appeal judgment in *Turnbull*<sup>3</sup>, the judge

<sup>1</sup> R. Clarke and M. Hough, *Crime and Police Effectiveness*, Home Office Research Study No. 79, London, HMSO, 1984. See also J. Burrows, *Investigating Burglary: the measurement of police performance*, Home Office Research Study No. 88, London, HMSO, 1986 and D. Steer, *Uncovering Crime: the Police Role*, Royal Commission on Criminal Procedure Research Study No. 7, London, HMSO, 1980.

<sup>2</sup> M. McConville, A. Sanders and R. Leng, *The Case for the Prosecution*, Routledge, London 1991.

<sup>3</sup> [1977], Q.B. 224.

has been required to warn the jury of the special need for caution if the case against the accused depends wholly or substantially on the correctness of a disputed identification. If the *Turnbull* approach is strictly applied, we believe that the system is capable of assessing such evidence safely. The risks of misinterpreting tenuous identification evidence are, however, great and we cannot overemphasise the need to adhere closely to the *Turnbull* guidelines<sup>4</sup>.

10. The gathering of identification evidence by the police is governed by Code D of PACE, which has four annexes covering the main means by which an identification may be made—a parade, by asking the witness to watch a video film of the parade (thus enabling victims to identify suspects without having to confront them), by confrontation between the witness and the suspect, and (where the identity of the suspect is not known) by the showing of photographs. We think that the code is generally satisfactory but we propose three modifications. First, we recommend that the police make a record of the description of the suspect as first given to them by a potential witness. This should be disclosed to the defence solicitor at the earliest possible opportunity. Secondly, we recommend that, before an identification parade takes place, the police should, if they have not already done so, provide the suspect's solicitor with details of the description given of the offender by the witness or witnesses who are due to attend the parade. Thirdly, we recommend that colour photographs or a video recording should be taken of all identification parades, not only, as at present, those at which no solicitor or friend of the suspect is present.

11. It was also suggested to us that the police and the courts should be readier to take account of the evidence of those witnesses who do not identify the suspect as the offender, although they may have had the same opportunity of recognising him or her as witnesses who do make a positive identification. We recommend that, as is already done in many cases, the jury should be warned by the judge to take such evidence into account.

12. We noted that in some police forces purpose-built suites are in use for the conduct of identification parades. These greatly assist the police in ensuring that the requirements of Code D are met, which in turn ensures that identification evidence is as reliable as possible. We recommend that this development be extended to all major urban areas.

## Interviewing of witnesses and suspects

13. It should go without saying that, whether they have obtained a confession or not, the police should interview as many witnesses to the offence as practicable, including any whom the suspect suggests may be able to exonerate him or her. We have no means of knowing the extent to which this already occurs but we received many suggestions in the evidence put to us that investigation is commonly curtailed once a confession has been made. In many straightforward cases there may, as we have already remarked, be little need to investigate further, particularly if the suspect is likely to plead guilty or accept a caution. But we would expect our recommendations in chapter four on the treatment of confession evidence by the courts to mean that the police will be readier in future to interview a wider range of witnesses even in apparently straightforward cases.

14. It has also been put to us that, when witnesses are interviewed, the interview and any subsequent witness statements should be tape-recorded or video-recorded if the evidence seems likely to be contentious at trial. This would, it is suggested, remove any room for argument over whether the witness had made the statement under pressure or inducement and, in identification cases, it would enable the initial reactions of witnesses as to whether they had or had not obtained a clear view of the suspect, or felt they could or could not identify him or her with certainty, to be recorded and made available to the defence.

15. We see attraction in the proposal but doubt whether it is workable on a wide scale. It would be impracticable and costly to record electronically all

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<sup>4</sup> We set these out at paragraph 64 of chapter four in the course of our discussion of confession evidence.

interviews with witnesses. Nor is it easy to see how the police could predict which interviews would be likely to prove contentious later and so call for electronic recording. Nor would we wish any recommendation of ours to result in more people being taken to the police station for interviews which could as readily be conducted elsewhere.

16. We have also considered whether we should recommend any special steps to be taken in cases where witnesses, particularly if they are victims of the crime being investigated, are in a distressed or vulnerable state. We accept that there will often be cases where witnesses in such circumstances need to be treated with particular care and sympathy, and that the need for this may be overlooked where the witness is not the victim. Guidance exists for the treatment of victims of rape or domestic violence, and we recommend that this approach be used more widely. We further recommend that police training should stress the special needs of distressed victims and witnesses and equip police officers with the necessary skills to handle such people with tact and sympathy.

17. There is some evidence that the questioning of suspects by the police is often rambling, repetitious and insufficiently focused on the real issues. Research conducted for the Home Office by John Baldwin<sup>5</sup> into the police service's experiments with video tape recording of interviews with suspects provides evidence of the poor quality of some interviews. Having observed 400 video recordings of interviews, Baldwin formed an unfavourable impression of the standard of basic interviewing skills in a significant proportion of cases. There is, however, no simple rule that applies to all police interviews. It may be appropriate for an interviewing officer to introduce peripheral and unimportant matters in order to gain the suspect's confidence. On the other hand overlong and irrelevant questioning is not only wasteful of police officers' time but may be a contributory factor to the occurrence of miscarriages of justice.

18. Other, more serious, criticisms of police interviews arising both from the evidence we received and from the research evidence include an over-ready assumption on the part of some interviewing officers of the suspect's guilt and on occasion the exertion of undue pressure amounting to bullying or harassment. This is borne out by Baldwin's study. He thought that some officers approached the interview expecting a confession and that it was often difficult for them to keep an open mind. They entered the interview room with their minds made up and treated the suspect's explanation with unjustified scepticism. The interview often descended into a repetitive series of questions. In several cases one word admissions were obtained in response to leading questions.

19. Baldwin also observed what he regarded as unduly aggressive treatment of suspects by police at interviews. Although this happened in a relatively small number of cases, Baldwin felt unease about the outcome, particularly where juveniles and young persons were involved. In another group of cases suspects were offered unfair inducements to confess particularly as regards the sentence that they were likely to receive if they agreed to have offences taken into consideration. There were also three instances in which private exchanges between solicitors and suspects were video- recorded despite the officer assuring both parties that the cameras had been turned off.

20. The risks inherent in certain police interview techniques were vividly illustrated by the copy of the tape sent to us by the Lord Chief Justice after the Court of Appeal had allowed the appeal of the Cardiff Three. This tape contained the record of a long and highly repetitive series of questions put to one of the appellants in a loud and aggressive way. This was one of a series of tapes which recorded interviews over a prolonged period leading to damaging admissions by the suspect after his repeated denials had been ignored.

21. We regard it as vital that police officers are trained to recognise these dangers and in particular to recognise the need to listen to what the suspect says

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<sup>5</sup> *Video taping police interviews with suspects: a national evaluation*, J. Baldwin, Police Research Series Paper no. 1, Home Office Police Department, 1992.

and, where practicable, to follow up and check his or her story. The need for action on investigative interviewing by the police has been recognised by the police service and endorsed by the Home Office. A new approach was set out in Home Office Circular 22/1992, dated 20 February 1992. That circular laid down certain principles for investigative interviewing, as follows:

- “(a) The role of investigative interviewing is to obtain accurate and reliable information from suspects, witnesses or victims in order to discover the truth about matters under police investigation.
- (b) Investigative interviewing should be approached with an open mind. Information obtained from the person who is being interviewed should always be tested against what the interviewing officer already knows or what can reasonably be established.
- (c) When questioning anyone a police officer must act fairly in the circumstances of each individual case.
- (d) The police interviewer is not bound to accept the first answer given. Questioning is not unfair merely because it is persistent.
- (e) Even when the right of silence is exercised by a suspect, the police still have a right to put questions.
- (f) When conducting an interview, police officers are free to ask questions in order to establish the truth; except for interviews with child victims of sexual or violent abuse which are to be used in criminal proceedings, they are not constrained by the rules applied to lawyers in court.
- (g) Vulnerable people, whether victims, witnesses, or suspects, must be treated with particular consideration at all times.”

22. Home Office Circular 22/1992 has been supplemented by Home Office Circular 7/1993 dated January 27, 1993, which announced the availability of a new national training package for basic interviewing skills. The package consists of a 55-page booklet entitled “A Guide To Interviewing” and a 28-page booklet entitled “The Interviewer’s Rule Book.” The package has been endorsed by the Police Training Council and chief constables have been urged to implement the package within their force as a matter of priority. In particular the Circular recommends the issue of the two booklets to all officers pending the making of the necessary training arrangements. The new package is to be integrated as soon as possible with the probationer training programme and with existing detective courses.

23. We welcome the progress that has been made in this area and see its continued development as important. We accordingly recommend that the new training should, so far as practicable, be given to officers of all ranks so that junior ranks who conduct most interviewing can be effectively supervised by their senior officers. We believe such training should inculcate those interviewing skills which are most likely to elicit the truth while at the same time ensuring that they are exercised within a clearly defined code of ethical conduct.

24. Much will be achieved by instilling in officers a recognition that oppressive interviews are liable to be inaccurate. Fatigue is an important factor in increasing the suggestibility and the inaccuracy of a suspect’s performance. Code C of PACE contains provisions<sup>6</sup> covering the length of interviews and the amount of

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<sup>6</sup> In summary, they are as follows. In any 24 hour period a detained person must normally be allowed a continuous period of at least eight hours for rest, free from questioning, travel, or any interruption arising out of the investigation. Breaks from interviewing are to be made at recognised meal times. Short breaks for refreshment are also to be provided at intervals of approximately two hours.

sleep which a suspect must be allowed, but it does not specify the minimum length of breaks between interviews. The longer an interrogation lasts, the longer in our view the break needs to be before the next interview begins. We recommend that this part of Code C be looked at further and subsequently kept under review.

### Power to require or request samples

25. The principle that persons should not be required to incriminate themselves is held by some to be breached by requirements that in certain circumstances suspects may be required to provide samples of breath, blood or other body fluids, or fingerprints. Parliament has, however, enacted such requirements in carefully defined circumstances. The legal provisions governing the taking and treatment of fingerprints and samples are set out in sections 61-65 of PACE. The samples that may be taken from a suspect are divided into “intimate” and “non-intimate” and the Act specifies the circumstances in which consent may or may not be required in each case, as well as the degree of seriousness of the offence required before a sample can be taken. Intimate samples<sup>7</sup> may not be taken unless the suspect gives consent in writing. Authorisation by an officer of at least superintendent rank is also required, and this will not be given unless he or she has reasonable grounds for suspecting that the suspect is involved in a serious arrestable offence and for believing that the sample will tend to confirm or disprove that involvement. Except for urine and saliva, the sample must be taken by a doctor. If the suspect refuses without good cause to give consent to the taking of an intimate sample, then, under section 62(10) of PACE, the court or jury may draw such inferences from the refusal as appear proper; and the refusal may, on the basis of such inferences, be treated as corroboration of any evidence against the person in relation to which the refusal is material.

26. Non-intimate samples<sup>8</sup> may be taken without consent, but only if an officer of at least the rank of superintendent has reasonable grounds for suspecting the involvement of the suspect in a serious arrestable offence and for believing that the sample will tend to confirm or disprove that involvement. There are no provisions requiring medical supervision or permitting later inferences to be drawn by the courts if consent is withheld.

27. It seems to us that to require a suspect to supply samples is quite different from providing that inferences may be invited from a refusal to answer questions. Scientific analysis of an intimate or non-intimate sample as defined by PACE may be probative of a person’s guilt or innocence. It must also be borne in mind that others may be suspected of committing the crime who might be exonerated if the sample is supplied. We therefore endorse the present position. We accept, however, subject to reclassifying saliva as a non-intimate sample (see paragraph 29 below), that it would not be appropriate to afford the police powers to take intimate samples by force.

28. In recent cases the right of the police to take samples of plucked hair other than pubic hair without consent has been challenged. Given that plucked hair samples may increasingly be capable of providing persuasive DNA evidence, we recommend that in the interests of justice power to take a sample of hair, other than pubic hair, without consent should extend to hair that is plucked as much as to hair that is cut.

29. The police service argue that swabs taken from a person’s mouth should be classed as non-intimate, thus enabling them to be taken without consent if the requirements described in paragraph 26 are met. They told us that mouth swabs

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<sup>7</sup> An “intimate sample” is defined by section 65 of PACE as being a sample of blood, semen or any other tissue fluid, urine, saliva or pubic hair, or a swab taken from a person’s body orifice.

<sup>8</sup> A “non-intimate sample” is defined by section 65 of PACE as being a sample of hair other than pubic hair, a sample taken from a nail or from under a nail, a swab taken from any part of a person’s body other than a body orifice, or a footprint or a similar impression of any part of a person’s body other than a part of his or her hand.

may be taken without consent in Northern Ireland and that the provision has worked satisfactorily there. Saliva can readily be used to obtain a DNA profile. We think therefore that there is merit in the police service's proposal and recommend that saliva be reclassified as a non-intimate sample for the purpose of section 65 of PACE, thus enabling mouth swabs to be taken without consent under section 63 of PACE.

30. We have also been informed that people suspected of being in possession of drugs may retain the suspected substances in their mouths. In such cases the police have no power to remove the substances concerned. We believe the police and other investigators should have the power to remove drugs and other suspected substances from suspects' mouths and so recommend, subject to the rule that no more force may be used in removing such substances than is reasonable in the circumstances.

31. The police service also propose that dental impressions be treated as intimate samples. Dental impressions are not defined as either intimate or non-intimate samples under PACE. This seems a serious omission given the reliability of dental impression evidence where available. Dental impressions cannot be treated as non-intimate samples because they have to be taken by a dentist. We agree with the police that they should be treated as intimate samples and that section 65 of PACE should be amended accordingly. This would enable the jury to be invited to draw an adverse inference from a refusal on the part of a defendant to provide a dental impression.

32. The requirement under PACE that non-intimate samples may only be taken without consent where serious arrestable offences are involved, and intimate samples only taken in such cases even if there is consent, is noticeably at variance with the rules which govern the taking of fingerprints. We recommend that, as the police service propose, where a suspect agrees to provide an intimate sample in a less serious case, the police should be permitted to have it taken especially since the resulting DNA profile might prove the suspect's innocence. We also recommend that, where a suspect declines to supply an intimate or non-intimate sample in cases other than serious arrestable offences, the courts should be able to draw such inferences from the refusal as they think fit and, if appropriate, treat the refusal as corroboration of other evidence.

33. We recommend that the power to take non-intimate samples without consent should be extended by a reclassification for this purpose of certain offences as serious arrestable offences. We do not propose that the power should be so far extended as to encompass all criminal offences, not least because the resources required, given the present technology, would prohibit it. However, as soon as resources, with or without advances in technology, permit, we recommend that the category of serious arrestable offences be extended to include, for this purpose only, assault and burglary.

34. We have had proposals put to us by the police service for a clearer legislative approach to the taking and retention of samples for the purpose of maintaining and consulting DNA data bases. The police service point out that it is not uncommon for persons arrested for sexual offences to have previous convictions for other types of serious offence, for example burglary. In order to assist in the identification and conviction of such offenders the police service propose that there should be power to take non-intimate samples without consent for the purpose of DNA analysis from all those arrested for serious criminal offences, whether or not DNA evidence is relevant to the particular offence concerned. The relevant data of those who are subsequently convicted would be retained so that, in any subsequent investigation where the identity of the offender is unknown but DNA evidence comes to light, that evidence can be checked against the samples in a data base. The police service also propose that intimate DNA samples should be capable of being taken without consent, under a court order, in cases where a person is reasonably suspected of having committed a sexual offence.

35. We agree that the rules need to be clear. We do not accept that the police need the power to take intimate samples without consent subject to our

recommendation at paragraph 29 above that saliva be reclassified as a non-intimate sample. Because, however, DNA profiling is now so powerful a diagnostic technique and so helpful in establishing guilt or innocence, we believe that it is proper and desirable to allow the police to take non-intimate samples (eg saliva, plucked hair etc) without consent from all those arrested for serious criminal offences, whether or not DNA evidence is relevant to the particular offence, and so recommend. The relevant DNA data or samples would be retained for subsequent use if the person concerned is convicted, but not otherwise unless retained under the conditions recommended in the next paragraph for the purposes of a frequency data base.

36. The police service have argued that there should be clear legal provisions governing DNA samples kept on “frequency data bases”, which are necessary for giving estimates of the likelihood of a DNA sample matching a sample in the data base. (Similar data bases are not necessary for fingerprints because it has long been accepted that each person’s fingerprint is unique.) The police argue that DNA data bases should not be confined to samples from convicted persons. We see no objection to the retention for data base purposes of any DNA samples obtained by the police in the course of their investigations provided that these are retained by an independent body. Where, however, a defendant is acquitted or a person is not proceeded against, it should only be possible to keep the sample on the data base for statistical purposes, as opposed to the purpose of assisting in further investigations, and there should be strong safeguards to ensure that such samples can no longer be linked by the police or prosecution to the persons from whom they were taken. The independent organisation responsible for keeping the data base may, however, need to be able to continue to identify the originators of the samples in order to avoid duplication.

37. We recognise that such developments would entail two different categories of data. The first, confined to data relating to persons convicted of a criminal offence, would enable DNA evidence found at the scene of later offences to be compared with the DNA data of those who had previous convictions so that the perpetrators of the later offence can be identified. It would also enable unsolved earlier offences where DNA evidence had been found but not linked with the offender to be cleared up if DNA samples taken from a suspect in connection with a later offence matched the evidence found at the scene of the earlier crime. The second would be used for statistical purposes only. The need for the second category necessitates different arrangements from those that apply to fingerprints, since the fingerprints of people acquitted or not proceeded against must be destroyed. The circumstances are, however, different in that the purpose of a frequency data base is not to match the samples taken from the suspect with a sample on the data base but rather to help to demonstrate the statistical probability of another person having the same DNA profile. For this reason it would be desirable to have as many samples as possible entered on the frequency data base, which we emphasise would under our proposals be overseen by the independent body.

38. We recommend that there be clear legislative provision for more extensive storage of DNA samples both for the purpose of identifying offenders and for the purpose of keeping frequency data bases as described in paragraphs 36 and 37 above. We make no detailed proposals on these matters since it is not part of our terms of reference to devise a new records system. We recommend that the problem be addressed by the legislature taking into account the proposals that we have indicated that we would find acceptable if suitable safeguards were in place.

### Police questioning after charge

39. One rule which restricts the scope of police investigations is the prohibition on asking suspects any questions after they have been charged. Since section 37(7) of PACE requires suspects to be charged as soon as there is sufficient evidence to charge them, the effect may be that the police are precluded too soon

from following up potentially productive avenues of inquiry. Paragraph 16.5 of Code C states that questions relating to an offence may not be put to suspects after they have been charged with that offence, unless they are necessary for the purpose of preventing or minimising harm or loss to some other person or to the public or for clearing up an ambiguity in a previous answer or statement, or where it is in the interests of justice that suspects should have put to them, and have an opportunity to comment on, information concerning the offence which has come to light since they were charged. By an amendment added to paragraph 16.1 of Code C in April 1991 the police can delay charging a suspect who is suspected of involvement in several offences until there is sufficient evidence to charge him or her on all the offences. But this is specifically stated to be subject to paragraph 11.4 of Code C, which provides that once the suspect has indicated that he or she has no more to say, questioning in regard to that offence should cease.

40. These provisions continue the similar provisions of the Judges' Rules which preceded them. Traditionally, questioning even before charge has been regarded as of doubtful legal validity. It was only shortly before the enactment of PACE that the House of Lords finally gave clear approval to detention for questioning before charge<sup>9</sup>. The Judges' Rules allowed further questions after charge only to clear up ambiguities. As has been seen, paragraph 16.5 of PACE Code C now allows such questions where it is in the interests of justice for the suspect to comment on new information.

41. Few people would nowadays regard the role of the police as being confined to arrest and questioning leading to a charge. The police are plainly also involved in preparing the case for prosecution after charge which may involve many kinds of further inquiries. We believe that, subject to appropriate safeguards, this could include further questioning of the suspect. This would have the following advantages:

- (i) police officers may now be tempted to prolong questioning beyond the point at which there is sufficient evidence to charge in the hope that further information about the case will emerge. This temptation would be removed, at least to some extent, if they knew that a suspect could be questioned further at a later stage; and
- (ii) there are in many cases legitimate reasons for further questioning beyond the stage at which sufficient evidence has been obtained to justify a charge. The facts of the case may suggest alternative charges and preferring one charge should not rule out substituting a more appropriate one if further questioning reveals a case for such a course. Further questioning may also lead to an explanation from the suspect which exonerates him or her, or to information or evidence against other suspects.

42. We therefore recommend, provided that the usual caution is repeated, and that the person charged has the opportunity of consulting a solicitor free of charge before any interview and of having that solicitor present at the interview, that the questioning of suspects after charge should be permissible. We think, however, that the power to question the suspect should cease once the full police file has been sent to the CPS or at any earlier court appearance. We also emphasise that the defendant must not be detained in custody solely for questioning after charge.

### Scientific and technical aids

43. As we have already stated, we reserve to a later chapter our recommendations on the provision of forensic science advice to the parties in the criminal justice system. We deal here only with the extent to which the police should seek to use forensic science facilities in support of their investigations. Many witnesses suggested to us that forensic scientific evidence represented the

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<sup>9</sup> *Mohammed-Holgate v Duke* [1984] A.C. 437.

most credible means of solving a criminal offence. We agree that such evidence is crucial in some cases. In the great majority, however, the police will be led to the perpetrator of the offence by eye witnesses and victims and the evidence may seem sufficient without forensic scientific support even where it is readily available. The police have to take into account the costs of analysis of the traces which scenes of crime officers gather and of the possible risk of delay if the laboratory concerned is already overloaded with cases. A decision to omit to collect available forensic science evidence may, however, prove badly mistaken if at a later stage witnesses change their stories or disappear.

44. Clearly the decision whether or not a case calls for the search for and scientific analysis of the available trace evidence is an important one. We therefore welcome the research which we understand that the Crime Committee of the Association of Chief Police Officers is conducting into the criteria used by different police forces for deciding whether or not forensic scientific evidence should be sought in individual cases. We further welcome the establishment, under the chairmanship of the Forensic Science Service (FSS) and involving the police and the CPS, of a working group which is examining the scope for the greater use of forensic science in investigating crime and in the gathering of intelligence.

45. Our hope is that the outcome of these initiatives will be a greater readiness on the part of the police to seek scientific evidence during their criminal investigations. We are concerned by suggestions made in the evidence put to us that the police are being deterred by budgetary constraints, and by the introduction by the FSS of charges for the analysis of exhibits, from making full use of FSS facilities. We are equally concerned that similar considerations may be inducing some police forces to send exhibits for analysis to their own in-house laboratories or to private sector laboratories whose facilities may be less costly but may not be of as high a standard as the FSS.

46. Fingerprint evidence is a special case. The expertise lies in the main with police forces themselves and not with the forensic science laboratories. Fingerprint evidence, however, is often not properly followed up because manual methods of matching traces to the relevant fingerprints in the national, regional and force fingerprint collections take far too long. We deplore the absence of a national computerised data base of fingerprints and regret the fact that a national automatic fingerprint recognition system is not due for introduction until 1996–97. We therefore recommend that the timetable for implementation be accelerated.

47. There is a variety of other equipment which comes under the heading of technical aids to investigation. There is no need for us to discuss the use of this equipment in detail. The police service themselves place great emphasis on equipment which helps them keep suspected criminals under surveillance, including closed circuit television and video recording cameras in public places such as football grounds and shopping centres. We strongly support the use of such devices, whose potential contribution to bringing offenders to justice has already proved its worth.

## Supervision of investigations

48. Our terms of reference require us to examine the supervision by senior police officers of investigations and in particular the degree of control exercised by those officers over the conduct of the investigation and the gathering and preparation of evidence. We found that there was little information on this topic. Supervision arrangements vary from force to force and there is no national or statutory requirement for an officer of a particular rank to take charge of a particular type of investigation. The following paragraphs describe what we understand to be the normal supervision arrangements in most forces.

49. The most serious investigations are led by a Senior Investigating Officer (SIO), whose task it is to take the lead on the policy and direction of the

investigation. He or she directs which lines of inquiry should be pursued, manages the inquiry team and related resources, keeps under review the direction of the inquiry and the range of management aids available to assist it, and considers the possibilities of linkage with other cases. The SIO is assisted by a deputy, whose main responsibility is to ensure that the decisions taken by the SIO are implemented. Typically SIOs do not interview suspects; this task generally falls to the deputy SIO. The rank of the SIO and his or her deputy will depend on the category of the case.

50. We were told that SIOs were subject to normal line management supervision in their forces in order to ensure that they keep an open mind about the direction of the inquiry. The Serious Crime Investigation, Management, Information Technology and Resources (SCIMITAR) course (for officers of the rank of assistant chief constable and above) and the course in Management of Serious and Series Crime (for officers of chief superintendent level and below) at the Police Staff College prepare police officers for the investigation of major crime and incorporate lessons learned from past investigations, the experiences of officers in the field, and information on the latest technological aids.

51. Central to the ongoing management of the most serious investigations is the computerised system known as HOLMES (Home Office Large Major Enquiries System). This incorporates both data storage and retrieval capabilities as well as case-management information. Future versions of this system will include a facility for dealing with safeguards for suspects.

52. In evidence to us the Association of Chief Police Officers said that a manual system, subject to the same supervisory processes as HOLMES, might be used in preference to HOLMES in cases where the identity of the offender was known or suspected or the motive for committing the crime was apparent. In some other cases, however, the manual system was used because of the lack of HOLMES terminals. It seems to us deplorable that investigations which call for the use of HOLMES have to rely on a manual system instead. We recommend that the necessary terminals are provided.

53. An important means of ensuring high standards of supervision of major inquiries, as well as of implementing best practice nationally, is by adherence to a system of case reviews. The Association of Chief Police Officers informed us that in 1990 they adopted a national structure for the timing, siting and methodology of such reviews, including details of the ranks and skills required by the members of the review team, although not all forces in fact conducted reviews in 1991. We welcome the proposed arrangements for a system of case reviews on these lines and recommend in addition that reviews of certain selected major investigations are conducted by members of Her Majesty's Inspectorate of Constabulary assisted by officers from another force. Those in charge should be officers senior to and independent of the SIO. The reviews might on occasion be conducted without notice (for example if the Inspectorate has been notified that there may be matters of concern under the "helpline" scheme mentioned at paragraph 65 below).

54. We support the suggestion made to us by Her Majesty's Inspectorate of Constabulary that policy files should be opened for all major inquiries, and so recommend. These files would set out the format and direction of the inquiry, outline the decisions taken on its scope, give the reasons for discontinuing any particular lines of inquiry, and record any restrictions imposed on resource grounds. A further suggestion from the Inspectorate is that major investigations should be followed by a full debriefing involving all the parties, including the CPS and the FSS as appropriate, so that future investigations can benefit from the experience gained. We endorse this further suggestion and recommend that it be implemented as soon as practicable.

55. We are less satisfied with the arrangements for supervising routine police inquiries. The police service told us that, at divisional and sub-divisional level, where the majority of investigations is carried out, the exercise of supervision is

generally through line management. In their view “supervision of the ethical dimension of investigations” has proved difficult. Although tape recordings of interviews provide a means of monitoring the conduct of interviewing officers, they are infrequently used for this purpose. Moreover, police conduct outside the police station is, as the police service accepted, less susceptible to supervision. Additionally, records maintained under PACE in regard to stop and search are rarely reviewed in the way envisaged by the Royal Commission on Criminal Procedure.

56. Further light on this area is shed by research conducted for us by John Baldwin and Timothy Maloney<sup>10</sup>. They found that supervision as such was scarcely applied to most of the cases they studied. Only in the large scale investigations involving teams of officers with a senior officer in charge did supervision assume a more than formal significance. There were ten cases of this kind in Baldwin and Maloney’s sample, in which senior officers of inspector or above gave orders, checked on progress, coordinated tactics and held regular briefings. In the general run of cases, however, supervision and investigation were inextricably blurred, with supervising officers doing much of the interviewing.

57. A similar picture is presented in research done for us by Michael Maguire and Clive Norris<sup>11</sup>. They found that, because detectives have to pursue inquiries over a wide area, they are often out of touch with the police station and many of their day-to-day activities cannot easily be overseen by supervisors. CID officers are therefore selected partly for their perceived ability to work with a minimum of supervision. Detective sergeants provide general leadership rather than supervision, carrying their own caseloads and acting for much of the time simply as senior constables. The researchers found little evidence that supervisors monitored interviews through listening to the tapes.

58. A third study, by Barrie Irving and Colin Dunnighan<sup>12</sup>, reinforces these findings. This research suggests that supervisory practices within the CID are not as effective as they might be in anticipating and avoiding the types of error which were identified in the participating police force. The researchers found no evidence of formal or informal quality control systems designed to minimise error. As part of the same study, Irving and Ian McKenzie review police training in the investigation of crime. Their review tends to confirm that the training of detectives and their supervisors does not incorporate an awareness of the types of error which are common to CID work.

59. We draw from all this the inference that a new approach to supervision is needed throughout the police service, with improved training in the supervision of inquiries at all levels. We recommend that as a first step, job descriptions should be drawn up for the supervising ranks. Adherence to these should lead to line managers at all levels being required to regard supervision as central to their roles. Sergeants should work as supervisors as well as having their own caseloads, and detective sergeants should be given responsibility for a specified group of detective constables. The precise degree of supervision expected should be spelt out and detective sergeants held accountable within reason for the performance of the group under their supervision.

60. These changes need to be accompanied by an overhaul of detective training and of training in investigations, with particular emphasis being placed on the

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<sup>10</sup> *The Supervision of Police Investigations in Serious Criminal Cases*, Royal Commission on Criminal Justice Research Study No. 4, London, HMSO 1992. The study was based on a non-random sample of forty five serious incidents, drawn from four hundred cases that had been examined by the author in an earlier evaluation of video taping experiments. Interviews were carried out with the police officers who had been put in charge of the investigation.

<sup>11</sup> *The Conduct and Supervision of Criminal Investigations*, Royal Commission on Criminal Justice Research Study No. 5, London, HMSO 1992. The study is based on interviews with seventy five officers of all ranks, together with some observation of key activities and examination of files. This approach enabled the researchers to provide a broad overview of the management and supervisory arrangements within different branches of the three participating police forces.

<sup>12</sup> *Human Factors in the Quality Control of CID Investigations*, Royal Commission on Criminal Justice Research Study No. 21, London, HMSO 1993.

mistakes most commonly made during investigations and how they can be avoided<sup>13</sup>. We so recommend.

61. We also recommend that further thought be given by police forces to their methods of selecting officers for Criminal Investigation Departments. Such methods should be put on a more formal basis and linked to clear job descriptions so that officers can be chosen for their likely ability to carry out clearly defined duties rather than simply on the basis of a perception of how they are likely to fit into a team.

62. We believe that police performance should be assessed on the basis of other factors besides arrest and conviction rates, which carry the risk of encouraging officers to secure a conviction at all costs, leading to the possibility of corner cutting or, in the extreme case, to serious malpractice. We accordingly recommend that as far as possible performance measures should be based on the quality of work performed. We welcome the emphasis that the police service is already placing on quality of service and performance. We understand that standard performance appraisal forms introduced following the issue of Home Office Circular 104/1991 should lead to officers being assessed on the basis of their skills, abilities and attitudes rather than chiefly on numbers of arrests, searches and stops in the street. This is a welcome development. Consideration might also be given to setting up quality control inspection units in forces to conduct random checks of detective activity.

63. Special considerations apply to the management and supervision of the serious crime squads which exist in many forces to ensure that special investigative efforts are directed at major crime. We were seriously concerned at the faults in management and supervision revealed by the reports on the West Midlands Police Serious Crime Squad by the Civil Liberties Trust<sup>14</sup> and by the Police Complaints Authority<sup>15</sup>. We conveyed our concerns to Her Majesty's Chief Inspector of Constabulary, who consulted us in advance of sending a letter to chief constables on 18 February 1992 which set out policy guidelines for the supervision of specialist crime squads, the implementation of which the Inspectorate will carefully review during force inspections. The guidelines, which we endorse, draw particular attention to the requirements for:

- (i) published terms of reference to facilitate the setting of objectives and the determination of performance measures;
- (ii) selection of staff to be on the basis of clearly defined job descriptions, with selection procedures taking account of equal opportunity policies and vacancies being advertised;
- (iii) explicit policies on the length of postings to specialist squads, with the maximum continuous period of posting to be between 3 and 5 years;
- (iv) clear lines of supervision and accountability; performance should be monitored on a regular basis, with patterns of complaints, both in relation to the squads as a whole, and in relation to individual officers, forming part of the monitoring. Line managers should be informed of any pattern of complaints involving a particular officer;
- (v) interchange between departments of a police force, the principle being that officers serving in specialist squads should, if promoted, normally not be promoted within those squads but into posts in uniformed departments.

64. The same letter went on to make recommendations, which we similarly endorse, on the steps needed to detect the beginnings of malpractice before it becomes entrenched. These include:

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<sup>13</sup> The Home Office have assured us that they will be considering the report by Irving and Dunnighan referred to at paragraph 58 in order to incorporate any lessons it may have into detective and investigative training programmes.

<sup>14</sup> *Unsafe and Unsatisfactory*. The Report of the Independent Inquiry into the Working Practices of the West Midlands Police Serious Crime Squad. London 1991.

<sup>15</sup> A Report on the Investigation in the West Midlands Police Serious Crime Squad, London, HMSO November 1991.

- (i) the use of internal inspection units;
- (ii) proper arrangements for the issue, use and inspection of pocket books;
- (iii) the preservation of pocket books, custody records and documentary exhibits for at least five years (in serious cases, ten years) with papers in controversial cases being retained indefinitely;
- (iv) sample examinations by chief constables personally of complaints investigations and complaints trends in order to determine whether patterns are developing which might indicate potential areas of difficulty, combined with the use of unannounced audits, initiated by the chief constable, to look at such matters as pocket books or PACE issues;
- (v) consideration of the establishment of a system whereby police officers or civilian employees can easily and confidentially draw the attention of chief officers to malpractice or to management issues which cause them concern.

65. We emphasise the importance of the last recommendation. There is a real risk that police officers and the civilian staff employed by police forces may be deterred by the prevailing culture from complaining openly about malpractice. We are strongly of the view that they should be able to voice their concerns without fear of reprisal, whether open or covert. We recommend accordingly that all forces should put in place, if they have not already done so, a “helpline” scheme along the lines suggested by Her Majesty’s Chief Inspector of Constabulary. We recommend that in addition, since some officers may be reluctant to report alleged misconduct to someone in the same force, it should be possible to make such reports, on a wholly confidential basis, direct to the Inspectorate. This might in turn lead to a specific audit by the Inspectorate of an on-going investigation. But it would be for the Inspectorate to decide what action should be taken in each case. We recognise that it might need strengthening for this purpose.

66. We also attach importance to the reduction as far as possible of the risk of tampering with evidence recorded in police officers’ notebooks. This is referred to at (ii) of the Chief Inspector’s recommendations as set out in paragraph 64 above. We understand that it is now best practice to issue police officers with notebooks containing fixed pages numbered sequentially. This is a useful safeguard which we recommend should be used in all forces.

67. What we have said above relates, as our terms of reference require, to supervision of police inquiries by senior police officers. Our terms of reference also require us to consider the role of the prosecutor in supervising the gathering of evidence. We discuss in more detail in chapter five the relationship between the police and the CPS. We simply say here that we believe that the police should consult the CPS at the earliest possible stage in serious and complex cases where the sufficiency of evidence seems likely to be a serious issue, and that the CPS should be free to ask the police to search for further evidence before deciding finally whether to continue the prosecution. But we do not consider it appropriate for the CPS to supervise police officers in the investigation. It is the responsibility of the police to investigate crime. There is no reason to believe that another service, whose members are recruited and promoted for their legal skills and experience, would be more proficient at investigating crime or at supervising and monitoring investigations conducted by those specifically trained for the purpose. Moreover, serious confusion of roles would be likely to result to no good purpose if the CPS, whose task is to assess the results of investigations in terms of the prospects of prosecution to conviction for the offence involved, were to direct investigations themselves. Such a step would also remove accountability

in this area from the police, with whom it most naturally belongs. Although, therefore, the CPS must be in a position to advise on the evidence that is required if the case is to go forward to trial, it should not be put in the position of supervising the gathering of the evidence.

## The investigation of serious and complex fraud

68. Although mainly concerned in this chapter with investigations by the police, we have taken note of the special arrangements created by the Criminal Justice Act 1987 for the investigation of fraud. That Act set up the Serious Fraud Office (SFO), under a Director, and enabled the specialist skills of lawyers and accountants to be used in the investigation of offences of serious fraud. This is in addition to the investigative skills of police officers, who are seconded to the Office though they are not a part of it (nor are they able to exercise the powers, discussed at paragraphs 28 to 30 of chapter four below, to require suspects to answer questions under section 2 of the Act).

69. We think that it is important that section 2 powers should be exercised, as we understand is invariably the case at present, outside the police station setting. We do not, however, see any objection to the Director of the SFO authorising the use of section 2 powers by police officers in cases investigated by his office. It seems to us anomalous that accountants and lawyers attached to the SFO may require suspects to answer questions under section 2 while police officers attached to the SFO, who are often more expert at investigating crimes, are precluded from exercising these powers in the same cases. We recommend that the Director's investigation powers under section 2 be extended accordingly, removing the prohibition in subsection (11) on his being able to authorise a constable to exercise his powers.

70. Serious cases of fraud often have an international dimension and the cooperation of the authorities in other countries can be crucial. This may not be forthcoming unless there is reciprocity, but section 2 powers may not be exercised in assisting other countries' agencies in the investigation of offences of fraud committed overseas. We believe that this should be changed and so recommend.

71. Our main concern in this area has been the arrangements for investigation of fraud cases that are not handled by the SFO. We were told that the SFO has the resources to have about sixty cases on its books at any one time. These are high profile cases; the criteria for their acceptance by the SFO were revised in 1992 and are set out in the Annual Report of the Serious Fraud Office for 1991–92. They are that the facts or the law or both are complex, or there is great public interest or concern. In judging referrals account is taken of the need to use the Office's section 2 powers and, normally, of whether the value of the alleged fraud exceeds £5m.

72. The inability of the SFO to accept all cases which fall within the statutory criteria means that very many cases of serious fraud are dealt with by the Fraud Investigation Group (FIG) of the CPS and by the police. These bodies do not have the powers available to the SFO under section 2. There seems to us no justification in principle for the present division of responsibilities and powers. The same body should investigate all cases of serious and complex fraud and the same powers should be available to the investigators.

73. Unfortunately practical considerations preclude us from recommending either an immediate amalgamation of the FIG with the SFO or an extension of section 2 powers to the FIG. The two bodies work quite differently. The SFO mounts highly resourced team investigations; the FIG advises on investigations which are carried out almost exclusively by the police. The Director of the SFO told us in oral evidence that he was concerned that any amalgamation should not dilute the resources available to the SFO to cope with its existing workload. We accept that that risk must be avoided. But we are seriously concerned that the

powers and resources which are held to be necessary for the effective investigation and prosecution of serious and complex fraud are not available to all those who are charged with that task, particularly at a time when the number of offences and the amounts of money involved are both increasing. It cannot be regarded as satisfactory that the present state of affairs should continue indefinitely and we therefore recommend that the Government conduct a study of the feasibility of merging the SFO and the CPS's Fraud Investigation Group as a matter of urgency.

74. We are aware that, even if the SFO and the FIG were to be amalgamated as we propose, there would still be a large number of fraud cases that are not at present referred to either the SFO or the FIG and would have to continue to be dealt with by the police under their existing powers. We doubt, however, whether it would be sensible to aim in the short to medium term for more than the amalgamation of the SFO and the FIG as we propose.

### Other investigative agencies

75. We have been principally concerned in this chapter with criminal investigations undertaken by the police, although paragraphs 68 to 74 are concerned with the special arrangements that apply to the investigation of serious and complex fraud. In general terms, we recommend that the principles and recommendations that we have set out in this chapter, and those which we set out in the following chapter, should apply as far as may be appropriate to all those bodies or agencies which have a responsibility for the investigation of crime. There is provision within PACE<sup>16</sup> to apply the provisions of that Act to HM Customs and Excise. We would hope that the consequential steps required are taken to ensure that the regime we envisage for the police in the investigation of crime and in providing safeguards for suspects apply to the many other relevant agencies, including Customs and Excise.

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<sup>16</sup> Section 114 of PACE is concerned with the application of PACE to HM Customs and Excise. The Act applies to Customs and Excise to the extent directed by Treasury Order.

# Chapter Three: Safeguards for Suspects

## General

1. The protection of suspects from unfair or unreasonable pressure is just as important to the criminal justice system as the thoroughness with which the police carry out their investigations. This protection is currently governed by the relevant provisions of the Police and Criminal Evidence Act 1984 (PACE), and our recommendations accordingly take those provisions as their starting point. Part IV of PACE introduced into the system the novel role of “custody officer”—a police officer not below the rank of sergeant whose responsibilities include ensuring that anyone held in custody at a police station is being lawfully detained, releasing suspects on bail after charge unless given reasonable grounds for believing that continued detention is necessary, and recording all matters relating to detained persons which are required by PACE or its codes of practice. In this chapter, we make a number of recommendations arising from our examination of the custody officer’s duties and functions. We also consider a range of other topics falling under PACE and its codes. These include:

- (i) the entitlement of anyone detained in police custody to receive free legal advice;
- (ii) the treatment in custody of juveniles and the mentally disordered or those who are otherwise vulnerable;
- (iii) the tape recording of interviews with persons suspected of indictable or either way offences;
- (iv) the prohibition except under specified circumstances of interviews with persons incapable through drink or drugs of understanding the significance of questions put to them; and
- (v) the requirement that suspects must be charged as soon as the police believe that they have sufficient evidence to found a prosecution and the person concerned has nothing further to say.

2. For our purposes the most relevant code of practice is Code C, which deals with the detention, treatment and questioning of persons by police officers. Code E, on tape recording, is also relevant. We have already referred, in chapter two, to Code D, on identification of persons by police officers. Although PACE and its codes of practice have been in operation only since 1986, we are able to evaluate the effect of Code C in particular with a considerable degree of confidence. This is thanks in part to the evidence submitted to us, but particularly to the several research reports in which the effects of PACE and its codes have been observed and monitored. These reports have been surveyed in a Home Office Research and Planning Unit Report<sup>1</sup>, and they support our firm conclusion that the effect of PACE and of Code C has been beneficial. Research shows general compliance with Code C, even more so since the revision which became effective on 1 April 1991, and there is general acceptance of its overall objectives. Our recommendations accordingly take these objectives as given and concentrate on the scope for improvement in the way that they are implemented in practice.

3. Much of the evidence which we received in this area was focused on the benefits which have resulted from the tape-recording of interviews in police

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<sup>1</sup> D. Brown and K. Larcombe, *Research on PACE: A Review of the literature*, publication forthcoming.

stations. It needs, however, to be emphasised that the component parts of PACE reinforce one another. Tape recording of interviews by itself is not a sufficient safeguard for those held in police custody. It needs to be supplemented by the provision of adequate legal advice, protection against oppressive treatment both before and after the interview, and medical treatment or independent assistance from an appropriate adult where called for. The role of the custody officer is the key to most of this, but custody officers cannot by themselves guarantee it. Suitably competent legal advisers, appropriate adults, police surgeons, and interpreters must be available.

4. The safeguards provided by Code C relate almost entirely to what takes place in the police station. This is deliberate. The intention is that the whole of the formal interviewing process should be transferred to the police station. PACE itself provides that a person arrested outside a police station shall be taken to a police station as soon as practicable, and Code C lays down that a suspect, once arrested, must not be interviewed about his or her involvement in the offence except at a police station. The rationale for this is that it is only at the police station that the full range of safeguards—access to legal advice, tape recording of interviews, and so on—can be provided under the supervision of the custody officer. It is, however, questionable whether it is realistic to make no provision concerning what takes place between arrest and arrival at the police station, and we make a number of recommendations which are designed to fill what we see as a gap.

5. By general consent, tape recording in the police station has proved to be a strikingly successful innovation providing better safeguards for the suspect and the police officer alike. The success of tape-recorded interviews, and the availability of increasingly advanced and inexpensive recording equipment, has led some of those who gave evidence to us to advocate the introduction of either audio or, where possible, video recording of all transactions between suspects and police. We acknowledge the force of the proposition that where improvement is made possible by new technology, this should be used. But we also see reasons for caution. It will never be possible to ensure that all transactions are recorded, particularly if individual police officers are determined, for their own reasons, that particular transactions should not be. It is difficult, if not impossible, to devise rules that ensure that those who are determined to evade those rules are prevented from so doing. Similarly, the possibility of equipment failure or incompetence on the part of users cannot be ignored. In any event, we are not convinced that video recording is necessarily superior to audio recording for all purposes and in all contexts; even the most advanced equipment may not yield a record which is free from the possibility of misinterpretation or abuse; and considerations of cost-effectiveness require the benefits of any proposed innovation to be fully justified in relation to the sums of money involved.

6. Although, therefore, we do make certain specific recommendations relating to audio and video recording, particularly as regards the recording of what takes place in the custody suite, we do not see even more advanced electronic equipment as holding out the solution to all the problems which remain in this area. However much or little is recorded, and by whatever means, there is still the need for rules which afford protection against what either cannot or will not, for whatever reason, be available to be played over for the benefit of prosecutors, defence lawyers, magistrates, judges or juries.

### Safeguards for interviewing outside the police station

7. We received a number of complaints about the risk of invention by the police of so called “car seat” confessions. These are confessions allegedly made by the suspect on the way to the police station, sometimes (it is claimed) by a circuitous route. No doubt, since such journeys are not always made in silence, many genuinely spontaneous exchanges occur, as well as some genuine admissions. We recognise, however, that in addition to the risk of invented confessions, the

gap between arrest and arrival at the police station affords an opportunity for police officers and suspects to discuss, perhaps with inducements such as promises of bail or threats to involve friends or relatives, what the suspect will say during the formal tape-recorded interview.

8. It is impossible to estimate the frequency of such practices. But the extent and nature of questioning outside the police station was examined in a study by David Brown and others<sup>2</sup> of the effects of the changes to Code C which came into force on 1 April 1991. Among the changes is a rewording of the code designed to discourage interviews outside police stations. The study found that, although questioning took place outside the police station less frequently after 1 April 1991 than before, it still took place in 10% of cases. This questioning may to some extent have been permissible, since the code, as we explain in paragraph 10 below, is not altogether clear in this area.

9. In a study conducted for us by Stephen Moston and Geoffrey Stephenson<sup>3</sup> the arresting officers at the participating police stations reported having interviewed suspects before arrival at the station in 8% of the cases in the sample. In addition 31% of suspects were reported to have been questioned before their arrest. Many of the reasons given by the police for this questioning were imprecise, but the authors consider that there may have been some confusion whether what took place was in accordance with the relevant provisions of Code C (see next paragraph) or not. Two other research studies conducted for us, although not directly on this topic, mentioned negotiations with suspects off the record on what was to be said on the record<sup>4</sup> and the scope for the police to bring pressure to bear on suspects outside the formal interview situation<sup>5</sup>.

10. Code C provides that interviews must normally take place at the police station (paragraph 11.1), must be properly recorded whether or not they take place at a police station (paragraph 11.5(a)), and the record must be shown to the suspect for him or her to sign (paragraph 11.10). The revision of Code C in April 1991 attempted a redefinition of an interview in Note For Guidance 11A. This states that an interview is the questioning of a person regarding his or her involvement or suspected involvement in a criminal offence, but that questioning only to obtain information or an explanation of the facts or in the ordinary course of the officer's duties does not constitute an interview for the purposes of the code. Neither does questioning which is confined to the proper conduct of a search. The Court of Appeal in *R.v. Cox*<sup>6</sup> pointed out that this definition was self-contradictory because questioning a person to obtain information or an explanation of the facts, or in the ordinary course of the officer's duties, could also be questioning of a person regarding his or her involvement in a criminal offence. We recommend that this apparent confusion be clarified when Code C is next revised.

11. Many witnesses argued that there was a case for the introduction of tape recording of all transactions with suspects taking place outside the police station. There will, however, always be some circumstances in which it is impractical for police officers to record what happens (for example in public order situations). In any event there will be argument over what happened before the suspect came within range of the tape recorder or before it was switched on. Nevertheless, we do not wish to rule out carefully researched and monitored progress towards the greater use of tape recorders outside the police station. We understand that the Association of Chief Police Officers is organising an experimental project in Essex which may well give some useful indication of what is feasible. We do not

<sup>2</sup> D. Brown, T. Ellis and K. Larcombe, *Changing the Code: Police Detention under the Revised PACE Codes of Practice*, Home Office Research and Planning Unit, London, HMSO 1993.

<sup>3</sup> *The Questioning and Interviewing of Suspects outside the Police Station*, Royal Commission on Criminal Justice Research Study No. 22, London, HMSO 1993. Police officers in three participating police forces recorded information on a sample of 641 suspects who were questioned or interviewed outside the police station.

<sup>4</sup> Irving and Dunnighan in the study referred to in chapter two, paragraph 58, note 12.

<sup>5</sup> M. McConville and J. Hodgson, *Custodial Legal Advice and the Right to Silence*, Royal Commission on Criminal Justice Research Study No. 16, London, HMSO 1993.

<sup>6</sup> *The Times*, December 2 1992.

believe, however successful the experiment, that all room for argument as to what takes place outside the police station will be removed. But where admissions or confessions or other conversations are recorded, it may be possible to judge whether they are spontaneously offered by the suspect or obtained in breach of Code C. To that extent unpressurised confessions will be more readily identified and police officers will have less scope for breaking the rules on interviews after arrest should they be so inclined. Moreover, the ability to play back the tapes of scenes of arrest and car journeys will give police supervisors a valuable means of monitoring the conduct of junior officers whose activities outside the police station cannot be directly overseen.

12. For these reasons we think that the Essex experiment may be important and recommend that any lessons learnt from it be built upon. If it does demonstrate the feasibility of the extension of tape recording to exchanges between suspects and police officers which take place outside the police station, we believe that extensions to the PACE codes should be considered to cover what should and should not be permissible between arrest outside the police station and arrival at it. The present Code C is mainly confined to events in the station. The range of situations outside the station which may need to be covered should be dealt with in a new section of Code C or E unless they are wide enough to justify a separate code. The new rules should cover the tape recording of unsolicited comments made outside the police station and discourage police officers from seeking to conduct an interview with the suspect in advance of arrival at the police station.

13. We do not believe that this would involve any weakening of the emphasis rightly placed at present on the safeguards that can only be provided in the police station. Rather it should help to ensure that questioning the suspect about involvement in the offence only takes place inside the station, because any breach of the code by police officers may be tape-recorded. At the same time, where conversations outside the station do take place and are recorded, the tape may provide evidence that they were or were not such as to breach the provisions of the code. We do not claim that this would be foolproof since there is no practical means of preventing the determined officer from putting pressure on the suspect before the tape recorder is switched on. We do, however, believe, subject to the outcome of the experiment to which we have referred, that extending tape recording as far as practicable to situations that arise outside the police station will represent a significant addition to the current range of safeguards for suspects and police officers alike.

14. Meanwhile we recommend that, whenever a confession has allegedly been made outside the police station, whether tape-recorded or not, the suspect should be invited to comment on it at the beginning of any tape-recorded interview that subsequently takes place at the station. The suspect should not, however, be invited by the custody officer to repeat the alleged confession at the custody desk. This step should be taken at the formal tape-recorded interview, after the suspect has had an opportunity of consulting a solicitor in private.

15. We have been informed that the Metropolitan police are using machines in custody reception areas which stamp the written records of conversations with suspects which have taken place outside the police station with the time and date at which the officer presents his or her record. Although this cannot prove that the alleged statement was made or at what time, it does authenticate the fact that a police officer at a particular time said that there had been such a statement and may suggest whether or not there was any delay in presenting a record of it. Accordingly we welcome this development.

## Safeguards inside the police station

### *(i) Establishing proper grounds for detention*

16. Under section 37 of PACE, the custody officer is required to determine whether there is sufficient evidence to charge an arrested person with the offence

for which he or she has been arrested. If the custody officer determines that there is not such evidence but has reasonable grounds for believing that detention without charge is necessary to secure or preserve evidence or that evidence might be obtained by questioning the suspect, the custody officer may authorise the suspect's detention. In carrying out their duties under this section, custody officers usually rely on the account given to them by the arresting officer of the circumstances of the arrest. Some custody officers also ask the suspect whether he or she wishes to comment on any part of the arresting officer's account, believing that this is relevant to whether the evidence justifies a charge or whether there should be further detention. Some custody officers fear, however, that such a request is not permitted under section 37 or Code C, both of which are silent on the matter. It has therefore been suggested to us that the matter should be clarified. We agree. In our view it is unreasonable that suspects, for fear that the exchange may be deemed an interview under PACE, should be refused the opportunity at the discretion of the custody officer to comment in this way if they wish. We differ, however, on the precise change that should be made to Code C on this matter, since four of us consider that the custody officer should not invite comments from the suspect in the absence of a warning and before he or she has had a chance of taking legal advice, while the majority of us believe that the custody officer should be able to ask the suspect for his or her views in appropriate circumstances.

*(ii) Detention time limits*

17. When a person is in police custody, the reasons for detaining him or her must be periodically reviewed. These reviews are the responsibility of the custody officer if the suspect has been charged or of an officer not below the rank of inspector if the suspect has not been charged. Under PACE the officer in either case is designated the "review officer". The stages at which a review must be made are set out in section 40 of PACE as follows:

- |                    |   |
|--------------------|---|
| first review       | —not later than six hours after the detention was first authorised. |
| second review      | —not later than nine hours after the first.                         |
| subsequent reviews | —at intervals of not more than nine hours.                          |

18. Reviews may be postponed for reasons of impracticability. The outcome of reviews and any reasons for postponing them must be written into the custody record. Under Code C all reviews should begin by giving the detained person an opportunity to make representations, through a legal adviser if desired.

19. The overall limit on detention at a police station without charge is 24 hours unless the suspect is held in connection with a serious arrestable offence. If the case involves such an offence, the period may be extended to 36 hours on the authority of a superintendent. Beyond that a warrant of further detention may be applied for from a magistrates' court. The period of such further detention is limited to a maximum of 36 hours. An extension of the warrant may then be sought for any period (not being more than 36 hours) that does not bring the total period of detention to more than 96 hours (i.e. 4 days) from the person's arrival at the police station. These provisions are set out in detail in sections 41 to 43 of PACE<sup>7</sup>.

20. We considered suggestions made to us that these time limits and review periods should be amended, mainly on the grounds that suspects were kept in detention up to the limits prescribed because the police took maximum advantage of any periods during which detention was permissible. We noted the results of studies by Brown<sup>8</sup> and by David Dixon and others<sup>9</sup> suggesting that the

<sup>7</sup> Longer limits, however, apply to suspects detained under the Prevention of Terrorism (Temporary Provisions) Act 1989—see paragraph 93 below.

<sup>8</sup> *Detention at the Police Station under PACE*, Home Office Research and Planning Study No. 104, London, HMSO 1989.

<sup>9</sup> D. Dixon, K. Bottomley, C. Coleman and M. Gill and D. Wall: *Safeguarding the Rights of Suspects in Police Custody*, Policing and Society, 1990.

average detention time was approximately 5 hours. A minority of suspects were held for longer periods: 11% for longer than 12 hours and 1% for more than 24 hours. However, Brown reports that half his sample were detained for less than 3 hours and three-quarters were released before the first review at 6 hours from arrival at the station. We are not convinced that any change in detention limits is necessary.

21. It seems to us, however, that a matter as serious as detention before charge should be the subject of appropriate national statistics. Parliament clearly thought so when laying down the requirements of section 50 of PACE that each police force should keep written records of certain matters and publish them annually. The resulting picture is, however, incomplete and impossible to relate to other information such as the overall number of arrests (a figure which is unavailable on a national basis). We therefore recommend the amendment of section 50 so as to ensure that information is made available on the following matters:

- (a) the numbers of persons arrested;
- (b) the numbers of those arrested who are subsequently charged; and
- (c) the numbers of those (1) charged and (2) not charged detained for
  - (i) under 6 hours;
  - (ii) between 6 and 12 hours;
  - (iii) between 12 and 24 hours;
  - (iv) between 24 and 36 hours;
  - (v) between 36 and 72 hours; and
  - (vi) over 72 hours.

*(iii) The role of the custody officer*

22. The research by Brown and others (see paragraph 8), and earlier research by Ian McKenzie, Rod Morgan and Robert Reiner<sup>10</sup>, identified certain weaknesses in the performance of the custody officer role. Brown and others, however, found that in general the impact of the revision to Code C which came into force on 1 April 1991 was to improve matters overall.

23. One requirement of Code C is that a poster should be displayed advertising the right to free legal advice and that the attention of suspects should be drawn to this. The research by Brown and others found that the poster was indeed displayed but suspects' attention rarely drawn to it. On the other hand, after the code had been revised, 99% of suspects recalled being told that they had the right to legal advice, and almost as many remembered being informed that they had the right to inform a friend or relative that they were being detained. Three-quarters said that they were told that legal advice was free (as opposed to hardly any before the revision of the code). Two out of three suspects were told that the right to legal advice was a continuing one and about one-half that the legal advice was independent. In the view of the researchers, in about a quarter of the cases observed, custody officers gave information about rights too quickly, incompletely, or incomprehensibly and, in giving information about the right to legal advice, tended to emphasise that suspects could change their minds later and that obtaining a solicitor might be difficult. The researchers found little evidence, however, of deliberate delay in getting in touch with solicitors where requested, and successful contact was made in 87% of these cases.

24. Against this background we have examined the case for the custody officer role remaining with the police. The research evidence, and our own observation of and discussions with custody officers, indicate that the police are not entirely comfortable with the role and that performance of it, though improving, still leaves something to be desired. We were told that the job is not a popular one

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<sup>10</sup> *Police Powers and Police: A study of the work of custody officers*, 1991, (unpublished).

and we saw that it is sometimes, perhaps often, performed in poor working conditions, usually unassisted by the computerised recording of data. It may also be unrealistic to expect a police officer to take an independent view of a case investigated by colleagues. As far as the evidence needed to substantiate a charge is concerned, the custody officer is hardly in a position to take a different view from the investigating officer because in the nature of things he or she will not have the same direct and detailed knowledge of the case.

25. There is force in these arguments but in our view they do not mean that the custody officer role should be removed from the police, even if that were a practicable option, which is doubtful. It has been argued that the function of protecting the rights of suspects at police stations should be given to the CPS or to some independent body of persons. They, however, would be in precisely the same difficulty of not having the same detailed knowledge of the case as the investigating officer, nor is it certain that they could, in the police station environment, maintain the desired independence from the arresting and investigating officers. It is in any case important that the police should take full responsibility for the integrity of the evidence gathered, during the interview process as in other ways. This will only happen if they remain accountable for ensuring that such evidence is reliable because everything possible has been done to prevent the suspect from coming under unfair pressure. To make another body responsible for the custody officer role would mean a serious risk that the police would no longer regard the responsibility for ensuring fair treatment of suspects as being theirs. In our view therefore everything possible should be done to develop and strengthen the performance by the police of the custody officer role.

26. We recommend accordingly that the custody officer should continue to be a police officer of at least the rank of sergeant. It follows that we do not consider that the use of acting sergeants as a regular practice should continue. The Court of Appeal has recently decided in the case of *Vince*<sup>11</sup> that the practice is permissible under PACE as it stands and we accept that in exceptional circumstances (for example in rural areas where experienced sergeants may not be available at every police station where suspects may need to be detained) it may continue to be necessary. The correct approach in our view is that an officer whose substantive rank is less than that of sergeant should never be employed as custody officer at any police station where a suspect may have to be detained for a full initial six hour period. Where suspects may have to be detained temporarily before transfer elsewhere, the practice may be less objectionable. We nevertheless recommend that it be kept to an absolute minimum.

27. Custody officers must review the evidence, supervise the completion of the custody record and authorise detention or charge. There may, however, be other duties, of a clerical and administrative nature, which could be delegated to trained civilian assistants under the control of the custody officer. The centralisation where practicable of custody officer duties which we recommend below may offer scope for offsetting savings which would enable such supporting posts to be created. Such a development would make better use of the custody officer's skills and training and in addition enhance his or her status and role, possibly justifying a rank higher than sergeant in larger, busier stations. We recommend that these possibilities be explored further as opportunity offers.

28. We regard it as of paramount importance that custody officers should be properly equipped by training for the task. We understand that at present a minimum of two days training in custody officer duties is provided to all newly promoted sergeants as part of their general training. This may be sufficient if it is to be reinforced by immediate and regular performance of custody officer duties, but in many cases police forces deploy only their more experienced sergeants on these duties. In such cases there is a danger that the training will have lost its immediacy and impact by the time the role is performed. We therefore recommend that, where this happens, further dedicated training is given before officers take up custody officer duties.

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<sup>11</sup> *Vince and another v Chief Constable of Dorset*, [1992] 3 A.E.R. 98.

29. PACE requires a custody officer not to be involved in the investigation of any offences for which he or she may be acting as custody officer. This separation of roles is fundamental. It is, however, difficult to achieve in a police station environment where custody officers not only scrutinise the actions of the arresting and investigating officers but also act as arresting or investigating officers themselves from time to time (albeit not simultaneously with the performance of their custody officer duties). This situation calls in our view for the most careful management and supervision of both custody officers and arresting and investigating officers by the senior officer in overall command of the police station. We recommend accordingly that station commanders are fully equipped by training for this task and that it is clearly noted on their job descriptions.

30. We believe that these developments could with advantage be combined with centralisation of custody functions wherever practicable and their provision as a separate specialist service, and we so recommend. Some forces are already developing centrally located custody facilities covering a wider geographical area than now. This will enable the necessary services and expertise to be concentrated in fewer police stations (and fewer to be designated under PACE). It might in time also enable more senior ranks to be appointed to custody officer posts in order to supervise and guide the day-to-day performance of custody officer duties and advise on the most difficult cases.

31. It is an essential element of the safeguards for suspects detained by the police that everything relevant should be clearly recorded in the custody record form. This is part of the protection against unfair treatment and improper coercion. It also helps to resolve any later argument that the case against the suspect has been vitiated by breaches of the rules.

32. The available evidence is that the recording requirements of PACE and Code C are in general observed. This is important even if, as some critics have claimed, the keeping of the record has become routine, with custody officers failing to ask themselves at each stage whether there really is a sufficient case for authorising continued detention or neglecting to question in other ways the suspect's treatment by the arresting or interviewing officers. There are, however, some difficulties over maintaining custody records, and some of the forms which we observed in use were not as clear in design and appearance as they might be. The forms also vary from force to force in ways which seem inconsistent with the need to observe rules that are of national application.

33. We were told, and from our visits to police stations can well believe, that it is not always practicable for recording and other requirements to be carried out without delay. For example, it is not possible, if several people are brought to the police station simultaneously following arrest, to open a separate custody record for all of them at the time of their arrival and delays may occur before all of them can be informed of their rights. Also if all the rooms suitable for interview are in use and it is not feasible to tape-record the interview elsewhere, there will be a delay before an interview can start. Whether such unavoidable delays constitute a breach of PACE is, in our view, doubtful, given that, for example, Code C requires the custody officer to fulfil many of his or her duties "as soon as practicable" rather than immediately. But custody officers perceive such circumstances as amounting to a potential infringement of the code and are reluctant to rely subsequently on the provision of an explanation of the circumstances that prevented earlier action. Since breaches of PACE may render custody officers liable to disciplinary proceedings and to unfavourable comment in court should the case against the suspect come to trial, there is clearly a need for clarification.

34. Accordingly, we recommend that Code C be redrafted so as to include specific recognition of these practical difficulties. This should include clear guidance on what should be done in situations where it is impracticable to apply the code immediately, the purpose being to avoid tempting custody officers to falsify the record because they wrongly believe that they would otherwise be in

breach of the code. We also recommend that all forces introduce computerisation of the custody record process. This has already been done in some forces and ensures that the times at which the various procedures are carried out are accurately recorded. The risk of falsification may be further reduced if the computer has an integral time clock and a print-out can be made of the record at the time the entries are made. The print-out can be given immediate verification by the suspect's signature at the time. We accept that a national custody record form may be impractical while computerisation is being introduced, but we recommend that all police forces should introduce computerised systems to a national standard. This process should be overseen and monitored by Her Majesty's Inspectorate of Constabulary. The national standard should prescribe the minimum acceptable form and layout of all custody records.

35. The shortcoming of any system of written records is that it will not necessarily reveal the circumstances surrounding and preceding the written entry. Allegations that procedures were rushed or omitted or that threats or inducements were used to persuade people to sign the form and waive their rights can never be entirely met by producing the form itself. Nor is it easy to counter allegations that certain actions took place that were not recorded although they ought to have been. The most serious example is where people detained in police cells are alleged to have been visited by arresting or interviewing officers, leading to accusations that suspects were improperly induced outside the formal interview setting to confess or otherwise cooperate with police inquiries.

36. For these reasons many of our witnesses, including some from the police service, saw a strong case for introducing the continuous video recording (including sound-track) of all the activities in the custody office and in the passages and stairways leading from the custody office to the cells. If feasible, the cell passage and the doors of individual cells should also be covered. This would create a visual and audio record which could be checked later if there was any complaint. In our view this step, which has already been successfully taken in several police forces<sup>12</sup>, would make it more likely that all parties would follow the procedures to the best of their ability and would protect them against unfair allegations of malpractice or error. We were told that in one force that already uses video cameras in the custody suite there has been a dramatic reduction in the incidence of unruly and aggressive behaviour on the part of suspects. Video recording would also enable senior police managers to monitor performance and offer timely advice if things were going wrong (although we stress that we do not envisage senior officers watching display screens on a continuous basis). The scope for later argument over the suspect's treatment while in police custody would be greatly reduced and, if the video recording system extended to the cell door, any question of whether the suspect had received unrecorded visits from investigating officers would be readily answered. We emphasise, however, that we are not recommending cameras in the cells themselves.

37. We see the case for video recording the custody suite as convincing and have no hesitation in recommending its introduction as soon as practicable in every police station designated under PACE as suitable for detaining suspects. On the basis of the costs of an experiment in Islington, the cost nationally after initial set up costs might be of the order of £9 million a year. This should be found, if necessary by reallocating priorities. It should be borne in mind that the presence of a video record will both reduce the scope for complaints against the police and enable any which are made about what may have happened in the custody reception area to be more readily resolved. These savings may be difficult to quantify but will not be negligible. In any case, in our view, the money would be better invested in this area than in extending arrangements for the video recording of interviews with suspects.

38. If video recording of the custody suite is introduced, the questions will arise whether suspects should be informed that they are being filmed and whether they

<sup>12</sup> We draw attention as an example of best practice to the pilot scheme conducted by the Metropolitan police at Islington. This has demonstrated that it is possible to install equipment which records clearly all that is done and said, even down to the making of the entries in the custody record form.

should have any right to require the cameras to be turned off. We see no case for enabling suspects to avoid being filmed; the procedure is for their own protection as well as to avoid future argument and we can think of no good reason for giving them the right to have the camera switched off. We do, however, recommend that suspects should be made aware that the camera is on, although failure to do so should not be a breach of PACE or the codes.

39. One of the most important tasks that a custody officer has is that of informing suspects of their rights and entitlements. Posters are displayed (although research has shown that people are seldom referred to them) and notices are available for handing to suspects. The research by Brown and others<sup>13</sup> suggests that, since the revision of Code C which came into force on 1 April 1991, custody officers have been readier to hand out the notices, with 90% of suspects signing to say that they had received them (although about 4% were not actually given them despite signing).

40. Some work was done on our behalf by Isabel Clare and Gisli Gudjonsson<sup>14</sup> in order to develop a more comprehensible version of the notice to detained persons, which has been criticised as being too difficult for many people to understand. The researchers have devised a simplified notice in two parts which, when tested under experimental conditions, greatly improved the level of understanding of the reader. For full comprehension, however, the first part of the notice needs to be read aloud in full by the custody officer to the suspect. If this were done (as provided for in PACE—see section (v) below) it would help identify those people who need the services of an appropriate adult because they suffer from mental disorder. According to Clare and Gudjonsson the first part of the notice takes four minutes to read aloud and we do not believe that this would be practical in custody offices at busy periods. Nor would some, not necessarily suffering from mental disorder, take it in. Other means must therefore be sought of identifying those people who need the services of an appropriate adult. Nevertheless, for those suspects able to read and comprehend a written notice, it will plainly be an advantage if the notice is as clear as possible. We therefore recommend that the version devised by Clare and Gudjonsson be tested under real conditions. Additionally two of our members recommend that the Home Office conducts a corresponding experiment in which suspects are shown a professionally prepared video recording explaining their rights.

#### *(iv) Interpreters*

41. Code C contains suitable provisions for requiring the presence of an interpreter at public expense where the suspect is deaf or has difficulty in understanding English. We have no changes to propose in these. The evidence that we received related in the main to the standards and qualifications of interpreters. Code C says little about these aspects, although it advises that most local authority Social Services Departments can supply a list of interpreters who have the necessary skills and experience to interpret for the deaf, while the local Community Relations Council may be able to provide similar information in cases where the person concerned does not understand English.

42. Guidance to the police on how they should ensure that interpreters are competent and about the need to monitor performance is contained in two Home Office Circulars, no.88/1985 and no. 15/1991. The former reminds chief officers of police of the importance of ensuring that forces operate an objective evaluation of interpreting skills, before they are required, to enable immediate access to a suitable interpreter. The latter suggests means of going about this task, including recourse to the Institute of Linguists Education Trust or local education bodies. The Circular also suggests that interpreters should be interviewed by an appropriate officer to test their awareness of their role and responsibility as interpreters, and to assess the extent of their specialised knowledge of police investigations and court procedures.

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<sup>13</sup> See paragraph 8, note 2.

<sup>14</sup> *Devising and Piloting an Experimental Version of the "Notice to Detained Persons"*, Royal Commission on Criminal Justice Research Study No. 7, London, HMSO 1993.

43. It is easy to say that the police should only use qualified interpreters who meet minimum standards of competence. In principle this must be so and the existing guidance goes some way towards achieving the objective. In practice, however, the police and the suspect may if the case is to make progress have to use the services of an interpreter who is readily available. There can be no objection to this if, whatever his or her paper qualifications, the interpreter is capable of translating basic information for the suspect, for example, why he or she has been taken to the police station, what his or her rights and entitlements are, and perhaps the charge. But we recommend that a fully qualified interpreter, independently employed by or on behalf of the suspect, is used wherever practicable when the suspect is giving instructions to a solicitor.

44. It appears to us, on the basis of the evidence put to us, to be particularly difficult to find properly qualified interpreters for the deaf. The British Deaf Association have proposed to us that only fully qualified interpreters should be used and that more funds should be made available to train interpreters and to pay interpreters in the criminal justice system on similar scales to those that apply elsewhere. We endorse these proposals and recommend their implementation, although we recognise that this is bound to take time. Meanwhile, we think it inevitable that the police will, as Code C allows, have occasionally to communicate with deaf people in writing. Some deaf suspects will be handicapped in more than one respect, suffering in addition to their deafness other difficulties such as blindness, speech impediments and mental handicap. We therefore also recommend that such deaf people be given the full protection of the “appropriate adult” arrangements which we discuss below.

45. We say more in chapter eight about the need for national arrangements to ensure a sufficient supply of competent and trained interpreters.

*(v) The provision of legal advice*

46. Section 58 of PACE gives all arrested persons the right to have advice at the police station from a solicitor free of charge regardless of their means. Subsection 58(8) gives the police the right in certain circumstances to delay access to a solicitor, but the courts have interpreted this provision very narrowly and there are few cases in which it applies. Earlier research<sup>15</sup> showed that about a quarter of all arrested persons asked for a solicitor. Brown and others<sup>16</sup>, found that the proportion of suspects requesting legal advice rose from 24% before the revision of Code C which took effect on 1 April 1991 to 32% after that revision. Suspects received legal advice before being interviewed in 29% of cases as compared with 20% before the revision of the code. Before interviews began, suspects were generally told again of their right to legal advice. The Crown Court Study showed far higher rates of requesting (66%) and receiving (53%) legal advice after arrest. One might, however, expect the rates to be somewhat higher in cases which are due to be tried at the Crown Court than for a sample including lesser offences.

47. Despite what seems to be a rising trend in the number of people detained at police stations who request and obtain legal advice, there remains a substantial proportion of cases in which legal advice is neither asked for nor received. We make some recommendations below which we believe will improve arrangements for offering and securing access to legal advice.

48. At present, if a detained person does not require legal advice, he or she waives the right to consult a solicitor privately by signing at the appropriate place in the custody record form. It is possible, as has been suggested to us, that some applicants sign away their rights without sufficient thought. One minor improvement which we recommend is to add alternative boxes which must be ticked, thus indicating the suspect’s considered choice. Additionally, when a

<sup>15</sup> A. Sanders, L. Bridges, A. Mulvaney and G. Crozier, *Advice and Assistance at Police Stations and the 24-hour Duty Solicitors Scheme*, Lord Chancellor’s Department, 1989.

<sup>16</sup> See paragraph 8, note 2.

suspect waives his or her right to legal advice, we recommend that this should be recorded on tape at the custody desk (assuming that our recommendation about video recording of custody suites has been implemented). It should in any case be recorded at the beginning of any interview at a police station under paragraph 11.2 of Code C (and, as we have noted in paragraph 46, the research indicates that this requirement is usually observed). We recommend that, in addition to reminding suspects at the beginning of the interview of their right to free and independent legal advice, the interviewing officer should, if they have declined such advice, ask them to give their reasons for waiving the right. These would then be recorded on tape.

49. In addition to these measures, we recommend that all suspects who say that they do not want legal advice should then be given the opportunity of speaking to a duty solicitor on the telephone. If they decline to do this, or speak to the solicitor but maintain their decision to forego their right to legal advice, their decision should be recorded on the custody record and repeated on tape at the beginning of any subsequent tape-recorded interview.

50. It may happen that suspects who have asked for legal advice change their mind and ask for questioning to proceed without waiting for the legal adviser to arrive. Where this occurs, paragraph 6.6(d) of Code C permits the interview to begin or continue without further delay provided that the person has given his or her agreement in writing or on tape to being interviewed without receiving legal advice and that an officer of the rank of inspector or above has given agreement for the interview to proceed in those circumstances. We recommend that this be added to as follows. The officer of the rank of inspector or above should, before agreeing to the interview beginning or continuing, inquire into the reasons for the suspect's change of mind and enter these into the custody record form. Alternatively, the officer should ensure that the suspect is asked by the interviewing officer what his or her reasons are for the change of mind at the beginning or recommencement of the tape-recorded interview.

51. These improvements in custody records need to be linked to the assistance that should be given by the police to solicitors when they attend at police stations to advise their clients. We recommend that, as is already best practice, solicitors should automatically see and if possible be given a copy of the custody record as it then stands on their arrival at the police station. They should also where possible be given an updated copy when they leave. Unrepresented suspects should be given a copy on request. We would expect solicitors, again as a matter of best practice, to include copies of the custody record in any later brief to counsel on the case.

52. We also recommend that, where this is not already happening, solicitors should be able to hear the tapes of any interviews which may have taken place with their clients before the solicitor's arrival at the police station. We received some evidence suggesting that this was not universal practice. Solicitors should also be given a copy of the tape as soon as practicable after charge.

53. The police should see it as their duty to enable solicitors to advise their clients on the basis of the fullest appropriate information. We appreciate that not all the information can be released in all cases. But if no information is given to the solicitor and the suspect is confused or unclear, as sometimes happens, about what he or she is supposed to have done, then the solicitor may have little choice but to advise the suspect to say nothing in answer to police questions. It is therefore in the interests of the police to make available such information as they can and in the interests of innocent suspects if it helps them to clear the matter up more quickly. We therefore recommend that Code C be amended so as to encourage the police to inform the suspect's solicitor of at least the general nature of the case and the *prima facie* evidence against the suspect.

54. We recommend that police training should include formal instruction in the role that solicitors are properly expected to play in the criminal justice system including the reasons why they should, from time to time, protect their clients in

a way which the police may see as unhelpful. Such training might be reinforced by a suitable reference in Code C. Some advice on the proper role of the solicitor at a police station interview is already offered at paragraph 6D of Code C but we think that this could be put more positively. At present it suggests that a solicitor is an unwelcome obstruction to police inquiries and to be tolerated only as far as necessary.

55. As we have noted, the demand for legal advice has risen since Code C was revised with effect from 1 April 1991. It is likely that it would rise still further if suspects could be certain that a request for legal advice would not lead to delay. At our request the Home Office Research and Planning Unit included in the research by Brown and others referred to at paragraph 8, note 2 above, a question asking suspects who did not take up the offer of legal advice whether they would have done so if a solicitor had been readily available at the police station. Nearly half said that they would have done, implying that the request rate for legal advice might rise as high as 66% if a scheme for solicitors to be regularly present at police stations were implemented.

56. We see little prospect of introducing such a scheme in the foreseeable future. The priority must rather be to improve the quality of the legal advice that is made available at present. Two of the research studies that we commissioned suggest that considerably more needs to be done in this respect. The first, by John Baldwin<sup>17</sup>, suggests that solicitors or their representatives made few interventions in interviews of suspects by police officers, saying nothing in 66% of the cases examined. In only 9% of cases did solicitors actively intervene on behalf of the suspect or object to police questions. The study did not, however, look at the quality of advice offered to the suspect before the interview, or the instructions which may have been given to the solicitor by his or her client. Although such advice or instructions may well have led in many cases to the suspect responding adequately to police questions without the need for a lawyer's intervention, Baldwin concluded that there was scope for lawyers to act more forcefully than they presently do on their clients' behalf.

57. The quality of legal advice at police stations was also addressed for us in research by McConville and Hodgson<sup>18</sup>. They considered that many advisers lacked adequate legal knowledge and confidence and that sometimes they seemed to identify more with the police than with the suspect. There were also some occasions when inadequate suspects were not, in the researchers' judgement, properly protected.

58. McConville and Hodgson also report that advisers had great difficulty in discovering much about the case on arrival at the police station. The majority made some attempt to obtain information from the police but only 14% consulted the custody officer and only 10% asked for a copy of the custody record. Five solicitors were refused such access. In 45% of cases no attempt was made to obtain information from the arresting or investigating officers. In these cases, solicitors or their representatives had therefore to rely on the information obtainable from the client. But even here, according to the researchers, advisers routinely failed to discover important material known to the client or to examine the legal position with any care. Advisers made no intervention in the interview in 78% of the cases in the sample.

59. Even if not necessarily applicable across the whole field of criminal legal advice, these findings are disturbing. Competent legal advice at this stage can

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<sup>17</sup> *The Role of Legal Representatives at the Police Station*, Royal Commission on Criminal Justice Research Study No. 3, London, HMSO 1992. The research was based on an analysis of the content of a sample of video and audio recordings of interviews with suspects. Six police stations, covering three police force areas, were included in the study. Although the sample cannot be claimed to be representative of all interviews conducted at the selected stations in the course of the study, there is no reason to regard the findings as atypical.

<sup>18</sup> See paragraph 9, note 5. The research was based on the practices of seventeen firms of solicitors and three independent agencies to whom firms of solicitors had delegated custodial advice work. Of the 180 cases studied, only about a quarter were attended by solicitors as opposed to their representatives. 16% were attended by articled clerks, 31% by other clerks and 21% by former police officers.

help not only to avoid future miscarriages of justice but to lead the police, in looking into suspects' explanations, to undertake further investigations which will result in innocent suspects being freed sooner and more fruitful lines of enquiry being pursued. We have therefore taken very seriously the need to address the problems identified by the research conducted on our behalf. We have brought it to the attention of both the Law Society and of the Legal Aid Board, and we look to them to take the necessary action. Meanwhile we make the following recommendations.

60. There appears to be a lack of clarity about the role of a solicitor or solicitor's representative at the police station. We have already commented (in paragraphs 53 and 54 above) on how we believe this might be corrected as far as police perceptions are concerned. Where solicitors are concerned, we believe that their responsibilities and those of their representatives are well set out in the Law Society's booklet "Advising the Client at the Police Station", last revised in 1991. This guidance needs to be more widely known, better understood, and more consistently acted upon. We look to the Law Society to take the appropriate action, and we specifically recommend that the Law Society experiment with producing a video film to support training in this area. Such a video might usefully include examples of inappropriate questioning by the police and of the appropriate intervention by solicitors in response.

61. We have been made very aware of the problems that arise from the fact that, whereas the duty solicitor scheme is subject to strict rules, including criteria which have to be met by duty solicitors and their representatives, no similar rules apply when a suspect calls in his or her own solicitor or when he or she is allocated a solicitor from a list in a police station in an area where there is no duty solicitor scheme. Legal aid fees are, however, payable to solicitors and their representatives whether they are part of a duty solicitor scheme or are the suspects' own solicitors. Steps should therefore be taken to make the suspects' own solicitors and their representatives subject to the same standards as apply to duty solicitors and their representatives. They should have to satisfy the Legal Aid Board that they are fit and proper persons to offer legal advice at police stations before being permitted to receive legal aid fees for such work. Since "own solicitors" account for some two-thirds of all solicitors called in to give advice at police stations, the importance of this recommendation is self-evident<sup>19</sup>.

62. There are occasions when suspects engage their own solicitors outside the legal aid arrangements at their own expense. Monitoring arrangements are needed for such cases and we recommend that the Law Society consider what can be done.

63. It seems to us important that, in the longer term, the training, education, supervision and monitoring of all legal advisers who operate at police stations should be thoroughly reviewed. We so recommend. We also recommend that the Legal Aid Board should commission occasional empirical research. This seems to us likely to be the most, if not indeed the only, effective means of checking on the quality of performance of legal advisers at police stations.

64. We have received some evidence on the fees payable under the legal aid arrangements for attendance at police stations by solicitors and representatives. We were not set up to adjudicate on the scale of legal aid fees, and we do not seek to do so. Unless, however, they are kept under review and set at an appropriate level to attract sufficient numbers of properly trained solicitors into duty solicitor schemes and to ensure the right mix of advice over the telephone and attendance at police stations in person, the suspect will not be properly protected. This does not apply only to the fees paid to solicitors who attend police stations. Duty solicitors are drawn almost entirely from those who practise in the magistrates' court. If the level or type of fees paid to solicitors in the magistrates' court does

<sup>19</sup> The Law Society have told us that they have set up a working party to examine the training and other requirements that should apply to own solicitors and their representatives. We welcome this.

not attract sufficient numbers of properly trained solicitors, there will be insufficient numbers to man duty solicitor schemes adequately.

*(vi) Recording of interviews at police stations*

65. We received a great deal of evidence commending the introduction of audio tape recording of interviews of suspects in all indictable and either way cases, which is more or less universally regarded as removing as completely as possible the scope for argument over what the suspect really said while in the interview room. We unreservedly welcome this advance. Apart from the vexed question of summaries of tape-recorded interviews<sup>20</sup>, we have no specific recommendations on audio tape recordings of interviews in police stations. We have, however, had to consider the many strongly felt arguments put to us that video recording of interviews represents an even more desirable advance and one that in the interests of justice should be introduced without delay.

66. Those who advocate the video recording of interviews with suspects do so on the ground that videotape provides a more comprehensive record of what takes place in the interview room than does audio tape. Some go on to argue that the actions and gestures of the suspect are as much evidence as what the suspect says and, if it is desirable to record electronically the suspect's words, it must be equally desirable to record his or her gestures. They draw the analogy with what happens in court, where it is held to be desirable that the jury should see, as well as hear, all persons appearing in the witness box. Experiments in videotape recording, which we saw for ourselves, are taking place in three police forces, the Metropolitan police, the West Mercia police and the West Midlands police, and different approaches have been followed in each. For example, in one of the forces the video camera is concentrated on providing a head and shoulders only image of the suspect. This allows the suspect's facial expression to be recorded in detail and it is therefore possible that in certain circumstances the observer may obtain a different impression of the suspect from both seeing and hearing him or her than might be formed by listening to an audio tape. It seems, however, to be a disadvantage that the interviewer is not video-recorded. In another force, a wide-angled lens captures all those in the interview room on the video record—the suspect, the interviewing officer and any third party, such as a legal adviser or appropriate adult. This enables the observer to see the interviewing officers during the interview and to form a judgement, in a manner not possible from an audio tape, on whether their physical demeanour is in any way intimidating. Further, it makes it possible to see the overall demeanour of the suspect.

67. The experiments being undertaken within the police service have been evaluated for the Home Office by John Baldwin<sup>21</sup>. He notes that anyone is bound to be struck by how real and vivid are the interviews on video tape. Although his project required him to spend many hours watching a television screen, it constituted a very efficient way of finding out exactly how interviews with suspects were being conducted. The video experiments could therefore be said to be a success in the sense that the tapes enabled a third party to make a confident assessment of the fairness or otherwise of almost any interview. The experiments also demonstrated that it was feasible to record police interviews of suspects on video tape on a routine basis. In Baldwin's view, video provides the best way of satisfying sceptics that interviews are being conducted in a competent and acceptable manner.

68. Baldwin found, however, that there remain technical problems. The clearest picture is provided by the system which excludes the interviewer. At stations where an attempt is made to capture the whole scene, there is a sacrifice of picture quality, with changes of expression and bruises or scars being invisible or difficult to see. He believed that the more advanced the equipment, the more

<sup>20</sup> See paragraphs 73 to 80.

<sup>21</sup> See chapter two, paragraph 17, note 5. As well as the 400 video recordings referred to there, Baldwin examined 200 audio recordings and drew comparisons with the video recordings.

liable it is, at least for the present, to mechanical failures. Indeed, Baldwin found that such failures, ranging from the fairly serious to inability to use the equipment at all, occurred in 27% of all cases. These are presumably problems that can be resolved in time as improvements in technology ensure that the equipment is more reliable and police officers become more familiar with it. But until they are, it would be unwise to assume that video taping of interviews will necessarily or always serve the interests of justice.

69. In his study Baldwin attempted to assess the benefits of employing video equipment as compared to using audio alone. He concluded that in about 80% of the interviews examined, the audio recording gave a sufficiently clear idea of what was taking place in the interview room. However, some tangible additional benefits from video recording could be discerned in the remaining 20%, although there were only 23 cases (6% of the video sample) in which it seemed to be of considerable importance to have the interview on video. In some of these cases, the offence with which the suspect was charged was of a very serious nature and in Baldwin's view it might well have been critical in court to be able to see, rather than hear, the suspects' spontaneous outbursts or to form a judgement on their expression, demeanour, attitude or reactions. These phenomena seemed to him well captured on the video recordings and very relevant in aiding an observer to form a view as to the propriety of the interviewing procedures.

70. We mention in chapter two the evidence, supported by other findings from Baldwin's evaluation, which we have received about the poor quality of some police interviews with suspects. It may therefore be an additional benefit of video recording of interviews that it provides a useful training aid for interviewing officers by giving them and their managers and trainers an opportunity to watch interviews that they have conducted. Errors made could be identified and such matters as the officer's preparation and technique discussed. It might also be possible for such recordings to be used in the training of solicitors for their role as legal advisers to suspects at the interview.

71. Having stated some of the potential advantages of video recording police interviews with suspects we should also set out some of the potential disadvantages. If, in any particular case, evidence of the suspect's gestures or facial expression are relevant, the video evidence of this will need to be available to the jury or the magistrates. This introduces the risk of prejudice to the defendant arising from irrelevant and possibly unfair surrounding circumstances. Suspects will seldom be at their best in the police station, especially if they have just been arrested and are in a state of semi-shock. Some interviewees will be made even more nervous by knowing that they are on television. It is too easy even for trained observers to mistake small gestures and tricks of demeanour for symptoms of guilt when they may be symptoms only of nervousness or anxiety. What is more, visual impact is so powerful and immediate that it may have the effect of distracting the viewer from what is actually being said. The impact of the interview will be influenced by camera angles, the degree of close-up used, lighting and other subtleties of photographic technique. The benefit of audio taping is that it necessarily concentrates on the words of the suspect, particularly the way that the words are said, and is thus arguably a better means than video of focusing on the actual evidence. Defence solicitors are much less enthusiastic about video taping than are police officers.

72. For these reasons all but two of us have reservations about the widespread use of video recording in the absence of further research and experimentation. This majority recommend that research specifically addressed to the anxieties expressed in the preceding paragraph should be carried out. Meanwhile, if resources are limited, we all consider that, as we have already recommended, priority should be given to video recording of what goes on in the custody suite. This will be a greater safeguard for the suspect than video recording in the interview room. Indeed, there was virtually no suggestion in the evidence put to us that malpractice that cannot be caught on audio tape occurs in the interview room. In the course of the further research which we consider necessary for other

reasons, more work is needed on the technicalities in order to achieve in one system the advantages of both the two different approaches to which we refer in paragraph 66 above.

(vii) *Summaries of police interviews ("interview records")*

73. Paragraph 5B of PACE Code E (which governs the tape recording of interviews) states:

"The interview record shall be prepared on the basis that it shall be used, first, to enable the prosecutor to make informed decisions about the case on the basis of what was said at the interview; secondly, to be exhibited to the officer's witness statement and used pursuant to section 9 of the Criminal Justice Act 1967 and section 102 of the Magistrates' Courts Act 1980; thirdly, to enable the prosecutor to comply with the rules of advance disclosure; and fourthly where the record is accepted by the defence, to be used for the conduct of the case by the prosecution, the defence and the court. The record shall, therefore, comprise a balanced account of the interview, including points in mitigation and/or defence made by the suspect."

74. Reading a summary is much quicker than listening to a tape and it has become common for all concerned to work to a considerable extent from the summaries. But summaries have two main problems. One is the fact that they take a very long time to prepare. The police service told us that a study over a two month period in a force with an establishment of 2,300 officers showed that the preparation of interview summaries was the equivalent to a reduction of twenty officers or almost 1% of its establishment. The police service also said that another study in an urban force of some 5,000 officers gave a similar result with an estimate that summaries absorbed the full-time equivalent of some fifty officers. The police service has estimated that, if these studies are broadly representative, summaries take the full-time equivalent of between 1,300 and 1,500 officers.

75. Secondly, misgivings have been voiced for some time about the quality of summaries produced by the police, and these have been confirmed by a study done for us by John Baldwin<sup>22</sup>. Of the cases which he examined, from four police force areas, he considered that in less than a third could the summaries be said to provide an accurate and succinct record of the interview.

76. The police service told us in oral evidence that they doubted whether the task fell properly to them. It took up a great deal of police time which might be better spent on operational duties, and the quality of the summaries was constantly being criticised. They accordingly suggested that the police should pass the tapes to the CPS without a summary but with an indication of whether the tape included admissions or a confession and, if so, where these were to be found on the tape. The CPS and the defence could then listen to the tape and obtain a transcript if that seemed necessary.

77. We also received suggestions that, if summaries are still required, they should be prepared by the CPS rather than by the police and that the preparation of transcripts of tapes should be done by or under the direction of the CPS. In Scotland the preparation of transcripts is done by typists working for the procurator fiscal service.

78. Meanwhile the Home Office have issued further guidance on the preparation of summaries of taped interviews in Home Office Circular no 21/1992. They have told us that this, combined with the steps being taken to improve the quality of interviews generally, is already leading to improvements in the standard of summaries. We, however, believe that, even if these further

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<sup>22</sup> *Preparing the Record of Taped Interview*, Royal Commission on Criminal Justice Research Study No. 2, London, HMSO 1992.

steps are successful in improving the quality of summaries, the issue raised with us by the police service, namely that large numbers of police officers would be released for normal police duties if summaries did not have to be prepared, needs to be addressed.

79. The options that seem to us to require further exploration are as follows:

- (i) summaries of the tapes might be dispensed with altogether. Instead the police would send the tapes to the CPS accompanied only by an indication of whether or not they contained admissions and if so where on the tape they were to be found. This would reduce the burden on the police. But prosecution and defence lawyers, as well as the courts, would have to spend far more time listening to the tapes. In principle the more the tapes themselves are listened to the better. But whether a requirement to listen to all tapes would be practicable or justifiable is obviously questionable;
- (ii) the police might continue to be responsible for the preparation of summaries. This option should not only be dependent on continued monitoring of the new arrangements promulgated in Home Office Circular no. 21/1992 but also on comparison of the costs to the police service of their continuing to undertake the task with the costs of another service doing it;
- (iii) the responsibility for preparing summaries might be transferred to the CPS. This would recognise that police officers are not necessarily by skills or training the people best qualified to perform the task, which seems better suited to members of an organisation whose responsibility it is to prosecute the case and so, arguably, to decide which parts of the interview represent the most relevant evidence. On the other hand CPS staff, whether lawyers or not, are likely to take longer to prepare summaries than police officers who have been present at the original interview; and
- (iv) the preparation of transcripts might replace the preparation of summaries, whether by the CPS or the police. Transcripts are easier and quicker to consult than an audio tape and eliminate the difficulty of deciding which are the essential points to include in a summary. But it may be a serious waste of resources to prepare a full transcript in every case.

80. We recommend that these options be further explored, by experiment where appropriate, by the Home Office in consultation with the other interested parties in order to establish the best practicable method for the future. We would emphasise that, in considering the choice between the CPS and the police if summaries are to be retained, it should not be assumed that they would need to be prepared by either lawyers or police officers. Support staff, specifically trained for the task, are one obvious resource that could be employed. Although there would be additional costs, perhaps substantial, in such a course, it should be borne in mind that, directly or indirectly, these costs would be offset by the release of police officer time for other, more appropriate, duties.

*(viii) "Appropriate adults"*

81. As already mentioned, PACE and Code C make specific provision for juveniles and for those suffering from mental disorder or mental handicap<sup>23</sup> to be assisted at the police station by a person described in the code as the "appropriate adult". Where juveniles are concerned, the appropriate adult is envisaged as normally being a parent but the research by Brown and others<sup>24</sup> noted that local authority social services departments are increasingly being asked to provide the

<sup>23</sup> Paragraph 1.4 of the code requires that, if an officer has any suspicion, or is told in good faith, that a person of any age may be mentally disordered or mentally handicapped, or mentally incapable of understanding the significance of questions put to him or her or of his or her replies then that person shall be treated as a mentally disordered or mentally handicapped person for the purposes of the code.

<sup>24</sup> See paragraph 8, note 2.

appropriate adult in such cases. Bearing in mind the risk of the young and the mentally disordered being unable to cope with the pressures of the police station environment and thus being particularly liable to make false confessions, we considered the available information on how these provisions were working.

82. As well as their entitlement to the presence of an appropriate adult, juveniles are entitled to consult a solicitor, a right that can easily be overlooked. The researchers found that before the revision of Code C which came into force on 1 April 1991, the appropriate adult was informed of the juvenile's right to consult a solicitor in about half the cases. This rose to over three-quarters after the revision of the Code. Code C makes it clear that juveniles should be informed of their rights and entitlements, including the right to access to legal advice, on arrival at the police station in the same way as adult suspects. In fact, however, the researchers found that information about these rights was almost invariably deferred until the appropriate adult arrived.

83. A report conducted on behalf of the Commission by Roger Evans<sup>25</sup> suggests that in many cases juvenile suspects need independent assistance in their dealings with the police and that this is not always best provided by a parent. Parents may find it difficult to remain objective and Evans noted that it was not uncommon for them to take the side of the police and assist the process of obtaining a confession. No doubt there are also examples of parents being too defensive.

84. Where a suspect is or may be mentally disordered, different problems arise. These are likely to be increasingly encountered by the police as rising numbers of people suffering from mental disorder find themselves living in the community. The research by Brown and others<sup>26</sup> found that specialist and psychiatric social workers were increasingly being called in as appropriate adults in such cases of mental disorder as were identified (about 1% of their sample, or 110 persons, consisted of such cases). An attempt has been made in a research report for us by Gisli Gudjonsson and others<sup>27</sup> to investigate the psychological characteristics of adult suspects and identify those who might require special treatment. The researchers concluded that the police interviewed many suspects of poor intellectual ability, with 6% having a reading age of below 9 years, that is to say, they were illiterate and needed an appropriate adult. Nevertheless, between 80% and 90% understood their basic legal rights. The researchers estimated that 7% of suspects were probably suffering from mental illness, 3% from mental handicap and one or two suspects from brain damage. Although the police missed some of these cases, in the view of the researchers they were able to identify the most serious cases and take the necessary steps to ensure that they were appropriately represented. The researchers nevertheless thought, on the basis of their evaluation of the mental state of the suspects in their sample (not only those suffering from a mental disorder), that there was a need for an appropriate adult in between 15% and 20% of the cases. Using the existing guidelines the police requested one in only 4%. They concluded that there must be clearer guidelines for police officers about the criteria to be employed when considering the need for an appropriate adult. This is a matter which we recommend should be considered by the working party that we propose should be established (see paragraph 86 below).

85. We cannot say that we are fully satisfied with the present rules and practical arrangements for providing the necessary advice and protection for those who

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<sup>25</sup> *The Conduct of Police Interviews with Juveniles*, Royal Commission on Criminal Justice Research Study No. 8, London, HMSO 1993. The research is based on an analysis of taped interviews with juvenile suspects. The author examined a total of 164 taped interviews in which the police record of interview stated that the suspect had made a full confession or the outcome of the interview was unclear from the record. The interviews took place during 1990 at police stations in one police force.

<sup>26</sup> See paragraph 8, note 2.

<sup>27</sup> *Persons at Risk During Interviews in Police Custody: The Identification of Vulnerabilities*, by G. Gudjonsson, I. Clare, S. Rutter and J. Pearse. Royal Commission on Criminal Justice Research Study No. 12, London, HMSO 1993. The research entailed interviews with, and psychological assessment of, adult suspects detained at two police stations. Interviews were carried out with 173 suspects and complete psychological assessments were obtained of 156 detainees who were subsequently interviewed by the police.

are likely to be particularly vulnerable to pressure while in police custody. It seems to us that a more systematic approach is needed to the question of which people are suitable for being called upon to serve as appropriate adults and the training that they should receive. It has been suggested to us that a video film should be prepared to assist in training and for showing to appropriate adults who may be called upon without having had any previous experience of the role. Also there might be some advantage in a leaflet being prepared about the role and responsibilities of appropriate adults which could be handed to them by the police on arrival at the police station. The possibility of establishing local panels of suitable people also seems worth serious exploration. Some parents may not be suitable to act as appropriate adults for their children, although it is difficult to be prescriptive about this. We are not clear why solicitors should not be able to act as appropriate adults.

86. We do not, however, wish to make any specific recommendations on these or other matters connected with appropriate adults. This is because we agree with the recommendation of Gudjonsson and others in the research to which we have referred that there should be a comprehensive review of the role, functions, qualifications, training and availability of appropriate adults. We recommend such a review, possibly by a multi-disciplinary working party chaired by the Home Office. The working party should consider all the matters on which, as we have mentioned above, we have reservations and any others which seem to require consideration and investigation.

87. A particular problem that has been drawn to our attention is that of what rules should apply when information is passed by a suspect to an appropriate adult. It is not clear to us whether the same privilege should apply as to communications between a client and his or her solicitor or whether, given that the appropriate adult may not be a solicitor, different rules should apply. If, however, the appropriate adult must, if required by a court, give evidence of any incriminating material, a proposition which arguably undermines the whole purpose of the role, then this needs to be clearly stated. The suspect should not be given the impression that whatever he or she says to the appropriate adult is entirely in confidence if that is not to be the case. An unambiguous rule is needed and we recommend that the formulation of this be undertaken as an important part of its agenda by the working party which we envisage.

*(ix) Police surgeons*

88. It should go without saying that there needs to be suitable arrangements for ensuring that people taken into police custody who need medical treatment receive it expeditiously. PACE and Code C lay down various requirements which seem to us to be in general on the right lines. Our main concern has been with the provision of medical services by police surgeons, or forensic medical examiners as they are known in the Metropolitan police district.

89. A report was prepared for us on the role of police surgeons by Graham Robertson<sup>28</sup>. He noted a difference between London and elsewhere in the assessment and treatment of people who might be considered unfit for interview on grounds of mental health. Outside London, it was more frequently the case that suspects were considered unfit for interview but it less frequently happened that an appropriate adult was called. In London, on the other hand, few of those detained were declared unfit for interview but doctors advised the police to call an appropriate adult in almost a quarter of the cases referred to them for assessment of possible mental disorder. The criteria used to assess fitness for interview varied with the doctor.

90. Although Robertson's research indicates that much valuable work is being performed by police surgeons, we are concerned by suggestions that we have

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<sup>28</sup> *The Role of Police Surgeons*, Royal Commission on Criminal Justice Research Study No. 6, London, HMSO 1992. The study covered three London and twelve provincial police stations and found that the commonest reason for a doctor to be called was in order to treat the minor injury of someone who was drunk or had been drinking. Mental illness accounted for 9% of examinations and mental handicap for 0.5%. 1 in 13 suspects were judged to be unfit for detention after referral to the doctor because of physical injury or illness or drunkenness.

received that the work that they do lacks any central co-ordination and quality control. We were told that the system in England and Wales compares poorly with that prevailing elsewhere, for instance in the State of Victoria, Australia. General practitioners receive little or no training in police work nor does their training include psychiatry, notwithstanding that a significant number of those detained by the police may be suffering from mental disorder. Nor are the universities involved to the extent that they might be in the training of police surgeons. These are, however, major issues and a separate working party is needed to do justice to them. We recommend that such a working party be set up by the Home Office, to consider the need for a central co-ordinating body, the need for centres of excellence at universities, the appropriate training and standards for police surgeons, the role of psychiatry, the fees payable, the availability and use of psychiatric nursing staff and other relevant matters. The working party will need to include appropriate representatives from the police, the psychiatric bodies, police surgeons and lawyers among others.

91. There also needs to be improved training and guidelines for the police on how to decide when to call out police surgeons. This is being addressed by the police service in collaboration with the medical profession and we welcome this.

92. Our attention has been drawn to the duty psychiatrist schemes which exist at certain magistrates' courts. We recommend that experiments be set up to determine whether such schemes would also be appropriate at busy police stations in city centres. Every police station should in any event have arrangements for calling upon psychiatric help in any case where this is needed. Police officers are accustomed to taking some suspects to hospital under the provisions of the Mental Health Act. Police surgeons should be able to obtain advice from a psychiatrist about cases in which they have doubts about the mental state of a suspect. Duty solicitors should be involved as far as possible in consultations between police surgeons, suspects, and the psychiatrist. Legal aid funds should be available to cover the costs of exceptional consultations by psychiatrists at police stations if authorised by a police surgeon in cases where the transport of the suspect to the hospital is not practicable for legal or security reasons.

## The Prevention of Terrorism Act

93. The Prevention of Terrorism (Temporary Provisions) Act 1989 makes special provision for the arrest, detention and exclusion from Great Britain of persons suspected of involvement in terrorism. In such cases there are certain consequential modifications of the application of PACE and its codes. Our terms of reference do not specifically require us to consider the workings of the 1989 Act. Some of its provisions, for example the powers of arrest and of exclusion from Great Britain, are not within our remit. Several witnesses, however, suggested to us that the Act should be repealed not only because of those provisions but also because the Act provides for longer periods of detention before charge than would be permissible under PACE and also modifies certain other requirements of PACE and its codes, in particular Code E on tape recording, which does not apply to cases that fall under the 1989 Act. Because the power to detain and the ability to tape-record interviews is relevant to the question of fairness to suspects and the reliability of confessions, we have felt it necessary to consider these aspects of the 1989 Act. We bore in mind too the fact that some of the serious miscarriages of justice which came to light immediately before we were set up had followed from cases of Irish terrorism to which the 1989 Act or its predecessors applied or would have applied had the offences concerned not taken place before their enactment.

94. We agree that in principle the safeguards of PACE and its related codes should apply to all serious offences equally. Ideally, therefore, we would wish to dispense with the modifications to PACE that follow from the provisions of the Prevention of Terrorism (Temporary Provisions) Act 1989. The question, however, is whether those modifications can be justified on the grounds of the

special problems caused by terrorism. The judgement of Parliament has been that those problems do justify such exceptions but that the matter should be kept under constant review. The 1989 Act has to be renewed annually and before Parliament decides on each renewal the results of an independent review are presented to it by the Home Secretary. Given this pattern of annual debate and review, we see little basis on which we could ourselves come to different conclusions from those of Parliament in this matter. On lengths of detention, the period for which a person may be detained under the 1989 Act is longer than in normal cases for reasons that we have little means of assessing but which are subject to constant scrutiny by the system of annual review and debate to which we have referred. On tape recording, the Home Secretary announced on 5 November 1992<sup>29</sup> that the full tape recording of interviews with terrorist suspects in England and Wales would begin, on a trial basis, on 1 December 1992. From that date all forces in England and Wales will have been tape-recording interviews with terrorist suspects substantially in line with current practice for the criminal suspects under PACE. The trials, to run for up to two years, will be carefully evaluated before any decision is taken whether to extend formally the code of practice on tape recording under PACE to cover terrorist cases. We welcome this announcement and, if the trials prove successful, we would also welcome the application on a permanent basis of PACE procedures to tape recording of interviews with terrorist suspects.

95. For these reasons, we make no recommendations for the repeal or amendment of the Prevention of Terrorism (Temporary Provisions) Act 1989.

## Police discipline

96. An effective system of police discipline is essential if police officers are to be deterred from malpractice or negligence, either of which may lead to miscarriages of justice, and if local communities are to have the necessary confidence in the integrity of the police. We doubt whether the existing arrangements for police discipline do now command general public confidence. They are seen as ineffective in that they appear to be both lengthy and uncertain and frequently result, when they lead to a finding against the officer concerned, in the imposition of penalties less than the offence would seem to require. We recognise that this impression may be due in part to the amount of publicity given to a minority of cases in which police officers are reported as not being prosecuted despite well-publicised allegations of malpractice, taking early retirement on medical grounds before disciplinary proceedings are concluded, or receiving only token punishment in the form of a reprimand or the loss of a few days' pay or a transfer to non-operational duties. We also recognise that the police service is making continuing efforts to promote integrity, quality of service and commitment to a clear set of ethical principles. Nevertheless, we see it as desirable that changes should be made to the existing disciplinary system not merely in support of those efforts but also to restore public confidence and to make it easier for chief constables to take firm and effective action in cases where they are satisfied that it is called for.

97. Where a police officer is charged with a criminal offence, he or she is clearly entitled to be treated in the same way as any other defendant, whether the offence is one involving the alleged abuse of police powers or one in which the officer is not acting as such but is charged with, say, theft or assault in circumstances no different from an ordinary member of the public. The case will then be passed to the office of the Director of Public Prosecutions (DPP) and it will be for that office to decide whether there is sufficient evidence to prosecute in accordance with the criteria laid down in the Code for Crown Prosecutors. We assume that where criminal prosecution is in question police officers are (or should be) in the same position as anyone else. This means that, if our recommendations elsewhere are accepted, police officers will continue to be protected from adverse comment if they refuse to answer questions put to them in interviews conducted under PACE by those investigating the alleged offence.

<sup>29</sup> *Hansard*, Written Answers, col. 318.

But they will, like other persons charged, be required, once apprised of the case against them, to disclose the outline of their own defence or risk adverse comment at trial if they then introduce a defence not disclosed in accordance with the new procedures.

98. More difficult issues arise from the police discipline code. Misconduct renders an officer liable to disciplinary action if it constitutes a breach of that code. The standard of proof is the criminal one. Furthermore, under the “double jeopardy” rule<sup>30</sup>, an officer prosecuted for a criminal offence cannot subsequently be charged with a disciplinary offence which is in substance the same, whether the prosecution resulted in conviction or in acquittal. However, an officer convicted of a criminal offence can be disciplined for the disciplinary offence of “criminal conduct”. In our view there is nothing wrong in principle in officers being subject to disciplinary proceedings in regard to matters for which they have been exonerated by the criminal courts. We take this view whether the standard of proof in both sets of proceedings is the same or different. The double jeopardy rule in our view has no valid application here because the proceedings are different and lead to different results. A criminal case is to determine whether an officer has committed a criminal offence and deserves punishment as a criminal. The disciplinary proceedings are to establish whether the officer has been guilty of misconduct and is liable to penalties for a breach of the standards and values of the disciplined service of which he or she is a member. The police service should be able to deal with officers who misconduct themselves according to the standards of the service regardless of whether they have been convicted or acquitted by a jury.

99. It is clearly right that any procedure for dealing with misconduct should take account of those features of the police service which distinguish police officers from other public servants and make civilian personnel management procedures inappropriate for them. Police officers are for example particularly vulnerable to malicious and fabricated accusations of a nature not normally made against other professions and often designed to protect the complainant from prosecution. Nevertheless, it must be desirable in principle that chief constables are able to dismiss from their forces officers who have improperly abused their powers or acted in any other way which shows them unfit to be entrusted with the exercise of those powers. There must at the same time be the opportunity for officers threatened with dismissal to put forward their side of the case and where appropriate to have access to colleagues or others who may be in a position to testify on their behalf. But there is no obvious or necessary reason why these objectives could not be better served by procedures modelled on the best practice of ordinary civilian employers rather than on the police discipline code in its present form.

100. A further difference from civilian employment is that the Police Complaints Authority (PCA) is involved in the investigation of certain discipline cases. We regarded the constitution and functions of the PCA as outside our terms of reference, and we make no recommendations about them. Some complaints made against police officers by members of the public will be referred by chief officers to the PCA for them to supervise the resulting investigation, as will some cases where an officer may have committed a criminal or disciplinary offence which has not been the subject of a complaint<sup>31</sup>. Further, the PCA may require the submission to it of any complaint made about the conduct of an officer which has not been referred to it, although it may not involve itself in any case in which no complaint has been made unless invited by the chief officer to do so. We envisage these arrangements continuing in their present form.

101. A different question is whether a police officer should be disciplined when a police authority pays damages in a civil action arising out of police misconduct. One difficulty is that the civil action for damages may not be concluded (or

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<sup>30</sup> Set out in section 104 of PACE.

<sup>31</sup> In 1991 4,330 complaints were referred to the PCA under section 87 and 88 of PACE. 70 criminal and 263 disciplinary charges were brought in the same year as a result of complaints. In 81 of the disciplinary charges, disciplinary action had been recommended by the PCA.

settled) until a long time, often years, after the event. There may also be an out-of-court settlement (perhaps at the insistence of insurers) even though liability would not necessarily be established if the action went to trial. Sometimes civil action is brought even though no individual officers can be identified as the culprits. In spite of these difficulties, we regard it as very unsatisfactory for the reputation of the police service when it is reported in the press that large sums in damages have been awarded or agreed to be paid in respect of serious misconduct by identified police officers and it then becomes known that no disciplinary action is to be taken against the officers concerned.

102. We have been concerned not only at the lack of prompt and visible disciplinary action in cases where it has been publicly reported that police malpractice has contributed to a miscarriage of justice but also at the lack of action against the officers concerned where a prosecution has been dismissed because of a more than technical breach of PACE or its codes and the actions of the police have been publicly criticised by the judge. In January 1992, therefore, we issued a questionnaire to chief officers to discover how many cases there had been in 1990 in which police officers had been disciplined or prosecuted for malpractice during the investigation of criminal cases or serious breaches of PACE. Unfortunately, for a variety of reasons, the information obtained proved less informative than we had hoped. One reason was differences of interpretation by forces of the data requested. Another was that breaches of PACE are not necessarily recorded as such. Nevertheless we were able to draw four broad conclusions. First, the DPP recommends prosecution in a small proportion of the cases referred by chief officers as possibly involving criminal offences by police officers; second, police officers face proceedings under the discipline code in only a small proportion of the cases referred to the DPP; third, there are hardly any formal disciplinary proceedings for breaches of PACE; fourth, there are no nationally agreed arrangements for reporting back to police forces on court proceedings in which the conduct of police officers is criticised by the judge.

103. For all of these reasons, we welcome the Home Secretary's announcement on 16 December 1992 of a review of the police discipline arrangements and the proposals in the consultation document on "Police Personnel Procedures" issued on 5 April 1993. We recommend that legislation should provide among other things for the following:

- (i) acquittal of a police officer in a criminal court should no longer be a bar to disciplinary proceedings on the same facts. Such proceedings should be capable of resulting in dismissal where the officer's conduct shows that he or she is unsuitable to remain in the police force;
- (ii) hearings should be less formal and less closely aligned to criminal proceedings. The standard of proof should not be the criminal standard;
- (iii) where a civil action is brought against a police authority as a result of alleged malpractice by a police officer, that officer should, if the facts seem to the chief officer to justify it, be subject to disciplinary proceedings, which may in appropriate circumstances be conducted notwithstanding pending civil proceedings;
- (iv) where a police officer is dismissed following an internal disciplinary hearing, he or she should have the right to seek damages for wrongful dismissal from the chief officer before an industrial tribunal or the civil courts in lieu of the present appeal to the Home Secretary;
- (v) systematic arrangements should be made to ensure that in cases where a court has criticised the conduct of the police, the criticism is passed on to the force concerned so that the chief officer can consider whether disciplinary proceedings are called for;
- (vi) a national system should be set up to ensure that reliable statistics about disciplinary matters, including breaches of PACE, are collected and recorded on a uniform basis by all police forces.

# Chapter Four: The “Right of Silence” and Confession Evidence

## General

1. In this chapter, we consider two connected topics which have important implications not only for the pre-trial stages of the criminal justice process but also for the conduct of the trial itself. Both have been the subject of much debate, and both continue to divide practitioners and commentators alike. The first is the extent to which the so-called right of silence—that is, in this context, the prohibition against adverse comment<sup>1</sup> at trial on a defendant’s refusal to answer police questioning—is a crucial safeguard for the suspect or defendant or, on the other hand, the extent to which it may be an unacceptable obstacle to establishing the guilt of those who have committed criminal offences. The second topic is the circumstances in which confessions should be admissible before the magistrates or a jury, bearing in mind that the more safeguards there are against false confessions being wrongly believed, the greater the risk that defendants who ought to be convicted will walk free because their genuine confessions will be excluded by the same safeguards.

2. As we emphasise in our opening chapter, we regard it as a fundamental principle that the burden of proof should lie with the prosecutor. We also believe that the police and other investigating agencies should carry out as thorough an investigation as is practicable and reasonable in order that all relevant information about an allegation of a criminal offence is available for the prosecution and defence to use as the basis for a trial. However, such investigations must be carried out within the established rule that “though every citizen has a moral, or if you like social, duty to assist the police there is no legal duty to that effect”.<sup>2</sup> There are exceptions whereby citizens have a legal duty to supply information which may incriminate them, mainly under road traffic legislation. Other apparent exceptions, which we consider below, arise in the area of serious or complex fraud.

3. The two specific questions on which our discussions have chiefly focused are these: first, should the fact that a defendant chose to remain silent when questioned by the police be a matter from which the prosecutor and judge should be allowed to invite the jury to draw an adverse inference? Second, should a confession properly obtained be allowed to go before the jury in the absence of any other supporting evidence? Both questions need to be considered in the context of our other recommendations about investigation and preparation for trial. We believe, however, that when formulated in this way they address the central issues which arise in this area from our terms of reference. Following our discussion of the refusal to answer police questioning, we set out our conclusion on the question whether and in what terms the prosecution and the judge should be permitted to comment on a defendant’s failure to give evidence at trial, as well as our conclusions on the treatment of confession evidence by the courts.

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<sup>1</sup> The right of silence covers many other situations in which a person may not be required to answer questions. The subject is exhaustively covered in the House of Lords judgment in *R. v. Director of Serious Fraud Office, ex parte Smith* [1992] 3 W.L.R. 66.

<sup>2</sup> *Rice v. Connolly* [1966] 2 Q.B. 414.

## Silence in the face of police questioning

### *(i) Introduction*

4. Our terms of reference specifically invite us to consider “the opportunities available for an accused person to state his position on the matters charged and the extent to which the courts might draw proper inferences from primary facts, the conduct of the accused, and any failure on his part to take advantage of an opportunity to state his position”.

5. At present, when a person being questioned becomes a suspect, whether or not he or she is under arrest, a caution must be given before any questions or further questions are asked. That is, suspects will be told that they are not required to say anything and that anything which they do say may be used in evidence. Research (see paragraphs 15-19 below) has shown that, notwithstanding the caution, most suspects do make statements to the police—either to admit or to deny the accusations. Only a minority are silent, either refusing to answer any questions or refusing to answer some questions. Research has also shown that of those who are silent, whether wholly or in part, a large proportion ultimately plead guilty and, of those who plead not guilty, a large proportion are convicted. But some who are silent are acquitted. It must be possible that in some of these cases the jury would have been less likely to acquit the defendant if the prosecution had been permitted to invite them to draw an adverse conclusion from the defendant’s refusal to offer any explanation to the police of the events or circumstances which led to his or her arrest. In the absence of research into juries’ reasons for their verdicts, the likely incidence of such acquittals must remain a matter of speculation. But the fact that the defendant remained silent will be known to the jury if the prosecution wishes it to be. Where this happens<sup>3</sup>, the judge is required to warn the jury that

“Any person suspected of a criminal offence or charged with one, is entitled to say nothing when he is asked questions about it. You must not hold his [silence] [refusal to answer questions] against him.”

### *(ii) Arguments in favour of amending the right of silence*

6. No one has suggested to us that silence in the face of police questions should in itself be made a criminal offence. In support of amending the right of silence, however, it has been strongly argued by the police service, the CPS and the majority of judges who gave evidence to us that it should be possible for the prosecution or the judge to invite a jury to draw adverse inferences from the failure of persons reasonably suspected of a criminal offence to offer an explanation of the evidence against them to the police. Those who hold this view point out that the duties of the police include the detection of crime and with it the responsibility for investigating offences. To investigate effectively the police need to try to establish exactly what did or did not happen in the situation which led to the suspect’s arrest. As part of this process, the interviewing of the suspect, as of victims or witnesses, is almost always necessary. The police have told us that the general principles which should govern police interviews are increasingly becoming recognised throughout the police service. They pointed out that the recently published *Principles of Investigative Interviewing* (set out in paragraph 21 of chapter two) emphasise that the role of the interviewer is to obtain accurate and reliable information by approaching the interview with an open mind. Principle (b) states: “.... Information obtained from the person interviewed should always be tested against what the interviewing officer already knows or what can reasonably be established.”

7. In a significant number of cases, it will be impossible for the police to carry out an effective investigation without at an early stage asking suspects to explain

<sup>3</sup> The Crown Court Study found that in 80% of cases where the defendant was silent the jury learnt it from the evidence in the course of the trial. It does not follow, however, that in the other 20% the fact that the defendant was silent was deliberately kept from the jury. In those cases it is probable that neither prosecution nor defence thought it important that the jury should be told. Where counsel do think that the jury should be aware of the silence of the defendant, they will have little or no difficulty in eliciting the fact of silence, although the questions put to the suspect at the police station will not be admissible in evidence.

the conduct which brought them under suspicion. The police regard it as important that in such cases innocent people should provide explanations for the facts alleged against them as soon as practicable. This is to enable suspects both to exonerate themselves and to direct attention towards the guilty. However, in the view of many police officers a significant number of suspects, by refusing to answer questions, seriously impede the efforts of investigators to fulfil their function of establishing the facts of the case. The initial aim of these suspects may be to avoid being charged but, if this is not successful, they may subsequently fabricate a defence which will not be revealed until their trial, at which point it may be impracticable to investigate and detect the fabrication. Alternatively, they may remain silent, offer no explanations and yet try to discredit the prosecution evidence or intimidate witnesses or victims in order to deter them from giving evidence. By such means some criminals are, in the view of the police and many others, taking advantage of a feature of the criminal justice system left over from a past era when there were far fewer safeguards to protect the defendant than there are today.

8. Police officers told us that in their experience, although most people who are arrested do answer questions inviting an explanation of the evidence against them, a considerable number of experienced or professional criminals do not. With very few exceptions, to prove a criminal offence there must be evidence of guilty knowledge or intent on the part of the accused. It may be possible to adduce such evidence from the circumstances of the offence but in many cases it can only be obtained by asking an accused person whether he or she has an explanation for the conduct which brought him or her under suspicion. Refusal to answer such questions may prevent such evidence emerging. The police service and others accept that suspects cannot be compelled to speak, but they contend that the prosecution should be able to comment at trial on the refusal of any persons against whom there is a *prima facie* case to explain their conduct, whether or not such a refusal was based on legal advice.

9. Those who support a modification of the right of silence for these reasons argue that such a step would not lead to a weakening of the protection provided for the innocent and vulnerable. The safeguards of PACE and its codes are already significant and might be extended, for example to allow suspects who are emotionally upset the opportunity to postpone an interview. Suspects may already ask for a second interview if they wish to retract or modify anything said earlier. Access to free legal advice is, in itself, a valuable safeguard as is the requirement that investigative interviews be recorded under controlled conditions. Much more use could be made of audio or video recordings to test the quality of interviews and the evidence arising from them. (The use of summaries or transcripts of recorded interviews may not always alert prosecution, defence or court to the real nature of the exchanges that have taken place during the interview.)

10. Those wishing to see adverse comment on silence permitted at trial also argue that it would reduce the present emphasis on confession evidence. They contend that the present law puts undue pressure on the police to obtain a confession because that is virtually the only way open to them to prove key elements of a criminal offence. They accordingly propose that a failure to answer questions that invite an explanation of the facts which have led to the arrest should be capable of being used in support of other evidence against the suspect. Only relevant questions asked in a room with audio or visual recording, preferably with a legal representative present, but at least after the suspect has been offered the opportunity of taking legal advice, would qualify for later comment at trial. Before the interview began there would be a caution on the following lines:

“You have the right to remain silent but if you fail to answer a relevant question or to mention a fact which you later rely on in any trial, a court or jury may conclude that your silence supports the evidence against you”.

11. Those who take this view do not argue that adverse comment should

automatically follow an accused person's refusal to explain suspicious conduct. It would be for the judge to rule, on the basis of fairness and assessing the probative value of the fact of the silence, whether in any particular case it would be appropriate for comment to be made. Such comment at trial might take the following form:

"The defendant did not reply to police questions and has not given any subsequent response to the case against him/her". (Or "The defendant failed to mention the fact which is now part of the defence case".) "There may be an innocent explanation and silence is not necessarily evidence of guilt. You must draw your own conclusions in the light of all the evidence you have heard".

12. Those who believe that the right of silence should be so modified see it as a way of seeking the truth by encouraging suspects to provide explanations which can be further investigated and which may exonerate them. In their view it would also go some way in preventing unscrupulous offenders from exploiting the system so that they escape the consequences of their crimes. Such a change would still retain proper protection for suspects but in addition would allow a court to appreciate the true nature of any questioning which has taken place so that the question as to what inferences can properly be drawn could be put to a jury in an open and balanced way.

*(iii) Arguments for retaining the right of silence*

13. Those opposed to any weakening of the right of silence in response to police questioning include the Bar Council, Law Society and the Criminal Bar Association, who do not accept that it could be right to allow suspects to be threatened with the possibility of adverse comment simply because they refused to answer police questions. They say that not only are the circumstances of police interrogation disorientating and intimidating in themselves, but there can be no justification for requiring a suspect to answer questions when he or she may be unclear both about the nature of the offence which he or she is alleged to have committed and about the legal definitions of intent, dishonesty and so forth on which an indictment may turn. Innocent suspects' reasons for remaining silent may include, for example, the protection of family or friends, a sense of bewilderment, embarrassment or outrage, or a reasoned decision to wait until the allegation against them has been set out in detail and they have had the benefit of considered legal advice. Members of ethnic or other minority groups may have particular reasons of their own for fearing that any answers they give will be unfairly used against them. There is the risk that, if the police were allowed to warn suspects who declined to answer their questions that they faced the prospect of adverse comment at trial, such a power would sometimes be abused. It is now well established that certain people, including some who are not mentally ill or handicapped, will confess to offences they did not commit whether or not there has been impropriety on the part of the police. The threat of adverse comment at trial may increase the risk of confused or vulnerable suspects making false confessions.

14. Those who take this view argue that it would, for all these reasons, be against the interests of justice to weaken the protection afforded to the innocent suspect by the right of silence. They do not agree that the present safeguard against adverse comment necessarily encourages the police to press too hard for confessions. It may indeed be the case that the police do sometimes try too hard and too exclusively to obtain a formal confession; but they maintain that, if silence is not of itself acceptable evidence, the police should thereby be encouraged to look for other evidence by which the prosecution case can be strengthened. If the right not to answer police questions were removed, adverse comment at the trial would enable a prosecution case which was otherwise too weak to secure a conviction to be strengthened in the minds of the jury by the implication that the defendant's silence automatically supported it.

(iv) *The research evidence*

15. Our discussion of these issues has been assisted by a review of the relevant research carried out for us by David Brown.<sup>4</sup> He points out that past studies, as well as the research done for us, have adopted differing definitions of the right of silence, have varied in the extent to which their samples are representative of police forces generally, and may, where they relied on data collected by the police, have exaggerated the extent of silence. Taking into account these and other methodological differences, Brown estimates that, outside the Metropolitan police district, between 6% and 10% of suspects exercise their right of silence to some extent, while within the Metropolitan police district the equivalent percentage is between 14 and 16. The number of those who refuse to answer any questions at all is estimated at 5% at most in provincial police force areas and 9% at most in the Metropolitan police district.

16. The Crown Court Study suggests that the incidence of the exercise of the right of silence may be higher in cases which go for trial at the Crown Court (that is to say on the whole the more serious cases). Prosecution and defence barristers who responded to questionnaires issued in the course of the study said that defendants exercised their right of silence in relation to all questions in 11%-13% of cases and to some significant questions in a further 10% of cases. The police agreed that 11% refused to answer all questions but estimated that a higher proportion (17%) were silent in response to some significant questions. Where the defendant pleaded not guilty he was more likely to have been silent than when he pleaded guilty.<sup>5</sup>

17. The research evidence neither confirms nor refutes the suggestion that, though it may be exercised in only a minority of cases, that minority includes a disproportionate number of experienced criminals who exploit the system in order to obtain an acquittal. There is some evidence, however, for instance in the Crown Court Study (see preceding paragraph), to suggest that the right of silence is exercised more often by suspects who are detained for serious crimes.<sup>6</sup>

18. These research findings offer no evidence that those who exercise their right of silence are less likely to be charged or less likely to be convicted. A study by Stephen Moston, Geoffrey Stephenson and Tom Williamson<sup>7</sup> of 1,067 CID interviews in nine London police stations in 1989 suggested that silence had no effect on the likelihood of a suspect being charged where the evidence in the case was clearly strong or clearly weak but that, where it was on the borderline, silence seemed to make a charge more rather than less likely. They also found that suspects who exercised their right of silence were more likely to plead guilty than those who answered police questions. The Crown Court study found that the reverse was the case, although around one-half of those exercising their right of silence nevertheless pleaded guilty. Where defendants pleaded not guilty, the acquittal rate was lower where they had exercised their right of silence than where they had not exercised that right. According to the prosecution barristers, 41% of those who had been silent were acquitted compared with 49% of those who had answered police questions. The defence barristers were in agreement on the acquittal rate for those who had been silent but gave a higher figure (54%) for those who had not been silent.

19. The research evidence may be summarised as follows. The right of silence is exercised only in a minority of cases. It may tend to be exercised more often in

<sup>4</sup> *The Incidence of Right to Silence in Police Interviews: The Research Evidence Reviewed*, Home Office Research and Planning Unit, unpublished. The relevant studies are listed and described at pages 10-15 of R. Leng, *The Right to Silence in Police Interrogation: A Study of some of the Issues Underlying the Debate*, Royal Commission on Criminal Justice Research Study No. 10, London HMSO, 1993.

<sup>5</sup> According to prosecution barristers, 29% of those who pleaded not guilty had been silent compared with 17% of those who pleaded guilty; according to defence barristers it was 24% compared with 15%; according to the police it was 35% compared with 19%.

<sup>6</sup> T. Williamson and S. Moston, *The Extent of Silence in Police Interviews*, in S. Greer and R. Morgan (eds) *The Right of Silence Debate*, Bristol, 1990, note that in a study conducted by them the right of silence was used in 23% of serious cases but in only 8% of trivial cases. 21% of those who exercised silence had a criminal record while only 9% of those who did not exercise the right had previous convictions.

<sup>7</sup> *Police Investigation Styles and Suspect Behaviour, Final Report to the Police Requirements Support Unit*, University of Kent Institute of Social and Applied Psychology. Published in *Criminal Behaviour and Mental Health* 1993, 3.

the more serious cases and where legal advice is given<sup>8</sup>. There is no evidence which shows conclusively that silence is used disproportionately by professional criminals. Nor is there evidence to support the belief that silence in the police station leads to improved chances of an acquittal. Most of those who are silent in the police station either plead guilty later or are subsequently found guilty. Nevertheless it is possible that some defendants who are silent and who are now acquitted might rightly or wrongly be convicted if the prosecution and the judge were permitted to suggest to the jury that silence can amount to supporting evidence of guilt.

(v) *Our conclusions*

20. In the light of all the evidence put before us, we have had to weigh against each other two conflicting considerations. One is the prospect, if adverse comment at trial were to be permissible, of an increase in the number of convictions of guilty defendants who have refused to answer police questions. The other is the risk of an increase in the number of innocent defendants who are convicted because they have made admissions prejudicial to themselves through the fear of adverse comment at trial or whose silence has been taken by the jury to add sufficient weight to the prosecution case to turn a not guilty verdict into one of guilty.

21. Two of us take the view that it would be right for adverse comment (as suggested in paragraph 11 above) to be permitted at the trial and for a consequential amendment (on the lines of the example in paragraph 10 above) to be made to the wording of the caution. In the appropriate case the jury could thus be invited to draw its own conclusions as to whether the silence in the case in question supported the evidence pointing to guilt. The two of us who take this view believe that it is amply justified by the arguments set out at paragraphs 6 to 12 above. They accept that the majority of us are reluctant to take this step for, among other reasons, fear of weakening the safeguards that exist for the vulnerable suspect. The minority would, however, strengthen those safeguards in other ways and in any case believe that the right of silence offers little or no protection to the vulnerable. There is some evidence, as well as the experience of the police service, which in their view implies that it is not the vulnerable but the experienced criminal who shelters behind the right of silence.

22. The majority of us, however, believe that the possibility of an increase in the convictions of the guilty is outweighed by the risk that the extra pressure on suspects to talk in the police station and the adverse inferences invited if they do not may result in more convictions of the innocent. They recommend retaining the present caution and trial direction unamended. In taking this view, the majority acknowledge the frustration which many police officers feel when confronted with suspects who refuse to offer any explanation whatever of strong *prima facie* evidence that they have committed an offence. But they doubt whether the possibility of adverse comment at trial would make the difference which the police suppose. The experienced professional criminals who wish to remain silent are likely to continue to do so and will justify their silence by stating at trial that their solicitors have advised them to say nothing at least until the allegations against them have been fully disclosed<sup>9</sup>. It may be that some more defendants would be convicted whose refusal to answer police questions had been the subject of adverse comment; but the majority believe that their number would not be nearly as great as is popularly imagined.

23. It is the less experienced and more vulnerable suspects against whom the threat of adverse comment would be likely to be more damaging. There are too

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<sup>8</sup> The research evidence on the difference made by the presence of legal advisers is not easy to interpret. Varying accounts may be found in Williamson and Moston (see paragraph 18, note 6), in Sanders and others (see chapter three, paragraph 46, note 15), and in McConville and Hodgson (see chapter three, paragraph 9, note 5).

<sup>9</sup> This, we understand, is what has effectively happened in Scotland where the accused routinely decline to comment on the charges against them at a preliminary hearing, known as a judicial examination, before a judge.

many cases of improper pressures being brought to bear on suspects in police custody, even where the safeguards of PACE and the codes of practice have been supposedly in force, for the majority to regard this with equanimity. As far as silence at the police station is concerned, therefore, the majority find themselves taking the same stance as the majority of the Royal Commission on Criminal Procedure (RCCP) which said, at paragraph 4.50 of its Report<sup>10</sup> that, if adverse inferences could be drawn from silence,

“It might put strong (and additional) psychological pressure upon some suspects to answer questions without knowing precisely what was the substance of and evidence for the accusations against them... This in our view might well increase the risk of innocent people, particularly those under suspicion for the first time, making damaging statements... On the other hand, the guilty person who knew the system would be inclined to sit it out... If the police had sufficient evidence to mount a case without a statement from him, it would still be to the guilty suspect’s advantage to keep to himself as long as possible a false defence which was capable of being shown to be such by investigation. It might just be believed by the jury despite the fact that the prosecution and the judge would be able to comment.”

24. In the majority’s view, therefore, in accordance with the recommendations which are argued more fully in chapter six, it is when but only when the prosecution case has been fully disclosed that defendants should be required to offer an answer to the charges made against them at the risk of adverse comment at trial on any new defence they then disclose or on any departure from the defence which they previously disclosed. They may still choose to run the risk of such comment, or indeed to remain silent throughout their trial. But if they do, it will be in the knowledge that their hope of an acquittal rests on the ability of defending counsel either to convince the jury that there is a reasonable explanation for the departure or, where silence is maintained throughout, to discredit the prosecution evidence in the jury’s eyes. As argued below, it should be open to the judge, as now in serious fraud cases, to comment on any new defence or any departure from an earlier line of defence.

25. In reaching this view the majority have considered whether there may be a special category of case where a different approach is needed. This is where a crime may have been committed, more than one person is present, and it is impossible to say who has committed the offence. This typically happens when one of two parents is suspected of injuring or murdering a child but it is impossible to say which one. It must not, however, be supposed that removing the right of silence would be the solution in such cases. It would not enable the prosecution to establish which of them had committed the offence if both nevertheless insisted on remaining silent. Nor would the possibility of adverse comment at the trial enable a court or a jury to determine in respect of which of them the silence should be taken as corroboration. We have every sympathy with the public concern over such cases but it seems to us that they need approaching in a different way, perhaps, where children are the victims, by extending the concept of absolute liability for a child’s safety.

## Silence at trial

26. The defendant who chooses, after prosecution disclosure and consultation with counsel, not to give evidence is in a different position from the suspect who refuses to answer police questions in custody. Given the principle that the burden of proof should rest on the prosecution, it must be wrong for defendants who leave the prosecution to prove its case to be exposed to comment by either the prosecution or the judge to the effect that their failure to enter the witness box corroborates the prosecution case. On the other hand, we agree that it is right that the direction given to the jury by the judge is worded differently from the direction with respect to a refusal to answer police questions when in custody.

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<sup>10</sup> London, HMSO, 1981 Cmnd 8092.

The judge must stress as now that the defendant's failure to give evidence is not to be taken as an indication of guilt. But it is surely proper for it to be pointed out to the jury at the same time that they have thereby been deprived of the opportunity of hearing any account which the defendant might have been able to give and that while his or her silence does nothing to corroborate the prosecution's case it equally does nothing to qualify or undermine it. These objectives seem to us to be achieved by the present directions used by judges in all types of case where the defendant does not give evidence:

"The defendant does not have to give evidence. He is entitled to sit in the dock and require the prosecution to prove its case. You must not assume that he is guilty because he has not given evidence. The fact that he has not given evidence proves nothing, one way or the other. It does nothing to establish his guilt. On the other hand, it means that there is no evidence from the defendant to undermine, contradict, or explain the evidence put before you by the prosecution. [However, you still have to decide whether, on the prosecution's evidence, you are sure of the defendant's guilt.]"

27. Once adverse comment is permitted on the departure at trial from a defence disclosed in advance of it, the possibility of such comment will be there whether the defendant gives evidence or not. But where the defendant does not do so, the comment must not suggest that his or her silence is any evidence of guilt. It can only be directed to the fact that the defence now being put to the jury was not indicated at the earlier stage. It may well be that a defendant, although innocent, would prove an unconvincing witness because, for example, he or she would be too nervous or too inarticulate to do proper justice to the strength of his or her case under cross-examination. Moreover, this may apply more strongly rather than less if a defence is advanced at trial for the first time. If, for example, the reason is that the defendant had hoped to avoid disclosing a defence which by its nature must cause serious embarrassment or distress to the defendant and his or her family, associates or friends, then the risk of appearing unconvincing to the jury under cross-examination may be all the greater. The prosecution may well suspect that the defence now being put forward is a last-minute fabrication. But that is for the jury to decide. Where the defendant does not give evidence in person, the prosecution may question and the judge comment on the explanation advanced through counsel or the calling of other evidence or both. But neither the prosecution nor the judge should invite the jury to draw from the defendant's failure to give evidence the inference that his or her explanation is less deserving of being believed.

### Silence in investigations of serious and complex fraud

28. There is a clear exception, in section 2 of the Criminal Justice Act 1987, to the rule against compelling a witness to answer questions. Under this section a person questioned by members of the Serious Fraud Office (SFO) may be prosecuted and sentenced to up to six months imprisonment if he or she refuses to answer those questions. It is important, however, to note that the answers cannot be used later against the persons who gave them unless they change their story. Parliament has, therefore, maintained the principle that a person cannot be compelled to give evidence in court against himself or herself. The powers in section 2 of the 1987 Act may lead to the detection of the offence, but the evidence to prove it in court must be obtained by a different route.

29. It has been put to us that the answers given to SFO investigators under section 2 of the 1987 Act should be capable of being used in evidence at any later trial whatever the circumstances. We do not accept this contention. We have been told that in practice section 2 powers have proved effective, and we are not aware of evidence which would lead us to believe that the inability to use the answers in criminal proceedings unless the defendant departs from those answers at trial will prove an obstacle to justice in the future.

30. Our conclusion therefore is that it is necessary and right that investigators in serious fraud cases should retain their existing powers to require answers to

questions. These powers have operated in the interests of justice without unfairness, we believe, to those being questioned, who are persons in responsible positions with ready access to legal advice, charged with sophisticated offences which might otherwise go not merely unpunished but undetected<sup>11</sup>.

## The risk of false confessions

31. Where a suspect has made a confession, whether at the moment of arrest, on the way to the police station, in the presence of the custody officer, or at a tape-recorded interview at the police station, it must normally constitute a persuasive indication of guilt, and it must in principle be desirable that, if a not guilty plea is entered in spite of it, the jury are given the opportunity of assessing its probative value for themselves. On the other hand, confessions which are later found to be false have led or contributed to serious miscarriages of justice.

32. There is no way of establishing the frequency of false confessions: a retracted confession may nevertheless be true, and defendants who have made false confessions may have reasons of their own for adhering to them. However, there is now a substantial body of research<sup>12</sup> which shows that there are four distinct categories of false confession:

- (i) people may make confessions entirely voluntarily as a result of a morbid desire for publicity or notoriety; or to relieve feelings of guilt about a real or imagined previous transgression; or because they cannot distinguish between reality and fantasy;
- (ii) a suspect may confess from a desire to protect someone else from interrogation and prosecution;
- (iii) people may see a prospect of immediate advantage from confessing (eg. an end to questioning or release from the police station), even though the long-term consequences are far worse (the resulting confessions are termed “coerced-compliant” confessions); and
- (iv) people may be persuaded temporarily by the interrogators that they really have done the act in question (the resulting confessions are termed “coerced-internalised” confessions).

It is important therefore that the criminal justice system should contain effective safeguards against false confessions being believed.

## Existing safeguards against unreliable confessions

33. In our view the safeguards under PACE against false confessions are comprehensive and, while not foolproof, are substantially sound. In the following paragraphs we examine each of the relevant sections of PACE and give our conclusions on each of the safeguards provided.

### (i) *Section 76 of PACE*

34. The admissibility of confession evidence is governed by section 76 of PACE. In order to be admissible under that section, it is for the prosecution to prove that the confession was not obtained:

- (a) by oppression (subsection 76(2)(a)) or

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<sup>11</sup> Similar powers are enjoyed by Department of Trade and Industry Inspectors and others under the Companies Act 1985, the Financial Services Act 1986, the Insolvency Act 1986, the Building Societies Act 1986, the Banking Act 1987 and the Friendly Societies Act 1992. The answers may be used in later criminal proceedings or for other purposes in connection with the regulatory powers of the bodies concerned. In view of the rather different context in which these powers are exercised, and the strong representations that we have received that they are necessary in their present form, we make no recommendation for change in this area.

<sup>12</sup> See G. H. Gudjonsson, *The Psychology of Interrogations, Confessions and Testimony*, Wiley, Chichester, 1992.

- (b) in consequence of anything said or done which was likely, in the circumstances existing at the time, to render unreliable any confession made (subsection 76(2)(b)).

35. The Court of Appeal in *R. v. Fulling*<sup>13</sup> held that the word “oppression” in subsection 76(2)(a) should be given its ordinary dictionary meaning. There seems no doubt that this includes oppressive questioning by police officers. For example, in *R. v. Miller, Paris and Abdullahi*<sup>14</sup> (the Cardiff Three case), the Court of Appeal, having described the police questioning as bullying and hectoring, had no doubt that this was oppression within the meaning of subsection 76(2)(a).

36. A confession may be excluded on the grounds of unreliability where there has been no impropriety on the part of the police. In *R. v. Silcott, Braithwaite and Raghip*<sup>15</sup>, the Court of Appeal held that the circumstances to be considered by the trial judge upon a submission under subsection 76(2)(b) of PACE included the mental condition of the defendant at the time of the interview and that the decision was to be taken upon the medical evidence rather than the trial judge’s own assessment of the defendant’s performance at interview. As a result of this judgment the courts are more likely than in the past to admit expert evidence of a defendant’s likely mental state at the time of the interview. We welcome this development.

37. Subsection 76(4)(a) of PACE provides that evidence of any fact discovered as the result of a confession shall be admissible notwithstanding that the confession itself has been wholly or partly excluded. Some witnesses suggested that this should be amended to exclude evidence obtained as a result of an excluded confession. (This exclusionary rule, which applies in the United States of America, is sometimes referred to as excluding “the fruit of the poisoned tree”.) We do not, however, believe that otherwise admissible evidence should be kept from the jury simply because connected evidence has been excluded as unreliable. If the evidence has been obtained by unfair means, the judge still has discretion to exclude it under section 78. We therefore recommend no change to subsection 76(4)(a).

*(ii) Sections 78 and 82(3) of PACE*

38. As well as having to meet the admissibility requirements applying specifically to confession evidence under section 76, confessions are subject to the general tests contained in sections 78 and 82(3) of PACE of the admissibility of all evidence. Under section 78, the court has a discretion to exclude any evidence if it appears that, having regard to all the circumstances, including the circumstances in which it was obtained, the evidence would have such an unfair effect on the proceedings that the court ought not to admit it. We are satisfied generally with the way in which section 78 has worked in practice and propose no changes to it.

39. Section 82(3) of PACE provides that nothing in Part VIII of the Act (which includes sections 76 and 78) shall prejudice any power of the court to exclude evidence at its discretion. The general view is that section 82(3) preserves the common law rules on the exclusion of evidence and so retains the power to exclude evidence if the prejudicial effect outweighs its probative value. We recommend no change.

*(iii) Section 77 of PACE*

40. Section 77 provides that where the case against an accused depends wholly or substantially on a confession by him or her and the court is satisfied that (a) he or she is mentally handicapped and (b) the confession was not made in the

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<sup>13</sup> [1987] Q. B. 426.

<sup>14</sup> *The Times*, 24 December 1992.

<sup>15</sup> *The Times*, 9 December 1991.

presence of an independent person, the court shall warn the jury of the special need for caution before convicting the accused in reliance on the confession. The judge must explain that the need arises because of the circumstances at (a) and (b), but in doing so he or she is not required to use any particular form of words. If the case is a summary one, the magistrates are required to treat the case "as one in which there is a special need for caution before convicting the accused on his confession." We have no recommendations to make on section 77 other than to suggest that when PACE is next revised attention is given to the fact that the section is limited to the "mentally handicapped", and does not include the "mentally ill" or other categories of the "mentally disordered". In this respect it is inconsistent with other provisions in the Act and in the codes.

(iv) *The judge's power to halt a trial*

41. Prior to the Court of Appeal's decision in *Galbraith*<sup>16</sup>, the considered view was that the judge was allowed to stop a case if he or she took the view that the prosecution evidence was unsafe and unsatisfactory. This would allow the judge to halt trials where a confession was unconvincing and constituted the main or only evidence. In *Galbraith*, however, the Court of Appeal held that this was to usurp the role of the jury. It held that the judge should only stop a case where (i) there is no evidence that the defendant committed the offence or (ii) the judge decides that, taking the prosecution evidence at its highest, a reasonable jury properly directed could not properly convict on it. The court went on to say:

"Where, however, the prosecution evidence is such that its weakness depends on the view to be taken of a witness's reliability or other matters which are generally speaking within the province of the jury and when on one possible view of the facts there is evidence upon which a jury could properly come to a conclusion that the defendant is guilty, then the judge should allow the matter to be tried by the jury."

42. We recommend that the Court of Appeal's decision in *Galbraith* be reversed so that a judge may stop any case if he or she takes the view that the prosecution evidence is demonstrably unsafe or unsatisfactory or too weak to be allowed to go to the jury.

## Admissibility of confession evidence

43. There are many factors relating to confessions which have a bearing on whether they should be admissible in court and, if they are to be admissible, whether any special warning by the judge to the jury is necessary. These factors include: whether or not the confession was made to a police officer or someone else; whether or not it was tape-recorded; whether there is any evidence which independently substantiates the confession or, alternatively, any evidence which merely supports the confession; and finally whether or not the defendant has the benefit of legal advice before making or confirming the confession. We examine each of these issues in the following paragraphs.

44. A distinction which some have suggested should be drawn is between confessions made in summary cases and those made in either way and indictable only cases. Although the risk of a false confession may not increase in proportion to the seriousness of the offence, the consequences for the suspect are greater and therefore the suspect should arguably be given greater protection in such cases against a wrongful conviction.

45. The PACE Code of Practice on Tape Recording (Code E) requires that all interviews at the police station with persons suspected of offences triable on indictment (including those triable either way) must be tape-recorded. This provision became effective throughout England and Wales as from 1 January 1992. Tape recording is not required for offences triable only summarily. In other cases, the custody officer may authorise the interviewing officer not to

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<sup>16</sup> [1981] W. L. R. 1091.

record the interview if the equipment is not working, or no suitable room is available, and there are reasonable grounds for thinking that the interview should not be delayed. The custody officer can also authorise non-recording if it is clear from the outset that no prosecution will result. A failure to tape-record an interview or other breach of Code E might lead to a confession being excluded under section 76 or 78 of PACE, although exclusion would not be automatic.

46. A number of witnesses recommended to us that there should be an absolute rule that a confession should only be admissible if it has been tape-recorded. This is the only reasonably certain way of ensuring that the confession was made and what the exact content of the confession was. Tape recording of interviews would also normally give some indication of the circumstances in which the confession was made, for example, whether it was the result of oppressive questioning. However, many witnesses argued that tape recording on its own cannot be regarded as an adequate solution to the problem of false confessions since the fact that a confession has been tape-recorded does not guarantee that its contents are true. Nor can it reveal what was said or done before the tape recorder was switched on. On the other hand, many genuine confessions are made but are not tape-recorded.

47. We noted that in two Australian jurisdictions rules have recently been laid down in statute governing the admissibility of confessions made to an investigating official that have not been tape-recorded. For example, in Victoria<sup>17</sup> any confession or admission made to an investigating officer is, if not tape-recorded, inadmissible unless confirmed by the person questioned and the confirmation is tape-recorded. There is, however, provision for admitting evidence of a confession that does not meet these requirements if the court is satisfied on the balance of probabilities that the circumstances are exceptional and justify the reception of the evidence. Similar provisions exist in Australian Commonwealth law.

48. These rules raise the possibility put to us by some witnesses of a distinction between confessions made or allegedly made to the police or other investigating authority and confessions made to people with no official standing. The majority of the Australian High Court in the case of *McKinney and Judge*<sup>18</sup> said that juries should be instructed to give careful consideration to the danger involved in convicting an accused person in circumstances where the only basis for conviction was a confession, the making of which has not been corroborated, allegedly made while in police custody. Within the context of this warning the court said:

“it will ordinarily be necessary to emphasise the need for careful scrutiny of the evidence and to direct attention to the fact that police witnesses are often practised witnesses and it is not an easy matter to determine whether a practised witness is telling the truth”

49. We understand the reasons for this approach, but we do not recommend a rule which requires a special warning in cases of confessions made to police and other investigating officers. A small number of police officers have been proved to have been dishonest in fabricating confessions but that is not a reason for singling out all police officers in a judicial warning required to be given in every case. The judge may often feel that the jury should be warned to treat with particular care evidence from those who have an interest in the outcome of the case. There are, however, many circumstances in which the evidence of witnesses other than police officers may need to be considered with great caution for the very same reason. These are matters which fall to the court to assess in the circumstances of each particular case and in our view no hard and fast rule should be laid down.

50. Nor do we recommend an absolute rule that a confession should be inadmissible unless tape-recorded. To do so would mean that some reliable

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<sup>17</sup> Section 464 H of the Crimes Act 1958, as amended in 1988.

<sup>18</sup> (1991) 65 A.L.J.R. 241.

confessions might be lost. Many witnesses suggested to us that spontaneous remarks uttered on arrest are often the most truthful. We agree. It may not be possible for these always to be tape-recorded and many suspects may later refuse to confirm them on tape when interviewed at the police station. We recommend that admissions allegedly made to the police outside the police station, whether tape-recorded or not, should be put to the suspect during the beginning of the first tape-recorded interview at the station. Failure to do this may render the alleged confession inadmissible. If, however, the suspect, on having the confession put to him or her, does not confirm the confession on tape, it should not automatically be inadmissible. The circumstances may still be such as to justify the evidence being put before a jury to weigh up.

51. Clearly if there were a requirement that confessions made to people other than investigating officers had to be tape-recorded, few if any would be heard by a jury since it is highly unlikely that such a confession would ever be tape-recorded at the time. Moreover the prospect of the suspect later confirming it on tape at the police station is likely to be poor. We are in no doubt that even though the alleged confession in such cases is most unlikely to have been tape-recorded at the time, it should nevertheless be allowed to go before the jury if it meets the tests contained in PACE and the judge, after *Galbraith* has been reversed, believes that the jury could safely consider it. We would also allow to go before the jury confessions alleged to have been made in similar circumstances to police and other investigating officers, subject to implementation of the recommendation that we make in paragraph 50 on putting to the suspect at a later stage unrecorded confessions allegedly made to the police outside the station. A safeguard in both cases would be the judicial warning (and, for the minority of us, a requirement of supporting evidence) that we propose below.

52. Section 58 of PACE provides that a person in custody is entitled to consult a solicitor privately as soon as is practicable. Under Code C a person who wants legal advice may not, subject to certain limited exceptions, be interviewed or continue to be interviewed until he or she has received it. A breach of these provisions may lead to the exclusion of any confession under section 76 or 78 of PACE.

53. Many witnesses proposed that there should be an absolute rule that a confession should be inadmissible unless made or confirmed in the presence of a solicitor. If the quality of the legal advice could be guaranteed, such a proposal would have the following advantages:

- (i) the solicitor would be a witness to the fact that the confession had been made and not fabricated;
- (ii) the solicitor's presence would help to ensure that the interview was conducted fairly with no impropriety on the part of the police; and
- (iii) having a solicitor present might reduce the pressure and anxiety felt by the suspect and so reduce the likelihood of him or her making a false confession.

(ii) and (iii) are more cogent considerations than (i), since tape-recording of the interview would normally be sufficient evidence that the confession had been made and not fabricated.

54. The main objections to such a proposal are as follows:

- (i) a suspect may not wish to have a solicitor present. This is not as unusual as may be supposed. Almost 70% of suspects in the police station do not ask for a solicitor;<sup>19</sup>
- (ii) a confession may be made in circumstances where it is impracticable for a solicitor to be present; for example where the confession is made outside the police station or to a person other than an investigating official, and

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<sup>19</sup> See Table 3.4 in the report by D. Brown and others cited in chapter three, paragraph 8. This shows the position after the revision of Code C of PACE which took effect on 1 April 1991.

the suspect may later refuse to confirm the confession at the police station in the presence of a solicitor;

- (iii) the presence of a solicitor at the formal interview would not prevent improper pressure being put on the suspect before the interview started; and
- (iv) regrettably, the quality of work done by solicitors and their representatives in police stations is far from satisfactory<sup>20</sup>. There is therefore no basis for believing that the presence of a legal adviser would necessarily ensure that the interview was conducted fairly<sup>21</sup> or that the suspect would be relieved of his or her natural anxiety.

55. We do not recommend that a confession should be inadmissible unless made or confirmed in the presence of a solicitor. It seems to us unreasonable to exclude from consideration what may well be genuine confessions made before a solicitor can practicably be present or made after a suspect has declined to consult a solicitor. In chapter three we make recommendations with regard to the provision of legal advice. In particular we recommend that all suspects who indicate a wish to waive their right to legal advice should be given the opportunity of speaking first to a duty solicitor on the telephone. If they decline this opportunity, or speak to a solicitor but maintain their decision to forego their right to legal advice, their decisions should be recorded on the custody record and repeated on tape at the beginning of any subsequent tape-recorded interview. If, however, suspects decline to cooperate in this procedure, we do not propose that the confession should be inadmissible.

## Corroboration of confessions

56. A requirement that a confession should be admissible only if there is other supporting evidence was seen by many witnesses as being the best protection against convictions based on false confessions. Other witnesses, however, thought that there should be no absolute requirement of supporting evidence but that judges should be required to warn the jury about the danger of relying on an uncorroborated confession.

### *(i) Corroboration in Scotland*

57. In Scotland, there is a general rule of evidence (to which there are a few minor statutory exceptions) that the accused's guilt cannot be established by the evidence of only one witness. There must be testimony incriminating the accused from two separate sources. This rule applies to all cases and not just those involving confession evidence. Applied to confession evidence, it means that no one who confesses to a crime, unless by a formal plea of guilty, can be convicted solely on his or her own confession. There must be evidence from some other source which supports the confession and incriminates that accused.

58. What amounts to corroboration of a confession varies from case to case. Something more than the confession itself is needed but what is required must depend on the circumstances of the case. As the Lord Justice-General said in the recent case of *Meredith and Lees*<sup>22</sup>:

“In some cases there may be ample evidence from other sources that the crime libelled has been committed. The remaining question will then be whether the accused committed it. A clear and unequivocal confession of guilt on his part may then require little more by way of evidence to corroborate it, if the admission is in terms which leave no room for doubt on this point and there is no reason to suspect that it was not freely made.”

<sup>20</sup> See chapter three, paragraphs 56 ff.

<sup>21</sup> In the interrogation of one of the Cardiff Three, the solicitor sat silent throughout the interview, including that part held by the Court of Appeal to be oppressive. This silence on the part of the solicitor was the subject of criticism by the Court of Appeal.

<sup>22</sup> 1992 S.C.C.R. 459.

59. A further aspect of the Scottish rules of corroboration which was raised by many witnesses to the Commission was the “special knowledge principle”. Confession evidence may be corroborated by facts which were mentioned by the accused in the course of the confession, which the accused would not have known if he or she had not been the perpetrator of the crime. For example, in *Manuel v. H.M.A.*<sup>23</sup> the accused confessed to murdering a young woman and offered to point out to the police the separate places in a field where he had buried the victim and one of her shoes. His ability to do this was held to be corroborative. Doubts have, however, arisen about the width of this principle because the courts have held that “special knowledge” does not necessarily mean “sole knowledge”. It is, in other words, possible that facts mentioned in a confession may be held to corroborate that confession even though they were known to other people before the confession had been made. The passage of time between the date of the crime and the date of the confession is, however, relevant since the longer the delay the more likely it is “that an accused person had acquired his knowledge of the detail not as a perpetrator of the crime or offence but as a recipient of the information from other sources.”<sup>24</sup>

60. Some witnesses have also expressed concern that “special knowledge” can be passed to suspects, whether wittingly or unwittingly, by the police officers conducting the interview.

#### (ii) Corroboration in England and Wales

61. In England and Wales as a general rule the evidence of a single witness is sufficient to prove any issue. Juries and magistrates may convict on the evidence of one competent witness alone. There are, however, certain categories of evidence to which, by way of exception to the general rule, corroboration rules apply. In some cases, statute requires that evidence be corroborated. They include cases of perjury,<sup>25</sup> procurement offences under the Sexual Offences Act 1956 and treason.<sup>26</sup> In some other cases, there is no specific need for corroboration but at common law the judge must warn the jury that it is dangerous to convict on the uncorroborated evidence of an accomplice or on the uncorroborated evidence of a complainant in a sexual case. The judge must then go on to direct the jury that if, after hearing the warning, they nevertheless conclude that the witness is speaking the truth, they are entitled to convict even if there is no corroboration.

62. In English law the word “corroboration” has a technical meaning. In the case of *Baskerville*<sup>27</sup> it was held that in order to be corroborative the evidence must be independent evidence which affects the accused by connecting or tending to connect him or her with the crime by confirming in some material particular not only the evidence that the crime has been committed but also that the accused committed it. A large body of complex case law has developed on what can and cannot be corroboration in law.

63. The Law Commission in a report, “Corroboration of Evidence in Criminal Trials”,<sup>28</sup> have recommended the abolition of the common law corroboration rules referred to in paragraph 61 and the statutory requirement relating to procurement offences under the Sexual Offences Act 1956. The Law Commission criticised the rules as being inflexible, complex, productive of anomalies, and inappropriate to the purpose that they were intended to serve. They also criticised the automatic application of the rules regardless of whether they were appropriate to the facts of the particular case. We refer again to the Law Commission’s views on this in paragraph 73 below.

<sup>23</sup> 1958 J.C. 41.

<sup>24</sup> *McAvoy v. H.M.A.* 1983 S.L.T. 16.

<sup>25</sup> *The Perjury Act 1911.*

<sup>26</sup> *The Treason Act 1795*, section 1.

<sup>27</sup> [1916] 2 K.B. 658.

<sup>28</sup> *Law Commission No. 202*, HMSO, 1991 Cm 1620.

(iii) *Corroboration in identification cases*

64. In *Turnbull*<sup>29</sup> a five-judge Court of Appeal laid down guidelines for the treatment of identification evidence. The Court held in particular that where the quality of the identifying evidence is poor, the judge should withdraw the case from the jury and direct an acquittal unless there is other evidence which goes to support the correctness of the identification. The other evidence may be corroboration in the stricter, *Baskerville* sense<sup>30</sup>, but need not be so if the effect is to make the jury sure that there has been no mistaken identification. The trial judge should identify to the jury the evidence which he or she adjudges is capable of supporting the evidence of identification. If there is any evidence or circumstance which the jury might think supporting when it did not have that quality, the judge should tell the jury.

(iv) *Arguments for and against a requirement for supporting evidence*

65. A number of those who gave evidence to us argued that in England and Wales there should be a rule that a confession should not be admitted in evidence unless supported by other evidence. They say that unsupported confessions have been believed by juries in a number of cases where it has subsequently emerged that the confessions were untrue. Some were untrue despite the fact that there had been no impropriety on the part of the questioners; others were said to be the result of police malpractice. A number of well publicised cases have illustrated the danger. In each of these cases the defence warned the jury in clear terms of the danger of convicting on an unsupported confession. In many of the cases the judge echoed that warning. Nevertheless the jury convicted on the basis of the confessions.

66. It is now generally accepted that persons do confess to crimes that they have not committed for one or other of the reasons set out in paragraph 32. The legal system has always allowed in evidence statements that are made against the interests of the maker in the belief that individuals will not make false statements against themselves. This belief can no longer be sustained. Research has conclusively demonstrated that under certain circumstances individuals may confess to crimes they have not committed and that it is more likely that they will do so in interviews conducted in police custody even when proper safeguards apply.

67. It is also now generally accepted that confessions have hitherto taken too central a role in police investigations. This was entirely understandable when the prevailing view was that accused persons do not admit crimes which they have not committed. But the belief that a confession must be obtained if possible and will, if obtained, be true may tempt police officers to apply pressure to suspects in ways which are unacceptable and which may lead to inaccurate statements by those suspects. Further, even proper pressure may lead to a false confession. Once a confession has been obtained the likely consequence is that the investigation will come to an end. Those who argue for a requirement for supporting evidence say that failure to impose such a requirement will continue to result in confessions being seen as the end of the investigation and that the prospect of a warning by the judge will not make any significant difference to the way in which the police conduct their enquiries. They also doubt whether even a strong warning by the judge will carry sufficient weight with juries to remove the risk of further miscarriages of justice in respect of unsupported confessions. They further argue that a judicial warning is by its nature contradictory. In their view, to tell a jury that it is dangerous to convict on the basis of an unsupported confession but then invite them to convict if they so choose does nothing to help them to decide whether the confession is true or false; the jury have nothing against which to measure it and therefore no means of distinguishing between a valid confession and a false one. Those who take this view accept that supporting evidence can be fabricated and that the requirement for supporting evidence will not eliminate the risk of miscarriages of justice in the future. But they believe that such a requirement would significantly reduce that risk.

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<sup>29</sup> See chapter two, paragraph 9, note 3.

<sup>30</sup> See paragraph 62, note 27.

68. The main argument against a requirement for supporting evidence is the likely effect on the numbers of people who are properly convicted on the basis of genuine confessions alone. A significant number of people plead guilty after a confession who might be strongly advised by their lawyers not to do so if the confession were the only evidence against them. There is no reason to believe that most of them are not in fact guilty. If they were to walk free, not only would justice not have been done in the individual case but there would be a cumulative adverse effect on the public's perception of the effectiveness of the criminal justice system. Furthermore, if there were a requirement of corroboration or supporting evidence, some prosecutions that are properly brought now could not be brought at all for lack of such evidence.

69. In order to assess how many cases might be affected by a requirement for supporting evidence, the Home Office Research and Planning Unit examined at our request 2,210 recent cases from 13 CPS branch offices in 7 CPS areas. These were all magistrates' court cases. 30 (or less than 1.4%) relied on confession evidence alone or on admissions that fell short of a confession. A more detailed study, also carried out at our request, by Michael McConville<sup>31</sup> examined the evidence available to the police in a sample of 524 cases. In 305 of these there was a confession. The study found that there were very few confession cases in which the police did not have other supporting evidence. In fact, the police and prosecution files showed that even the stricter *Baskerville* test of corroboration could have been satisfied in 87% of such cases. In the remaining 13%, corroborative evidence of this nature was not brought before the court but in close to half of these cases the police could probably, in McConville's view, have produced corroboration if the rule had required it. There were 15 confession cases (5%) in which the author estimated that the *Baskerville* test could not have been satisfied, but in some of these the different Scottish rules might have been satisfied. McConville estimated that 14 convictions (5% of confession cases) would probably have become acquittals because of the apparent lack of supporting evidence of any kind.

70. Taken together these studies suggest that a supporting evidence requirement would affect only a very small percentage of cases. But the absolute numbers would nevertheless be quite high, since over 100,000 cases a year are tried in the Crown Court and between 1 million and 1½ million in the magistrates' courts.

71. It can, on the other hand, be argued that the number of cases in which the police might or might not be able to find supporting evidence is less important than the prospect that the introduction of a requirement to do so would lead to some defendants walking free who would rightly be found guilty under the present rules. This could only be regarded as acceptable if it could be shown that the proposed corroboration rule gave significantly greater safeguards against wrong convictions than are now available. Some of us are doubtful whether this would be the case, if for no other reason than that it would not by itself prevent miscarriages of justice resulting from fabricated confessions and the production of supporting evidence obtained by improper means.

72. A different but related argument is that, if there were a requirement that there should be supporting evidence, the police would be required to devote more resources than they do now to investigating cases more thoroughly. The number of guilty verdicts might well then increase, since if the prosecution had evidence in support of a confession the jury would be more likely to return a verdict of guilty than if there were a confession alone. But it would still be debatable whether the benefits derived from the application of the additional resources were sufficient to justify it. McConville's study<sup>32</sup> suggests that in the small percentage of cases when the police refrain from seeking evidence additional to a confession they are often making a rational decision to conserve limited resources.

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<sup>31</sup> *Corroboration and Confessions: The Impact of a Rule Requiring that no Conviction can be sustained on the Basis of Confession Evidence Alone*, Royal Commission on Criminal Justice Research Study No. 13, London HMSO, 1993.

<sup>32</sup> See paragraph 69, note 31.

73. Moreover the general trend in the law has been to move away from corroboration requirements. Formerly, there was a requirement that a child's unsworn evidence must be corroborated. This requirement was abolished by the Criminal Justice Act 1988. As we have also noted, the Law Commission<sup>33</sup> have proposed the abolition of the corroboration rules in cases where evidence is given by an alleged accomplice or the victim of a sexual offence. The Commission have also recommended the removal of the corroboration requirement for offences of procurement under the Sexual Offences Act 1956. The Law Commission envisage that this would leave the judge free to give whatever advice to the jury he or she considered appropriate in a particular case.

74. Our predecessors on the Royal Commission on Criminal Procedure were unanimous that a requirement that confession evidence should always be supported by other evidence would be unacceptable. After emphasising the importance of the police checking the details of confessions, they said (paragraph 4.74 of their Report):

“However we do not accept the suggestion that a person should never be convicted upon his confession alone uncorroborated by any other evidence. To do so would, unless the criteria for the prosecution were changed, mean that those who were willing to confess and to plead guilty could not even be charged unless or until other evidence of their guilt had been secured. That has such considerable implications for the resource and organisational aspects of the pre-trial procedure and for the right of an accused to speedy disposal as to be altogether too drastic a way of removing the risk of false confessions. People do confess to offences and are convicted, sometimes on a plea of guilty, where there is no other material evidence. We do not consider that it would be in the interests of justice to introduce rules of evidence which would have the effect of precluding this. But when the evidence against the accused is his own confession, all concerned with a prosecution, the police, the prosecuting agency and the court, should, as a matter of practice, seek every means of checking the validity of the confession.”

75. A further argument has been put to us that there are dangers in placing too much emphasis on the need for a confession to be supported by other evidence. The risk is that the other evidence may be weak but be taken, simply because it is there, to corroborate the confession. If the confession is also weak evidence, the combination may lead to a miscarriage of justice which could have been avoided had both pieces of evidence been subjected to careful independent scrutiny. Indeed, a credible and genuine confession on its own may in some cases represent a stronger case against the accused than a weak confession combined with weak supporting evidence.

### Judicial warnings on confession evidence

76. A number of witnesses opposed to an absolute requirement for supporting evidence favour the suggestion that when a confession is admitted in evidence the judge should give the jury a warning, tailored to the facts of the particular case, to the effect that it is dangerous to convict in the absence of supporting evidence. These witnesses deny that there is anything contradictory in a warning which still leaves the jury free to conclude that the content of the confession is true. Where a confession is credible and convincing in the absence of other evidence, the jury should be able to consider it once the attendant risks have been fully explained to them.

77. We all see advantages in giving the jury a warning about confession evidence in any event. We agree that its precise terms should depend on the circumstances of the case. But if, in accordance with the recommendation of the majority, it remains possible for a confession to be admitted without supporting evidence, we all agree that the judge should warn the jury that great care is

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<sup>33</sup> See paragraph 63.

needed before convicting on the basis of the confession alone, and should explicitly refer, giving examples as suggested in paragraph 32 above, to the possible reasons for persons confessing to crimes which they did not commit. The judge should also draw attention to any such reason advanced by the defence and say where appropriate that cases have been known in which persons have confessed for similar reasons to offences which they did not commit. The judge would then direct the jury as to what evidence, if any, had been given that was capable of supporting the confession. If there were no such supporting evidence, the judge would so direct the jury. Where the confession had not been tape-recorded, the warning would draw attention to this fact and to any possible motive that the person to whom the confession was made might have for fabricating the confession. Finally, since supporting evidence would not be an absolute requirement, the judge would explain that if, after giving full weight to the warning, the jury were nevertheless satisfied that the confession was true, they could convict even in the absence of supporting evidence.

78. There is obviously no point in a judicial warning unless the jury is in fact influenced by what the judge says. Liberty in their oral evidence to the Commission argued that it was unlikely that a warning would have had any effect in past cases where the jury had heard page after page of signed confessions. It would be even more difficult for a warning to counter the effect on a jury of having heard a defendant confess to the offence on tape. It seems to us, however, that the effect of a warning will depend crucially on the way the judge tailors it to the facts of the case. We do not believe that a strong and circumstantial warning would be without effect, whatever the content of a tape played in court. Moreover, the knowledge that such a warning would be given would encourage the police to look for supporting evidence in cases that otherwise would have to rely for successful prosecution on confession evidence alone.

79. Such a warning would be similar in some respects to the present corroboration warning for accomplices and complainants in sexual cases. We are aware that the Law Commission<sup>34</sup> has criticised as “irrational” the terms of a warning which requires the judge to start by saying that “it is dangerous” to convict on the basis of certain evidence, but then tells the jury that it is possible to do exactly that. We do not, as we have argued above, accept that this objection is insurmountable. The warning we envisage is, like the warning given in identification cases, intended to leave it open to the jury to convict in cases where, despite the dangers to which the judge draws their attention, the confession is credible and has passed the necessary tests of admissibility.

80. The Law Commission also criticised the inflexibility of the corroboration rules because in every case, “whatever the trial judge’s assessment of the reliability of the evidence or the assistance that the jury needs in assessing it, he is obliged to give them a standardised warning (in terms or in effect) that it is dangerous to convict in the absence of corroboration. The inappropriateness of such a rule, and the extent to which it clashes with the proper purpose and intended effect of the judge’s summing up of the evidence, has been well stated by the Court of Appeal:

“The aim of any direction to a jury must be to provide realistic, comprehensible and common sense guidance to enable them to avoid the pitfalls and to come to a fair and just conclusion as to the guilt or innocence of the defendant. This involves the necessity of the judge tailoring his warning to the particular case. If he is required to apply rigid rules, there will inevitably be occasions when the directions will be inappropriate to the facts. Juries are quick to spot such anomalies, and will understandably view the anomaly, and often as a result, the rest of the directions with suspicion, thus undermining the judge’s purpose. Directions on corroboration are particularly subject to this danger ...”<sup>35</sup>

81. The type of warning which we propose above does not seem to us to be

<sup>34</sup> In the report cited at paragraph 63.

<sup>35</sup> *Chance* [1988] Q.B. 932.

vulnerable, however, to this criticism. We have set out what we envisage as the main features of the warning that is required but stressed that it is for the judge to tailor the warning to the facts of the case. This approach has been shown to work well in identification cases following the *Turnbull* guidelines. We see no reason why it should not have a similar effect in confession cases.

### Evidence capable of being supporting

82. If supporting evidence is to be required or a warning that the jury should look for supporting evidence or both, a further question arises as to what should count as supporting evidence.

83. Some witnesses suggest the adoption of the *Baskerville* test whereby there would need to be independent evidence which affects the accused by connecting or tending to connect him or her with the crime by confirming in some material particular not only the evidence that the crime has been committed but also that the accused committed it. Since, however, we agree with the Law Commission that the rules as to what can and cannot count as corroboration in the *Baskerville* sense have become unduly complex and are confusing to juries, we do not recommend that the *Baskerville* test should be required to be satisfied.

84. Many witnesses have proposed that, rather than the *Baskerville* test, supporting evidence as set out in the *Turnbull* judgment should be sought, that is to say, evidence the effect of which makes the jury sure that the contents of the confession are true. This would be similar to the Scottish rules on corroboration, except that some of our witnesses rejected the “special knowledge” principle (see paragraphs 59 and 60 above).

### Recommendations on corroboration of confessions and on judicial warnings

85. We have been unable to come to a unanimous conclusion on this difficult issue. We are, however, in agreement as to the recommendations we make in this chapter on certain safeguards, notably retention of the existing PACE provisions and the reversal of *Galbraith*. These, taken together, should make it much less likely that confession evidence will lead to future miscarriages of justice. We are also unanimously in favour of a warning to the jury from the judge in cases where confession evidence is involved. The only issue therefore on which we are divided is whether confession evidence alone should continue to be capable of leading to a conviction or whether a conviction should be possible only where there is some other evidence to support the confession.

86. Three of us think that a conviction should never be based on a confession alone. They believe that there should be a requirement for supporting evidence in the *Turnbull* sense. They do not think that special knowledge or the accused’s silence should count as supporting evidence at any stage. In addition, even where there is supporting evidence and the confession has been admitted in evidence, the judge should give the jury a strong warning about the need for caution before relying on the confession evidence.

87. The majority of us, however, recommend that, where a confession is credible and has passed the tests laid down in PACE, the jury should be able to consider it even in the absence of other evidence. Where a confession is not credible we would expect the case to be dropped before it reaches the jury; either the police will not pursue it, or the prosecution review<sup>36</sup> will screen it out, or the judge will direct an acquittal following the reversal of *Galbraith* or exclude the confession under section 76 or 78 of PACE. We think that a confession which passes all these tests should be left to the jury to consider. We do, however, recommend that the judge should in all such cases give a strong warning along the lines set out in paragraph 77 above, and that the other evidence which the jury should be advised to look for should be supporting evidence in the *Turnbull* sense.

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<sup>36</sup> See chapter five, paragraph 27 ff.

# Chapter Five: The Prosecution

## General

1. One of the most important changes to the criminal justice system in recent years has been the establishment by the Prosecution of Offences Act 1985 of a national prosecution service headed by the Director of Public Prosecutions (DPP). The Crown Prosecution Service (CPS) began work in 1986. Before that, except in certain cases reserved to the Attorney General or the DPP, the conduct of the prosecution in cases instituted by the police was the responsibility of the police, who either presented the prosecution case in the magistrates' courts themselves or instructed lawyers to do so. In some police forces there existed prosecuting solicitors' departments which provided the police with any legal advice needed and presented the prosecution case in the more serious offences tried at magistrates' courts. In some force areas the police used lawyers in private practice. In the Crown Court the prosecution case was and still remains in the hands of members of the independent Bar, except in a few Crown Court centres where solicitors have historic rights of audience. Before 1986 prosecution barristers were normally briefed by the prosecution solicitors' departments or by solicitors engaged by the police. They are now briefed by the CPS.

2. In this chapter we consider the effectiveness of the CPS as an organisation for the prosecution of offences and the relationship between the CPS and the other principal participants in criminal cases. The relationship of the CPS with the police, which we have already touched on in paragraph 67 of chapter two, is particularly relevant. We see as central to it the unambiguous separation of the roles of investigator and prosecutor. It was the need for a separate prosecution authority which led to the establishment of the CPS in the first place. In our view, just as the police should concentrate on discovering the facts relevant to an alleged or reported criminal offence, including those which may tend to exonerate the suspect, so should the CPS concentrate on assessing both the strengths and weaknesses of the case which, if the decision is taken to proceed, will bring the defendant before the courts.

3. As we explain, we have found that there can be friction between the police and the CPS. While this is to some extent inevitable, it leads us to question whether the present arrangements for resolving such disagreements are satisfactory. We address in particular what should happen where the CPS receive from the police a case which in their view needs further investigation but the police are reluctant to carry out additional inquiries. The only sanction available to the CPS at present is to discontinue the prosecution. We therefore recommend, for the reasons given in paragraphs 23–26 below, that the necessary mechanism be established by the police and the CPS for consultation to take place at the appropriate levels to resolve such disputes.

4. The review of cases referred by the police for prosecution, and their thorough consideration and preparation subject to tight time limits, is central to the CPS's functions. In what follows we emphasise that the CPS must thoroughly prepare cases in advance and thus discontinue weak cases before they get to court. We do not think that the discontinuance of indictable cases in the Crown Court where trial has not yet commenced should require the consent of the court, as at present. We make other recommendations designed to reduce the number of cases in which no evidence is presented at or after the first day of the trial.

5. Improved communication with victims and other witnesses may help to identify weak cases at an early stage. Such communication is particularly important in view of the reliance of the criminal justice system on the willingness of victims and other witnesses to give evidence. We therefore make proposals designed to ensure that they are kept informed as necessary of what is going on in the case. Where a case is discontinued against the express wishes of the victim, an explanation should normally be given. In many cases, however, even taking the interests of the victim into account, there may be more suitable means of dealing with an offender than by prosecution and we discuss possible alternatives under the heading of "Diversion".

6. Although this chapter is directed mainly at the CPS and their relationship with the police, the same principles apply to other prosecution authorities (for example the Customs and Excise, Inland Revenue and Serious Fraud Office), whose relationships may sometimes be with other investigating agencies than the police. We have not considered these in any detail.

## Present performance of CPS

7. The establishment of the CPS did not take place without controversy. It appears to have been hastily effected and inadequately resourced, particularly in London and in those parts of the country outside London where there had not previously been a prosecuting solicitors' department. Inevitably there was heavy reliance at the outset on solicitors and barristers in private practice rather than the service's own lawyers. This continues, albeit on a much reduced scale. According to the service's annual report for 1991-92, private practitioners were employed as agents for the CPS in 22% of sittings in magistrates' courts in the fourth quarter, as opposed to 37% in the first quarter of 1990-91. The CPS have told us that in their view it would be impracticable to eliminate the use of agents entirely but that their objective is to reduce dependence on them to 10% of magistrates' court sittings by 1995. The early over-reliance on agents was in part due to the service's recruitment difficulties, which have eased over the last two years: CPS lawyers in post are now within 7% of the overall estimated requirement. According to the CPS's annual report for 1991-92, demand for jobs with the CPS continues at a high level and the quality of recruits is excellent.

8. We have been concerned at the level of ordered and directed acquittals. An ordered acquittal is one where the prosecution offer no evidence at the trial and the judge accordingly orders an acquittal, normally without empanelling the jury. A directed acquittal is where the judge intervenes to stop the case, usually because no reasonable jury could convict on the evidence. The original objectives of the CPS included the promotion of greater consistency of policy and uniformly high standards of case preparation and decision-making across the country. It was said: "the effect should be that cases which are unlikely to succeed should be weeded out at an early stage"<sup>1</sup>. We agree that this is an important objective, not only to identify cases where there is no prospect of conviction, but also to identify those which would justify further work being undertaken.

9. We are encouraged by what we see as the improving performance of the CPS, although we noted that it may still remain patchy in some areas. This view is shared by most of those who gave evidence to us on the point: even those who criticise the CPS for specific shortcomings, for example inadequate preparation or the careless drafting of indictments, agree that overall performance is improving. It is important for the CPS to maintain an effective and regular system both of internal review of performance and of quality assessment of case handling. We note that the CPS have started to develop such a system, based on data about the timing of decisions in cases and their outcome. We recommend that this system be further extended to include the communication to CPS lawyers of the comments of senior prosecuting counsel, and of judges faced with

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<sup>1</sup> *An Independent Prosecution Service for England and Wales*, London, HMSO, 1983, Cmnd 9074, page 14.

examples of poor CPS performance. We would encourage judges to bring such matters to the attention of prosecuting counsel where appropriate. It should then be the responsibility of CPS management to review the case and to consider what action may be needed to prevent a recurrence of the failure.

10. At a late stage in our deliberations, the DPP announced a major restructuring of the CPS which will clearly have a bearing on its future performance and ability to take on new responsibilities. At the moment, the CPS covers the country through a structure based on thirty-one areas. These are to be reduced to thirteen and will be headed by chief crown prosecutors of more senior rank than at present. Except for London, each area will have some seven to ten branches. The full implementation of this plan will not have taken place until after we report. We note, however, that the aim is to create larger areas in order to achieve consistency of practice across the country.

11. Although the CPS are aiming to recruit people who will stay in the service, we see merit in the recruitment of people of high ability who will not necessarily remain in the CPS for the whole of their careers. We have been told that in Scotland members of the procurator fiscal service may later move out of the service into private practice. Service in the CPS should similarly come to be seen as a desirable entry in a lawyer's curriculum vitae whatever his or her eventual career pattern.

12. We are aware that lawyers employed by the CPS see extension to them of rights of audience in the Crown Court as a means among other things of enhancing the attractiveness of a career in the service. This issue falls within the responsibilities of the Lord Chancellor's Advisory Committee on Legal Education and Conduct, which has recommended in effect that the matter be kept under review. There is, however, nothing in our recommendations that would alter the role of the CPS in such a way as to affect the argument whether they should be given rights of audience at a future date.

13. We believe that further attention needs to be given to the question how best the CPS should use their legal staff. Most CPS lawyers are to be found presenting cases in the magistrates' courts, while at the Crown Court the CPS are normally represented by law clerks without full legal qualifications. This gives rise to difficulties when the advice of a CPS lawyer is needed at the Crown Court, and we understand that the CPS propose to build on a successful experimental scheme whereby a lawyer would be posted to the main Crown Court centres. We welcome this but it seems to us to highlight the need to examine with some care the functions performed by CPS staff to ensure that lawyers are only used on those tasks for which their skills are required. There is some formal prosecution work at magistrates' courts which does not require the presence of a lawyer and which could readily be dealt with by unqualified members of the CPS staff. In no circumstances should this apply to contested cases. We recommend that steps be taken to reorganise the allocation of CPS staff to cases with this in mind.

## Relationship with police at investigative stage

14. As we have said, we do not recommend that the CPS should supervise police investigations. That is the model adopted in some other jurisdictions including Scotland. In Scotland, however, investigation is in practice left entirely in the hands of the police in all but the most serious cases. Even where the procurator fiscal attends the scene of the crime (as happens in all cases of sudden death but seldom in other cases), it is rare for him or her to direct police inquiries in any detail. In France it seems that it is also rare for the pre-trial judge, the *juge d'instruction*, to be involved in the investigation itself. It has recently been estimated that this occurs in only 10% of cases<sup>2</sup>.

15. We have also considered the account given by Leonard Leigh and Lucia Zedner<sup>3</sup> of the German system. They note that, while in theory the police are the

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<sup>2</sup> In the report cited at chapter one, paragraph 11, note 3.

<sup>3</sup> See chapter one, paragraph 13, note 5.

auxiliaries of the prosecutor, in fact the actual investigation of cases is done by the police, prosecutors rarely attend the police station, and their advice is in practice only sought in selected cases. In most cases the prosecutor first deals with a case when the completed police investigation file is handed to him or her for the charge to be drafted. Despite this, the authors note that the German prosecutor's "combination of investigative and evaluative roles, and in particular his powers in respect of interviewing witnesses, can produce certain tensions."

16. Thus, it should not be supposed that to put the prosecution in the position of being able to direct and supervise police inquiries would remove all scope for argument between the two services. Leigh and Zedner were told that the police sometimes resent having to carry out the prosecutor's directives. It seems to us that such resentment is likely to apply in any system where the prosecution service is given effective responsibility in the investigation stage. For the reasons already given in paragraph 67 of chapter two we are unpersuaded that to give the CPS such a responsibility in England and Wales would add anything of significance to the thoroughness and competence of the investigation. Nor can we see how it would add to the protection of the suspect. The CPS are able to advise the police on the evidential aspects of individual investigations and, as we say below, we should like to see an extension of this practice. Not only do we see this as their proper function but we think that they are more likely to retain their objectivity on this basis than if they superintend police investigations directly. The CPS did not in their evidence to us seek the power (or duty) of so doing.

17. Although we do not regard it as desirable for the CPS to be put in charge of police investigations, we do believe that it is important that the police should in appropriate cases seek the advice of the CPS. Both services are in agreement that this should happen more frequently than at present. Some information on the cases where the police at present seek advice from the CPS before charge is given in an interim research report by David Moxon and Debbie Crisp<sup>4</sup>. They looked at thirteen CPS branches and found that there were wide variations in the percentage of cases in which advice was sought, ranging from 1% to 14%. The national average was 4%. The main reason for the police seeking advice (in 57% of such cases) was in order to resolve doubts about the sufficiency of the evidence<sup>5</sup>. Cases relating to juveniles formed a significant proportion (16%) of cases in which the police sought advice, sometimes on whether or not a caution would be an appropriate alternative to prosecution.

18. We recommend that the police should seek the advice of the CPS in appropriate cases in accordance with guidelines to be agreed between the two services. These guidelines should set out how such cases are to be identified and clarified and when and how advice is to be sought. The main lessons that we draw from the research by Moxon and Crisp are that practice in this area needs to be more consistent throughout the service and that the cases in which it is appropriate to seek advice should include those which are serious, complex or sensitive. This should ensure that the DPP discharges her statutory function under section 3(2) of the Prosecution of Offences Act 1985 to give, to such extent as she considers appropriate, advice to police forces on all matters relating to criminal offences.

## The institution of criminal proceedings

19. By the time a case comes to court, it will normally have had to satisfy three different sets of criteria at three different stages:

— on an arrest without a warrant, that there are reasonable grounds for

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<sup>4</sup> *Termination of Cases by the Crown Prosecution Service*, Home Office Research and Planning Unit. Publication forthcoming.

<sup>5</sup> In 26% of cases the police asked for advice about the number or type of charges. The largest category of offence for which advice was sought was where there were co-defendants in the case. This accounted for 30% of cases and was closely followed by cases in which there were two or more charges (24%). The commonest offences about which advice was sought were theft (30%), various offences of violence (18%), sex offences (13%), criminal damage (11%) and breaches of the peace (including public order and offensive weapons offences (10%)). 15% of the cases involved property offences in which the value of the property stolen was £10 or less. Family disputes accounted for 7% of cases.

suspecting that the person concerned has committed the offence for which he or she is being arrested (section 24 of PACE);

- on charge, that there is sufficient evidence to prosecute and for a prosecution to succeed (paragraph 16.1 of Code C of PACE);
- on review, that there is a realistic prospect of conviction (paragraph 4 of the Code for Crown Prosecutors).

20. Under section 3(2)(a) of the Prosecution of Offences Act 1985, it is the duty of the DPP to take over the conduct of all criminal proceedings instituted on behalf of a police force. Under section 3(2)(b) the DPP may institute proceedings herself in important, difficult or otherwise appropriate cases but the great majority of criminal prosecutions are taken over by the CPS under section 3(2)(a) after they have been initiated by the police. Section 15 (2) of the same Act defines the point at which proceedings in relation to an offence are instituted. This is where a justice of the peace issues a summons or a warrant for a person's arrest or where a person is charged with an offence after being taken into custody without a warrant. Since the police will usually provide the information on which a summons or warrant is issued by a justice of the peace, and since it is they who at present charge people who have been taken into custody without a warrant, the police are regarded as initiating the prosecution in any case that falls to them to investigate. While therefore the CPS are responsible for taking over and conducting the prosecution, they are not responsible for initiating it save in the special cases covered by section 3(2)(b).

21. We considered whether it was right that a service other than the prosecution authority should continue to have the responsibility for initiating the prosecution. In many other jurisdictions, in particular those in which the prosecutor has control of the investigation, it is axiomatic that the prosecutor also initiates the prosecution. Proposals were put to us which would have given the CPS responsibility for framing the initial charge. We saw certain advantages in such a change, not least because it would have the advantage of distinguishing unambiguously between the responsibility for the investigation of criminal offences and the responsibility for bringing a case against a defendant and presenting it in court. After closer examination, however, we concluded that the practical difficulties outweighed this theoretical advantage. It would not be practicable to have CPS staff posted to police stations in order to frame the charge in every case, or even only in serious cases. There would still therefore have to be some procedure to mark the point at which the police concluded their investigation and the CPS took over. It seemed to us that this procedure would be bound to remain very similar in all but name to the present police charging process but that there might in addition have to be additional steps incorporated to accompany the proposed transfer of responsibility. This would bring with it the risk of extra bureaucracy and delay and on balance therefore we recommend no change to the present system.

22. In many cases suspects are brought before the courts to make applications for bail even though the police might be willing to grant bail themselves. This is because the police have power to release a suspect on bail but not to release subject to conditions. We recommend that they should have the additional power of releasing on bail subject to conditions, since this would reduce the suspect's liability to attend court<sup>6</sup>. A person bailed by the police in this way whom it was later decided not to charge or prosecute would thus be able to avoid a court appearance and any attendant publicity altogether.

## Power to require the police to make further inquiries

23. Unlike prosecution authorities in civil law countries, and in Scotland, the prosecution in England and Wales has no right to require the police to make inquiries. The only step open to the CPS if the case seems too weak to prosecute

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<sup>6</sup> It would also enable the police in more cases than at present to release suspects on bail while inquiries continued, an approach which we commend because it should lead to more thorough investigation. We were told by the Metropolitan police that it is a key element in the work of that force's Evidence Project Implementation Committee (EPIC).

is to discontinue the proceedings. Before taking such a decision, the CPS may request the police to make further inquiries in order to fill any gaps in the evidence against the defendant but the police are under no obligation to comply.

24. The CPS in written evidence to us argued that, even if the police sought their advice before charge in more cases than they now do, there would still be instances where further investigation by the police would be required after charge. This would be either because the difficulty in the case arose after the time at which the CPS gave their advice or because it arose in a case which had not been referred to the CPS for advice at all. The CPS argued that it was unsatisfactory to maintain a system where a suspect who might otherwise be found guilty can be discharged simply because the police do not comply with advice to investigate further.

25. The police service representatives told us that it was rare for the police to decline to make further investigations if the CPS made a reasonable request and, where there was disagreement on the need for more work to be done on a case, the sanction of discontinuance was sufficient. The CPS, on the other hand, told us that in some police force areas it was not uncommon for CPS requests to be ignored or refused. The result was that some cases came to court without the information having been made available, so that the case had either to be withdrawn or to be presented with all its shortcomings.

26. We agree that discontinuance is an unsatisfactory sanction in such circumstances. We recognise that requests from the CPS to the police to investigate further may sometimes be unrealistic or unreasonable having regard to the lack of seriousness of the offence. We do, however, regard it as unsatisfactory that the police should ignore reasonable requests by the CPS to look for further evidence. The best way forward seems to us to be for the police service to undertake in future to meet all reasonable requests from the CPS, with a formal system of consultation at a variety of levels of seniority to resolve disputes in cases where the police consider a request to be unreasonable. This we see as a process of amicable, though formal, consultation. We have considered whether this course might prove ineffective in the absence of a fallback power, as exists in Scotland, in the end to require the police to carry out the further inquiries that appear to the prosecution authority to be needed. We have concluded that, in the unlikely event of continuing disagreement in a serious case, H.M. Chief Inspector of Constabulary and the DPP should jointly bring about a resolution of the dispute. We so recommend. One of us, however, would go further and would like to see the DPP empowered, like the procurator fiscal in Scotland, to give instructions to chief constables in relation to the investigation of offences.

## Discontinuance of criminal proceedings

27. The requirement on the CPS to review the case papers sent to them by the police on a continuing basis and to decide whether the prosecution should proceed is set out in the Code for Crown Prosecutors issued by the DPP under section 10 of the Prosecution of Offences Act 1985<sup>7</sup>. If it is to be taken further, the case should pass both the evidential sufficiency criterion of the code and its public interest criterion. Under the first, a prosecution should not be continued unless the crown prosecutor is satisfied that there is admissible, substantial and reliable evidence that a criminal offence has been committed by an identifiable person. The CPS do not support the proposition that a bare *prima facie* case is enough, but rather will apply the test of whether there is a realistic prospect of a conviction. The code lists various factors which the service should take into account when applying this test. These are mainly directed at identifying any possible weaknesses in a case and include a number of questions about the credibility of witnesses.

28. Crown prosecutors are advised in paragraph 6 of the code to draw so far as is possible on their own experience of how far evidence of the type under

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<sup>7</sup> The code, as amended from time to time, is included as an annex to the Crown Prosecution Service's Annual Reports.

consideration is likely to be acceptable in court before reaching a conclusion about the likelihood of a conviction. Once satisfied that the evidence itself can justify proceedings, the crown prosecutor must then consider whether the public interest requires a prosecution. The code mentions certain factors that should influence the crown prosecutor towards rather than against prosecution. For example, it notes that the graver the offence, the less likelihood there will be that the public interest will allow of a disposal less than prosecution. Moreover, although the public interest is said to be the paramount consideration, the interests of the victim are declared to be an important factor in determining the balance of that interest and the crown prosecutor is required to consider whether the victim has suffered significant harm or loss, relative to his or her circumstances. A clear racial motivation is also to be regarded as an aggravating factor when assessing whether prosecution is required. If, after weighing all the relevant factors, the crown prosecutor is still in doubt as to whether proceedings are called for, the attitude of the local community and the prevalence of the particular offence locally or nationally should be considered. The code finally provides that, should doubt still remain, the crown prosecutor should opt for prosecution so that the court can be the final arbiter. We have repeated those factors that may tell in favour of prosecution in full because we think it important that they should not be overlooked. Failure to prosecute in cases that demand that course can do considerable damage to the confidence of the public in the criminal justice system, as many of the letters that we have received testify.

29. The code also makes it clear, however, that prosecution is not called for in every case, even if the CPS is fully satisfied that there is a realistic prospect of conviction. It sets out certain categories of case in which, subject to the particular circumstances, proceedings may not be required. The list includes cases

- (i) where a court would be likely to impose a purely nominal penalty;
- (ii) in which the offence was committed three or more years before the probable date of trial;
- (iii) involving young adults to whose future prospects the stigma of a conviction might cause irreparable harm;
- (iv) involving older or infirm offenders;
- (v) where the offender was suffering from mental disorder at the time of the offence; and
- (vi) where the offender's mental state might be worsened if proceedings continued.

30. It was put to us by some witnesses that the CPS were inclined to prosecute cases which, had they applied the public interest criteria of the Code for Crown Prosecutors, they should not have pursued. There were other representations to the effect that the CPS were too much inclined to pursue weak cases. Witnesses suggested that the acquittal statistics, the statistics for discharge following committal hearings at magistrates' courts, the cases in which the CPS offered no evidence at the beginning of the trial or at some point after its commencement, and the numbers of judge directed acquittals at the Crown Court were all indications of weakness in case preparation by the CPS. (The statistics concerned are discussed at paragraphs 32 and 33 below.) The CPS, on the other hand, argued that, while they did not claim to have yet achieved the very high standards of case preparation at which they were aiming, they attached great importance to this aspect of their duties. Nor was it always the fault of the CPS if a case collapsed. Frequently the reasons were beyond anyone's control, in that witnesses changed their stories or failed to give evidence convincingly in the witness box or did not turn up for the trial. The CPS also pointed out that they had no power to discontinue a case between committal for trial by the magistrates and trial at the Crown Court. They were thus compelled to go through the process of formally offering no evidence even in cases which their ongoing process of review had identified as too weak to continue.

31. Under section 23 of the Prosecution of Offences Act 1985, a case can only be formally discontinued up to the point that it begins to be heard in a

magistrates' court or, if it is an indictable offence, up to the point that it is committed by a magistrates' court for trial at the Crown Court. In the Code for Crown Prosecutors, the term discontinuance is also used to cover a prosecution decision to offer no evidence after these stages. The question does, however, arise, when no evidence is offered at the trial, whether the CPS should not have discontinued the case at an earlier stage and avoided the trouble and expense of an aborted trial. The same question arises in cases that are not discontinued by the CPS but where the court decides, whether at the instance of the defence or of its own motion, that there is no case to answer and directs an acquittal or (in the case of a magistrates' court) discharges the defendant.

32. The CPS provided us with figures that may have some bearing on the performance of their review function. They told us that the rate of discontinuance at the magistrates' courts was 12% in 1991-92. Unfortunately this figure cannot be compared with that for earlier years because the basis for recording it has changed. Moreover, the term "discontinuance" for this purpose includes cases in which no evidence was offered at court as well as cases which were discontinued before a court appearance. It is therefore not possible to distinguish cases which the CPS may have decided after careful consideration should not be continued from cases where the weaknesses only became apparent at the court on the day of trial.

33. In assessing the incidence of weak cases in the Crown Court, the numbers of ordered and directed acquittals (see paragraph 8 above) are relevant. According to the latest *Judicial Statistics*<sup>8</sup>, 43% of acquittals were judge ordered, 16% were judge directed, and 41% were by the jury. On these issues we have obtained further assistance from two pieces of research, one of which we commissioned ourselves and the other which the Home Office Research and Planning Unit had had in mind for some time and was able to bring forward at our request. We have already cited the latter, by Moxon and Crisp, at paragraph 17 above.

34. Moxon and Crisp studied a sample of magistrates' courts cases dealt with by thirteen CPS branches during the year 1990-91. Although seven of the branches studied were close to the national average of 11% in their discontinuance rate, the highest rate was 25%. Of the cases discontinued, 5% were discontinued before any court appearance and 7% at the first court appearance. A further 37% of cases were discontinued between the first and second court appearances. The majority, however, were discontinued at the second or subsequent court appearance.

35. One purpose of identifying weak cases at an early stage is to discontinue them before the defendant, the victim and the other witnesses are put to the trouble and expense of a court appearance. Measured against this objective, the percentage (5%) of cases discontinued before any court appearance is disappointingly small. The researchers also discovered that, where cases were terminated at the court, the decision to discontinue was often taken before the hearing but not communicated to the defendant in time to save a court appearance. This was often (39% of the cases) because too little time had been left between the taking of the decision to discontinue and the date of the trial. In 29% of such cases, however, the whereabouts of the defendant were unknown. We conclude nevertheless that with better case management, including observance of the time limits recommended by the Working Group on Pre-Trial Issues<sup>9</sup>, there is scope for improvement in this area. We recommend therefore that the CPS take steps to discontinue cases in time wherever practicable to save the defendant, the victim and the other witnesses from the need to attend court. We welcome the fact that the guidelines being developed by the CPS for their "National Operational Practice", which seeks to set national standards in this as in other areas, are already moving in the direction that we should like to see.

36. The study by Moxon and Crisp also found that, of the cases discontinued, nearly a third were dropped on public interest grounds. Of such cases, nearly a

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<sup>8</sup> London HMSO 1991, Cm 1990, Table 6.9.

<sup>9</sup> In its report, issued in November 1990 but not published. See paragraph 12 of chapter seven.

half were discontinued because the offence was thought to be trivial or a nominal penalty seemed likely. The remainder were discontinued for a variety of reasons including the complainant's reluctance to proceed (13%); mental illness or stress (10%); the youth of the defendant (10%); the previous good character of the defendant (8%); the fact that the defendant had agreed to compensate the victim (6%); and the age or infirmity of the defendant (3%). In 4% of the cases discontinued on grounds of public interest, the CPS recommended that the police should administer a caution in lieu of prosecution. These findings seem to indicate that the CPS are ready to consider discontinuing cases in line with the criteria set out in the Code for Crown Prosecutors in the public interest and that this part of the Code is being appropriately applied.

37. We have already mentioned that, if a case is to be tried in the Crown Court, the CPS have no power to discontinue the prosecution after a magistrates' court has committed it for trial. This means that if in the course of its continuing review of the case the CPS conclude that the prosecution should not be pursued, they must ask the court to call the case on at the earliest possible date, when it can be indicated in open court that no evidence is being offered. Many cases remain live far longer than they need to, with consequent anxiety to the defendant and wastage of resources. It has been argued in evidence to us that it is desirable for the court to maintain some oversight of the decision to offer no evidence. We do not, however, accept that the CPS are not to be trusted to take the decision themselves. The decision falls logically to the prosecuting authority. Moreover, in magistrates' courts cases, many of which are indictable offences, the CPS are entrusted with the decision with no court supervision. We believe that the gains in efficiency and certainty for the defendant far outweigh the objection that the decision would no longer be amenable to judicial oversight. We therefore recommend that the CPS be given the power to discontinue proceedings up to the beginning of the trial in both the magistrates' courts and the Crown Court.

38. Cases destined for the Crown Court that have been incompletely prepared may, as we have observed, be expected to come to light in the number of judge ordered and judge directed acquittals. Research conducted for the Commission by Block, Corbett and Peay<sup>10</sup> looked at the last 50 case files involving ordered or directed acquittals of the Crown Court which were completed prior to November 1991 in each of two CPS areas, one urban and one provincial. The researchers regarded 45 of these acquittals as unforeseeable, over half of them because the victim or key witnesses disappeared or refused to testify. 27 were classified as foreseeable and a further 28 as possibly foreseeable. The researchers concluded that in 25 of the 100 cases the evidential weakness was present and foreseeable before, at or just after committal. At a minimum, they considered that 15%, which were foreseeably weak prior to committal, should have been discontinued or manifest deficiencies in the evidence rectified. The researchers also noted instances of inadequate advice to the CPS from prosecuting counsel.

39. These judgements are necessarily subjective. It is, however, relevant that the Crown Court Study reveals that in the view of both prosecuting and defence barristers and of judges, the prosecution case was weak in about one fifth of contested cases. Over 80% of these cases ended in acquittal. This confirms our belief that the CPS should do even more to ensure that cases destined for trial at the Crown Court are prepared as thoroughly as possible. In particular we recommend that, when counsel is briefed in a case, he or she should be required to read the papers in good time and to inform the CPS in writing that in his or her view the case meets the criterion of the Code of Crown Prosecutors in that there is a realistic prospect of conviction, or that further evidence is required, or that it should be discontinued or no evidence offered<sup>11</sup>. In order to make such a

<sup>10</sup> *Ordered and Directed Acquittals in the Crown Court*, Royal Commission on Criminal Justice Research Study No. 15, London, HMSO, 1993.

<sup>11</sup> This would be consistent with the Bar's Code of Conduct which, at Section VI, paragraph 601, says "A practising barrister:

(a) must in all professional activities . . . act properly, conscientiously, diligently and with reasonable competence and take all reasonable and practicable steps to avoid unnecessary expense or waste of the court's time . . .  
(b) must read all briefs and instructions delivered to him expeditiously."

procedure effective, it is essential that machinery exists at barristers' chambers for allocating the cases to appropriately experienced counsel on receipt of the brief and for ensuring that counsel provides the advice and signs it in good time. The system must not be allowed to fail because no one knows who is the counsel in the case. We recommend that the Bar ensure that suitable procedures are put in place, failing which steps should be taken through legal aid legislation to impose them. Failure to provide the necessary advice could be met by transfer of future work to other chambers or adverse comment by the judge to the Bar's Professional Conduct Committee.

40. We agree with the conclusion of Block, Corbett and Peay that, instead of allocating case files to whichever prosecutor happens to be free, every case should be assigned to one prosecutor or team of prosecutors for the period when it is passing through the magistrates' court. This is already best practice in some CPS branches and is being encouraged in the new guidelines being developed in the "National Operational Practice" to which we have referred in paragraph 35 above. We welcome this development. We welcome too the CPS's plans to extend the practice to the point where a case is concluded in the Crown Court.

41. We have already referred to the Code for Crown Prosecutors which the DPP is required to issue under section 10 of the Prosecution of Offences Act 1985. This gives guidance on the general principles to be applied by crown prosecutors in determining whether or not a prosecution should be proceeded with, what charges should be preferred, and how mode of trial issues should be approached. We have no changes to propose to the code but we welcome the recent amendment which revises the guidance on the approach to suspected offenders who may have been suffering from mental disorder at the time of their offence or in whose case pressing the prosecution may have a serious adverse effect on their mental health<sup>12</sup>.

## Relationships with counsel

42. We received some evidence on the relationship of the CPS with the independent counsel whom they brief to present the prosecution case at Crown Court trials. This is said to be unsatisfactory in some cases, with the CPS being reluctant to consult counsel early enough or to take counsel's advice on the discontinuance of weak cases. The Crown Court Study also revealed widespread dissatisfaction on the part of counsel with the requirement to consult the CPS before a decision is taken at court whether or not to offer no evidence in a case or to substitute a less serious charge than that appearing on the indictment. Under guidelines contained in the report of the Farquharson Committee<sup>13</sup> a solicitor who has briefed counsel to prosecute may, if he or she disagrees with the advice given by counsel or for any other professional purpose, withdraw his or her instructions before the commencement of the trial up to the point when it becomes impracticable to do so. Where matters of policy fall to be decided after this point, including offering no evidence on the indictment or on a particular count or the acceptance of pleas to lesser counts, it is the duty of counsel to consult his or her instructing solicitor or crown prosecutor if at all possible. Since, however, the CPS are usually represented at the Crown Court centre by an unqualified law clerk, not by a solicitor or barrister, such consultation may be impracticable or have to be done indirectly through the law clerk. (The law clerk typically telephones a qualified lawyer at CPS offices and passes his or her decision back to counsel).

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<sup>12</sup> The Code now clearly sets out that there is a rebuttable presumption that a person suffering from a mental disorder should not be prosecuted unless there is a wider public interest requiring such action. Paragraph 8v(a) provides:

"... where there is evidence to establish that an accused or a person under investigation was suffering from mental disorder at the time the offence was committed, the Crown Prosecutor will observe the principle that prosecution will not be appropriate in the circumstances unless it is overridden by the wider public interest, including in particular the gravity of the offence. Other material considerations will include the circumstances of any previous offences, and such relevant information concerning the nature of the person's condition, the likelihood of his further offending, and the availability of suitable alternatives to prosecution as may be provided."

<sup>13</sup> "The Role of Prosecution Counsel", Law Society's Gazette, 26 November 1986.

43. Counsel regard this as unsatisfactory, but in evidence to us the DPP argued that she and the CPS are accountable for the conduct of the prosecution case and must remain able to take these crucial decisions. She told us that she was working towards an arrangement whereby a qualified lawyer would be present at all Crown Court centres in order to be able to settle matters of this kind direct with counsel there. If this can be achieved, it should help to provide speedier CPS reaction to a proposal agreed between counsel. We assume, however, that problems will continue to occur in this area. We regard it as important that so far as possible such problems should be addressed by clear guidelines laid down for barristers and CPS staff alike. The Farquharson Committee drew up its guidance before the CPS had been properly established. We think that there would be benefit if Lord Justice Farquharson were asked to reconvene his committee to see if there is need for refinement of the 1986 guidelines and we so recommend.

## Victims and other witnesses

44. The evidence of victims and other witnesses is crucial to the criminal justice process because prosecutions will founder, and guilty people thus escape justice, if victims and other witnesses are not prepared to make statements to the police and thereafter to give evidence. It is important therefore that everything possible is done to support and, where necessary, protect witnesses in what is often an unenviable role. We received a great deal of evidence that for witnesses to give evidence in a criminal trial is a daunting (and sometimes even dangerous) task and one that many come to regret having undertaken. This is particularly so where women have been the victims of rape or other sexual crimes or of domestic violence. We have therefore taken very seriously the many suggestions put to us for improvement of the way in which victims and other witnesses are treated at the various stages of the criminal justice process. The police have the most involvement with prosecution witnesses, although the decisions that affect those witnesses are most frequently taken by the CPS. There is therefore a risk that communication between the CPS and prosecution witnesses may be inadequate, that the victim's views may be insufficiently taken into account, and that the victim may not be kept informed of crucial decisions. The following recommendations are designed to reduce this risk.

45. The Code for Crown Prosecutors, before setting out the public interest criteria that may lead to a decision not to prosecute, states that, although the public interest will be the paramount consideration, the interests of the victim are an important factor in determining the balance of the public interest and should be taken into account. We agree with this general approach. Important though the feelings of the victim are, they cannot override the public interest and no one has suggested to us that the victim should have the right to decide whether or not a prosecution goes ahead. Equally the CPS are accountable in general to Parliament and to the courts for the manner in which they exercise their discretion whether or not to prosecute; they are not accountable to the victims in individual cases. That said, we recommend that victims should so far as practicable be kept informed of the progress and outcome of cases, including decisions not to prosecute and, in some cases, the results of bail applications or successful appeals.

46. Since the views of victims may not always be apparent from the case papers, it seems to us that the CPS should in appropriate cases take steps to ascertain those views before decisions are taken. This will not be possible in all cases but should be the aim in at least those in which the potential consequences for the victim are serious. In particular, when the CPS are considering whether or not to oppose bail, they should be in possession of adequate information on the likely consequences for the victim of any decision to release on bail. If they do not have that information, they should ask for it. The CPS and the police should together agree the categories of case in which the police would be requested to provide the information routinely to the CPS where there is an objection to bail. Cases in which women have been the victims of crimes of violence or of rape or other sexual offences need particular care. In cases of domestic violence the woman

may well be in danger of losing her home or of suffering further violence if bail is granted to the defendant. In other cases also distress, intimidation or physical harm to the victim may well occur. Close liaison with the police is needed and steps must be taken to minimise the risk of further violence if bail is granted. It is in our view essential that local authority social services departments are able to place vulnerable women in refuges if that is the only way of ensuring their safety.

47. Normally, communications between the CPS and witnesses take place through the police. As a general rule this is sensible because the police will be more likely to be aware of the witness's circumstances and so be in a better position to pass on the information, taking into account any untoward factors such as the victim's mental or emotional state. Nevertheless, there are times when it would be better for the CPS to pass on the information direct. This is particularly so when a decision has been made in advance of the day of trial not to prosecute or to prosecute on a less serious charge and the police are either not in a position to convey to the victim the full reasons for this decision or fail to convey the information convincingly because they themselves are not in sympathy with it.

48. Particular care, however, and the continued involvement of the police, will be necessary in cases where the victim fears for his or her personal safety because a defendant is to be released on bail. It is also important for victims to be warned if someone convicted of an offence against them has appealed against conviction, been released on bail pending appeal, or has been released because the appeal was successful. In such cases it is essential that the victim receives timely warning and, if appropriate, advice and assistance from the police. We so recommend.

49. In cases which proceed to trial, we recommend that the CPS lawyers handling the case should meet victims and key witnesses before the trial whenever there is a particular reason for checking any part of the evidence that they are likely to give. This would assist in the ongoing assessment which the CPS must make of the prospects of a conviction in the case. It is particularly important that prosecution advocates should confer at some point with expert witnesses so that the former understand precisely the effect of the scientific evidence available in the case. We have received some evidence that this does not always happen. We refer to this again in chapter nine.

50. The Bar's Code of Conduct forbids barristers to interview witnesses before the trial other than their own client or an expert. This is because of the fear that barristers will rehearse witnesses. There may also be a risk of barristers becoming witnesses in the case. A minority of four of us believe that the rule is a sound one and should be kept. The place for testing a witness's evidence is in court and there would, in the view of the minority, be a risk of miscarriages of justice occurring if witnesses who were unsure of their evidence had their doubts removed as a result of meetings with counsel.

51. The majority of us, however, do not regard either of these reasons as persuasive. Any inclination on the part of barristers to rehearse witnesses would be diminished by the fact that the interview with the witness would normally take place in the presence of a representative of the solicitor's firm. Solicitors, who do a great deal of advocacy in the lower courts, are not subject to such a rule and we are not aware of complaints that they rehearse witnesses improperly.

52. As for the fear that the barrister might be at risk of becoming a witness in the case, the majority regard this danger as insignificant. It seems to present no problem for solicitors in the lower courts or the CPS in the Crown Court. The majority regard the Bar's rule as outmoded and likely to impede both proper preparation of cases and good human as well as working relations with witnesses. The majority note that other common law jurisdictions have no such rule and recommend that it be abolished. It seems to the majority to be in the interests of justice that prosecuting counsel should in particular be able to discuss the cases with the victim. Many victims and witnesses feel inadequate or fearful about giving evidence, or are worried by the fact that the events they will be asked to

recall may have occurred a long time ago. Meetings between witnesses and counsel, if conducted with propriety, will in the view of the majority help to improve the presentation of cases in court both by increasing the confidence of witnesses and by helping barristers in the presentation of the case.

## Time limits

53. The Home Office, in written evidence, told us that, in November 1991, the average time to process indictable cases through magistrates' courts was 129 days, 1 day longer than the year before and 25 days longer than in 1986. In Crown Court cases, according to the Judicial Statistics for 1991, the average waiting time for those in custody was between 6 weeks and 13 weeks (the national average being 10 weeks) from the date of committal to the start of the trial. (These figures represent a slight improvement as compared with earlier years.) The figures varied from circuit to circuit. 84% of defendants in custody waited less than 16 weeks, 58% less than 8 weeks. For those on bail the average waiting time was between 8½ and nearly 17 weeks (the national average being just over 13 weeks). This also varied between circuits. 73% of cases waited less than 16 weeks and 41% less than 8 weeks. But these figures conceal some cases which are waiting for months (often over a year), a position which we regard as most unsatisfactory even if some delays result from defendants' own decisions.

54. In recent years time limits have been introduced as a way of helping to move cases more speedily through the system. Statutory time limits (under section 22 of the Prosecution of Offences Act 1985) were first applied in three areas of the country in 1987<sup>14</sup> and were extended in stages to the whole of England and Wales, the process being completed in October 1991<sup>15</sup>. The limits apply to custody cases only. The limit is 56 days between first appearance at a magistrates' court and summary trial; if a choice between summary trial or trial on indictment has not been made within 56 days, the limit may be extended, on application, to 70 days, which is also the limit from first appearance to committal. The time limit between committal and arraignment at the Crown Court is 112 days. Breach of the time limits does not mean that the prosecution's case is dismissed but rather that the defendant in custody is entitled to be released on bail unless the court agrees to an extension on an application made by the prosecution before the limits have run out. The Home Office have informed us that the effect of the latest geographical extension of custody time limits will be monitored and it is not to be expected that their full effect will be known until they have been in operation for some years.

55. As well as these statutory limits, the Working Group on Pre-Trial Issues<sup>16</sup> has produced national guidelines setting maximum periods for the completion of the various stages in the progress of criminal cases within the overall statutory limits already in force. These guidelines concern in the main the preparation of the case by the police and the CPS. The limits they set will need revision if our recommendations on mode of trial and committal proceedings (see next chapter) are accepted but in general we endorse the concept of time limits of this nature and recommend that their effectiveness be closely monitored. We welcome the fact that the existing limits are being developed through the guidelines set out by the CPS in their document "National Operational Practice".

## Diversion

56. Many witnesses, including the police service and the CPS, recommended to us that more should be done to keep out of the courts cases which did not seem to call for prosecution and which could be dealt with in some other way. We have therefore considered the case for encouraging the police and prosecution services to keep from the courts more cases which do not need to be considered

<sup>14</sup> *The Prosecution of Offences (Custody Time Limits) Regulations 1987*, SI 1987/299.

<sup>15</sup> *The Prosecution of Offences (Custody Time Limits) (Amendment) Regulations 1991*, SI 1991/1515.

<sup>16</sup> See paragraph 35, note 9.

by the judicial process. As we have already said (paragraph 28 above), failure to prosecute in cases that demand it can do great damage to public confidence in the criminal justice system. Also, as we noted in the same paragraph, the Code for Crown Prosecutors acknowledges that the interests of the victim should be taken into account in deciding where the balance of the public interest lies. We do not therefore advocate any system of automatically enabling offenders in particular types of case to evade the consequences of their actions. There may, however, be scope for dealing efficiently and less expensively with some offenders without the need for a court appearance.

57. The most common means of diverting first and petty offenders from the criminal justice process, particularly in the case of juveniles, is the caution. The number and range of cases in which people are cautioned by the police have increased steadily over the years, with 279,000 being cautioned in 1991, an increase of 4% on the previous year. Of these, 179,000<sup>17</sup> related to indictable or either way offences, mainly shoplifting. This was 8% up on the year before. We believe that there may be many more petty offenders who could be treated similarly. Cautioning practice, however, needs to be subject to national guidelines and applied more consistently across police force areas than appears to be the case at present. We recommend that police cautioning should be governed by statute, under which national guidelines, drawn up in consultation with the CPS and police service among others, should be laid down in regulations. These regulations should also govern the keeping of records of cautions so that information about whether a suspect has been cautioned previously can easily be transferred between police forces.

58. We do not recommend that proposals to caution should have to be referred for approval to the CPS. The police, however, should be free, as they are at present, to ask for CPS advice on whether or not a caution should be administered in cases where they consider that appropriate. Also where a case is sent to the CPS by the police to consider whether a prosecution would be justified, we recommend that the CPS should be enabled to require the police in lieu of prosecution to administer a caution, provided always that the defendant admits the offence, as the present cautioning guidelines require. At present, if the police refuse to administer a caution at the request of the CPS, the CPS will usually discontinue proceedings so that no further action at all is taken. This may not always be a desirable outcome.

59. The decision whether or not to charge (or take other action) in a case is normally a matter for police discretion and often they will decide to take no further action. This may be for a variety of reasons, including the absence of sufficient evidence against the suspect. It has been suggested to us that the decision to take no further action should, as happens in some overseas jurisdictions, for example Germany, only be taken by the CPS. We see no compelling reason for this in principle and in practice it would place a severe and perhaps insupportable burden on the CPS. We therefore make no recommendation on the matter.

60. Several witnesses, including the CPS, pressed on us the desirability of combining the caution with a requirement on the offender to cooperate with social work agencies or the probation service or to agree to consult a doctor or attend a clinic. We were attracted by this idea, particularly where the offender may be suffering from mental disorder or social handicap and criminal proceedings seem inappropriate as a means of dealing with the case. We were told, however, that neither the police nor the CPS felt that it should take the lead in administering such schemes. We agree that they may in fact not be the most appropriate services to take the overall responsibility. The most suitable candidate would seem to be the probation service. We understand that in at least one police area an informal system has been jointly developed between the

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<sup>17</sup> Aged 10-13: 21,000 males; 6,300 females  
 Aged 14-16: 41,000 males; 14,800 females  
 Aged 17-20: 28,000 males; 8,400 females  
 Aged 21 and over: 41,400 males; 19,000 females

police and the local probation service. This may well provide a model for national development and we recommend that the topic be looked at further.

61. We learnt with interest that in Inner London and in Coventry, Oldham and Newcastle, schemes exist, run by the probation service, which aim to increase the quantity and quality of information available to the CPS to enable them to consider fully the case for discontinuance in less serious offences. These schemes, known as Public Interest Case Assessment (PICA) schemes, are based on magistrates' courts and collect information on offenders which is then sent to the CPS in order to inform its decisions whether or not to continue the prosecution. We were told that, in the Inner London scheme based on Horseferry Road, Marlborough Street and Marylebone Magistrates Courts, 31% of the reports submitted to the CPS in the latest year of operation led to a decision to discontinue in the public interest. In 67% of those cases, the PICA report provided information that was crucial to the decision to discontinue and in 86% it led to the CPS having information to which they would not otherwise have had access. This leads us to think it likely that expansion of PICA across the country would lead to significant benefits. We recognise that there are resource implications but we would expect these to be offset at least to some extent by the savings in court time and otherwise resulting from the identification of cases which did not have to be prosecuted. We understand that an evaluation of the PICA schemes by the Home Office Research and Planning Unit is due in 1993. Subject to that we recommend that the scheme be put on a formal and systematic basis and extended as far as practicable across the country.

62. In some continental jurisdictions, the prosecution authorities are empowered to levy fines direct on offenders, with their agreement, as an alternative to taking formal proceedings against them in court. In England and Wales there exists the machinery for imposing fixed penalties for motoring offences. In recent years, a fixed penalty system for a wide variety of offences has been introduced in Scotland. Under section 56 of the Criminal Justice (Scotland) Act 1987, the procurator fiscal has the power to make a "conditional offer" to an alleged offender as regards any offence triable in the district court (that is minor summary offences). The substance of the offer is that if the offender pays a fixed penalty (or the first instalment thereof) to the clerk of the relevant district court within a specified time, proceedings will not be brought. Acceptance of the offer through making the relevant payment does not count as a criminal conviction (although a record is kept locally by procurators fiscal of the imposition and payment of the fine). Such a penalty is known as a "fiscal fine". The fiscal fine is a fixed sum (currently £25) and is payable in instalments of £5 at fortnightly intervals. The fiscal fine emerged as a result of the deliberations of the Stewart Committee<sup>18</sup>, which was set up to study alternatives to prosecution in an effort to ease the pressure of work on both the court system and the prosecution service. The scheme is used in a significant number of cases: in 1991, there were 15,599 fiscal fines.

63. We believe that similar arrangements should be introduced in England and Wales. There would be a small cost to the magistrates' courts' fine collection machinery but this should be considerably outweighed by the savings in magistrates' court trials. We therefore recommend that prosecution fines on the Scottish model be introduced in England and Wales for use instead of prosecution in appropriate cases. We recommend, however, that instead of one level of fine as in Scotland there should be an appropriate range of fines. As in Scotland the imposition of such fines should only be possible with the agreement of the offender. In some areas there might be a requirement that the defendant pay compensation to the victim with or without a prosecution fine. In such cases it would be very relevant to take the views of victims into account before reaching a decision.

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<sup>18</sup> *Keeping Offenders Out of Court: Further Alternatives to Prosecution*, HMSO 1983, Cmnd 8958.

# Chapter Six: Pre-Trial Procedures in the Crown Court (I)

## General

1. Once a suspect has been charged, the case should be brought to trial as soon as possible. First, however, certain preliminary procedures must have been completed, including the full disclosure of the prosecution case to the defence; and the defendant should have had the opportunity of submitting that there is no case to answer. Each stage should be subject to a time-limit which should be left to be established after consultation and perhaps with statutory backing. The sequence of procedures which we propose would, taken with the recommendations in our next chapter, significantly modify the existing system of preparation for trial. In this chapter we recommend the removal of the defendant's right to elect for jury trial in either way offences; the abolition of committal proceedings; new rules to govern disclosure by the prosecution; and a general requirement on the defence thereafter to disclose the substance of its case.

2. Crucial to our recommendations is the requirement that all but one<sup>1</sup> of us would place on defendants, where they propose to put forward a defence, to disclose the substance of their case when, but only when, the prosecution case has been disclosed. Objection may be made to this on the grounds that it infringes the right of defendants not to incriminate themselves. We do not, for the reasons set out more fully further on in this chapter, consider this objection to be valid. Disclosure of the substance of the defence at an earlier stage will no more incriminate the defendant nor help prove the case against him or her than it does when it is given in evidence at the hearing. The burden of proof remains on the prosecution and the defence remains free to decide what its case will be. Adverse comment by the prosecution and direction by the judge should be permitted if, but only if, the defendant introduces at the trial a defence not previously disclosed. Where this happens the judge, unless satisfied that no comment should be made, will be required to direct the jury to the effect that it is for them to assess the validity of the defendant's explanation, if any, for not having advanced his or her defence as soon as the prosecution's case was set out. The objective is to bring forward the moment at which the issues which the jury will have to decide can be clearly and concisely laid out, subject always to what may emerge in the examination and cross-examination of witnesses. We also believe that once adverse comment is permitted it will be in the interests of defendants to comply with the pre-trial procedures which we recommend and counsel will be likely so to advise them. Furthermore, we expect that so-called "ambush" defences, where a wholly new line of defence is deliberately introduced too late in the trial for the prosecution to be able to challenge it effectively, will become rarer than they are at present.

3. We stress that under our proposals disclosure of the defence case comes only after the prosecution case has been disclosed in full, including the statements of witnesses that the prosecution intends to call. The prosecution must also disclose any relevant evidence that it does not intend to call, including, most importantly, any evidence that might point to the defendant's innocence. We endorse the principle that it should not be a matter purely for the prosecution to decide what is relevant and what is not: the defence should have the right to see a schedule of

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<sup>1</sup> Professor Zander, whose note of dissent is set out at pages 221 to 235 below.

all the evidence in the prosecution's hands and to ask for the disclosure of any further material that seems to them to be relevant to the case. There must, however, be safeguards against the abuse of that right. The defence must not be free to conduct a "fishing expedition" through large masses of material simply in the hope that something may turn up which will embarrass or obstruct the prosecution, and there must be adequate protection of sensitive material that it is neither in the public interest nor in the interest of justice to disclose. Our recommendations accordingly include proposals which will, in a very limited number of cases, place the decision in the hands either of the trial judge or of a member of a standing panel of judges who will be free to conduct an ex parte hearing in the absence of the defence if satisfied that it is required.

## Mode of trial

4. Under the present law a defendant must be tried in the Crown Court if the offence is indictable only, and must be tried at a magistrates' court if the offence may only be tried summarily. There is, however, a large category of offences which may be tried at either court. These are known as "either way" offences<sup>2</sup>. They are tried summarily in a magistrates' court unless either

- (a) the magistrates, having regard to the considerations set out in paragraph 10 below, direct that the case be tried at the Crown Court or
- (b) the defendant elects to be tried at the Crown Court.

5. In fact only 18% of the cases tried in the Crown Court are indictable only. The remainder are either way offences which are tried there either because the magistrates so direct (52%) or because the defendant so chooses (30%) even though the magistrates have decided to try the case themselves<sup>3</sup>. It does not appear that either magistrates or defendants always achieve their objectives. Research by the Home Office Research and Planning Unit<sup>4</sup> found that in 1990, 64% of either way offences sent to the Crown Court were sent by magistrates<sup>5</sup>—presumably because they thought their sentencing powers were insufficient or the case was otherwise too serious for them. But in the event, in 62% of the cases in which the magistrates declined jurisdiction, the Crown Court imposed a sentence that would have been within the power of the magistrates to impose.

6. Defendants who chose to be dealt with at the Crown Court appeared to have three main objectives. The first, which is automatically achievable, is to put off the day of trial. If they are in custody this will, under present arrangements, give them an additional advantage—their time on remand, which counts towards any eventual sentence of imprisonment, is spent with the benefits (not available to convicted prisoners) of the remand regime. These benefits include better access to lawyers, more visits, the right to wear their own clothes, and the ability to spend more money at the prison shop.

7. However, the research suggests that such considerations for choosing Crown Court trial operate only in a minority of cases. Most defendants who opt for trial at the higher level do so in the belief that they will stand a better chance of acquittal after a fairer trial. This was found to be the case some years ago by A. E.

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<sup>2</sup> The distinction between either way and summary only offences is blurred in that it cannot be said that summary offences are always less serious than either way offences. This is particularly so when it comes to offences of dishonesty. It is often argued that theft, which is an either way offence, must continue to carry the right to trial by jury because of the effect of a conviction on a person with a clean record and a responsible job or position in society. Yet there are many summary only offences where the effect of a conviction could be considered to be just as serious for a first time offender. The following are examples of such summary only offences—false representation for obtaining benefit, avoiding payment of a railway fare, fraudulent use of a telecommunications system, keeping a brothel, soliciting (kerb crawling) and impersonation of a police officer.

<sup>3</sup> See *Crown Prosecution Service Annual Report 1991–1992*, London HMSO 1992 (HC 48) page 25.

<sup>4</sup> C. Hedderman and D. Moxon, *Magistrates Court or Crown Court? Mode of Trial Decisions and Sentencing*, London HMSO 1992.

<sup>5</sup> There seems to have been a significant recent rise in such committals. In 1987, the comparable proportion was only 47%.

Bottoms and J. D. McClean<sup>6</sup>. The more recent research by Hedderman and Moxon similarly found that the main reasons cited by both defendants and solicitors for preferring Crown Court trial are that the chances of acquittal are higher and that magistrates are “on the side of the police”. Research evidence shows that magistrates are more likely to convict than a jury where the trial is contested. In a report of a comparative study of the outcome of contested cases tried summarily and at the Crown Court, Julie Vennard<sup>7</sup> concluded that, for the offences triable either way included in her sample, the chances of acquittal were significantly higher in the Crown Court (57%) than in the magistrates’ courts (30%). Given that most defendants who opt for Crown Court trial say that they do so because they think it gives them a better chance of an acquittal, it may seem odd that most in the end plead guilty. According to the research by Hedderman and Moxon, 27% of those who elected for trial intended from the outset to plead guilty. By the day of trial 70% of those who elected for trial had pleaded guilty to all charges and a further 13% pleaded guilty to some charges. (In cases where the defendant pleads guilty to some charges the plea of not guilty to the other charges is commonly accepted by the prosecution so that such a case generally ends as being a guilty plea.)

8. According to the Hedderman and Moxon research, 50% of the sample who elected for trial at the Crown Court did so in the belief that if convicted the sentence would be lighter. This belief was, however, mistaken. When matched cases were compared, judges were three times as likely to impose immediate custody and sentences were on average two and a half times as long. Overall, judges imposed more than seven times as much custody as in comparable cases in the magistrates’ courts. One third of the defendants in the sample who elected trial in the Crown Court would, in retrospect, have preferred to have been dealt with at a magistrates’ court. The researchers also found that, for all types of offence, the magistrates were more likely to order defendants to pay compensation to the victim than were judges in the Crown Court.

9. Since the research was conducted, a Working Party, chaired by Lord Justice Farquharson, has drawn up national mode of trial guidelines which were published<sup>8</sup> in October 1990. These may provide some encouragement to magistrates’ courts to try more cases themselves but it will be some time before it is known whether they have achieved this objective. The guidelines were not intended to affect the number of cases in which the defendant elects trial at the Crown Court and it is therefore possible that, in many cases where the magistrates decide that they should accept jurisdiction in accordance with the guidelines, their decision will be negated by the defendant electing trial at the Crown Court.

10. The venue for trial of an either way offence is determined before the accused enters his or her plea. Under section 19 of the Magistrates’ Courts Act 1980, there is a mode of trial hearing at a magistrates’ court at which “the court shall consider whether ..... the offence appears more suitable for summary trial or for trial on indictment.” The section further provides that “before so considering, the court shall afford first the prosecutor and then the accused an opportunity to make representations as to which mode of trial is more suitable”. The Act states that in reaching a decision, the magistrates shall have regard to the nature of the case, whether the circumstances make the offence one of a serious character, whether the penalty they have power to impose would be adequate and any other circumstances which appear to the court to make it more suitable for the offence to be tried one way rather than the other.

11. After allowing an opportunity for the prosecution<sup>9</sup> and the defence to make known their views, the magistrates’ court decides whether the case should be

<sup>6</sup> *Defendants in the Criminal Process*, Routledge and Kegan Paul, 1976.

<sup>7</sup> “*The Outcome of Contested Trials*” In D. Moxon (ed.) *Managing Criminal Justice*, London HMSO 1985.

<sup>8</sup> Practice Note (National Mode of Trial Guidelines) (1991) 92 Cr. App. R. 143.

<sup>9</sup> Research by the Home Office Research and Planning Unit found that magistrates’ decisions were in line with prosecution recommendations in 96% of cases. See D. Riley and J. Vennard, *Triable-either-way cases: Crown Court or Magistrates’ Court*, London HMSO, 1988.

heard in the Crown Court or is suitable to be heard summarily. If the magistrates decide that it is suitable for summary hearing, they are required by section 20 of the Magistrates' Courts Act 1980 to inform the defendant that he or she may either consent to be tried in the magistrates' court or elect to be tried before a jury. In this way, the considerations which have led a magistrates' court to decide that the case should be tried summarily can be overturned by the defendant choosing a Crown Court trial<sup>10</sup>. Defendants also have to be informed that, should they consent to summary trial and be convicted, they may be liable to be committed to the Crown Court for sentence if the magistrates' court is of the opinion that a sentence should be passed which is beyond its own powers to impose.

12. This procedure, though complex, is administered efficiently in the courts and takes up little time. But, in the light of the research by Hedderman and Moxon, it is plain that the system does not work as it is intended. The magistrates send for trial a large number of cases that they could try themselves; while defendants opt for trial on the basis that they are going to plead not guilty but then usually plead guilty. We have considered the approach in other jurisdictions, and in particular Scotland, where the decision on the mode and venue of trial rests with the prosecuting authority. In Scotland the Crown decides whether an offence should be tried in the district court, the sheriff court or the High Court, unless it is an offence such as murder or rape which is automatically designated to the High Court or a minor offence reserved to the district or the sheriff court. If the case is to be tried in the sheriff court the procurator fiscal also decides whether it will be tried under solemn procedure (i.e. with a jury) or summarily by a single judge. The procurator fiscal's decision is not subject to appeal. Nor does the prosecution's control over the mode and venue of trial in Scotland seem to give rise to any controversy. There are therefore some attractions in the CPS being given similar responsibilities in England and Wales, subject to suitable guidelines being laid down by the Attorney General in the Code for Crown Prosecutors. It was, however, argued before us in oral evidence by several witnesses that, given the different history and context in England and Wales, the Scottish practice of leaving the mode of trial decision to the prosecution would not be acceptable here at least for the time being.

13. We believe that the procedure for determining mode of trial should be changed in order to secure a more rational division of either way cases between the magistrates' courts and the Crown Court. We do not believe that this decision should be left to the defendant, though he or she should have a voice in the matter. We recommend that, where the CPS and the defendant agree that the case is suitable for summary trial, it should proceed to trial in a magistrates' court without further ado. Similarly a case should go to the Crown Court for trial if both prosecution and defence agree that it should be tried on indictment. We see no reason why the courts should be concerned with mode of trial where the prosecution and defence both agree. The likelihood is that the court would also agree in such cases<sup>11</sup>. Where, however, the defence do not agree with the CPS's proposal on which court should try the case, the matter should be referred to the magistrates for a decision as happens now under section 19 of the Magistrates' Courts Act 1980 (see paragraph 10 above).

14. The system that we propose will undoubtedly mean that there will be fewer mode of trial hearings and may well result in fewer cases being sent to the Crown Court for trial, thus leaving the Crown Court free to concentrate on the more serious cases. It is not possible for us to say what proportion of either way cases would no longer go to the Crown Court. But we believe that the proportion would be substantial because under the system we propose defendants would no longer have the right to insist, as they do now in over 35,000 cases a year<sup>12</sup>, contrary to the views of the magistrates, that their cases should be heard in the Crown Court.

<sup>10</sup> And frequently are overturned. According to the Crown Prosecution Service Report for 1991-92, defendants elected trial in over 35,584 cases, amounting to 37% of the either way cases sent to the Crown Court.

<sup>11</sup> See paragraph 11, note 9.

<sup>12</sup> See paragraph 11, note 10.

15. Reduction of the pressure on the Crown Court is a desirable objective although it is not in itself the reason for which we recommend the change. To the extent that more cases remain in the magistrates' courts, savings may be made available which would enable more resources to be devoted to ensuring that the more serious cases going to the Crown Court are not only better prepared but more quickly heard. A trial in a magistrates' court is many times cheaper than a trial at the Crown Court<sup>13</sup>.

16. One way of removing cases from the ambit of the Crown Court would be to reclassify the less serious offences as triable summarily only<sup>14</sup>. We have not regarded the task of identifying the offences concerned as falling within our remit. We note, however, that attempts to reclassify offences in this way have proved controversial in the past, and that there are particular difficulties with offences such as theft where the seriousness of the alleged offence can vary greatly depending on the circumstances. It is for example difficult to legislate for a situation where an offender may mean to steal a large amount but only succeeds in getting away with something far less valuable.

17. We recognise that many people are of the view that the right to trial by jury should not be further restricted. The James Committee<sup>15</sup> noted the strong representations which they had received from legal practitioners and members of the public against their proposal to remove the right to elect jury trial in cases of low value theft. Since then, there has been continuing resistance to any further diminution of the defendant's right to trial by jury, both on the grounds that jury trial should in principle be used and because it is argued that jury trial should be available in any case in which a defendant may if convicted suffer damage to his or her reputation. Some also believe that, if defendants feel that they have a better chance of an acquittal from a jury than from the magistrates<sup>16</sup>, then they should have a right to jury trial for that reason.

18. We are not convinced by these objections. We do not think that defendants should be able to choose their court of trial solely on the basis that they think that they will get a fairer hearing at one level than the other. Magistrates' courts conduct over 93% of all criminal cases and should be trusted to try cases fairly. Aggrieved defendants have in any case a right of appeal by way of a complete rehearing of the evidence by a judge and two magistrates at the Crown Court. Nor in our view should defendants be entitled to choose the mode of trial which they think will offer them a better chance of acquittal any more than they should be able to choose the judge who they think will give them the most lenient sentence. Loss of reputation is a different matter, since jury trial has long been regarded as appropriate for cases involving that issue. But it should only be one of the factors to be taken into account and will often be relevant only to first offenders. In our view, in either way offences the decision as to the mode of trial should rest on a variety of relevant factors including the gravity of the offence, the past record if any of the defendant, the complexity of the case, and its likely effect on the defendant (including the likely sentence) if there is a conviction. Under our proposed scheme the defendant would have the right to urge any considerations supporting jury trial that he or she wished. If the CPS were persuaded, that would be the end of the matter. If the CPS wished nevertheless to propose summary trial, it would be for the bench to weigh up all the factors and determine the mode of trial. We see merit in the legislation specifically referring to the various matters (including potential loss of reputation) which the bench should take into account.

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<sup>13</sup> See chapter one, paragraph 18.

<sup>14</sup> Allowing relatively minor offences to be tried by magistrates would have a considerable impact on the workflow of the Crown Court. The major burden is caused by minor offences of theft (including shoplifting) and handling stolen goods. In 1989 an internal study by the Lord Chancellor's Department found that some 10% of Crown Court time and 11–12% of the caseload would be saved if the following offences were classified as summary only—theft and handling stolen goods below £100 in value, obtaining property or a pecuniary advantage by deception where the value involved was below £100, abstracting electricity and going equipped to steal.

<sup>15</sup> *Report of the Interdepartmental Committee on the Distribution of Criminal Business between the Crown Court and the Magistrates Courts*, London HMSO 1975, Cmnd 6323.

<sup>16</sup> For the research results indicating the basis for this view, see paragraph 7.

19. We believe that our proposals will achieve the aim of a more rational distribution of cases between the higher and lower courts. We also believe that significant benefits for the overall efficiency of the criminal justice system will result without the quality of justice being diminished thereby.

## Committal proceedings

20. Committal proceedings are intended to enable the sufficiency of the evidence to be examined by the magistrates' courts so that weak cases are abandoned before they receive a full trial in the Crown Court. This is undoubtedly a worthwhile objective but we think, as did the Royal Commission on Criminal Procedure and the Fraud Trials Committee, that there are better ways of securing it.

21. The great majority of committals are a formality. Under section 6(2) of the Magistrates' Courts Act 1980, the magistrates may commit the defendant for trial at the Crown Court on the basis solely of written statements (this is called a "paper" committal). The committal takes place without consideration of the contents of those statements, unless the defendant has no solicitor or the magistrates receive a submission that the statements disclose insufficient evidence to put the defendant on trial at the Crown Court. In either of these two eventualities, the magistrates must hold full committal proceedings.

22. Full committal proceedings, under section 6(1) of the 1980 Act, usually occur at the request of the defence, although the procedure is also open to the prosecution. The procedure is cumbersome in that the oral evidence of each witness has to be put into writing by the clerk of the court. It must then be read to the witness, signed by him or her, and authenticated by the magistrate. There is some mitigation of this process in that, if the defence do not wish to cross-examine a witness, a written statement may then be admitted in evidence, although its contents must either be read out in full or in summary form. If the prosecution makes out a *prima facie* case<sup>17</sup>, the magistrates' court has to commit for trial. If it is not satisfied that the evidence is sufficient, it should discharge the defendant. This discharge, however, is not the equivalent of an acquittal and the prosecution may bring a fresh charge or apply to a judge for consent to prefer a voluntary bill of indictment.

23. It has proved difficult to obtain reliable information on the incidence of full committal proceedings under section 6(1) of the 1980 Act as opposed to "paper" committals under section 6(2). The statistics received by the Home Office from the police do not distinguish between discharges as a result of committals and cases which are discontinued at the magistrates' courts for other reasons. We have therefore preferred to use figures supplied to us by the CPS. These indicate that full committals for the six months up to 30 September 1991 numbered about 4,400, as against 60,000 paper committals. Full committals thus amount to around 7% of all committals, a figure which is close to the 8% obtained by a study by the Home Office Research and Planning Unit<sup>18</sup> of all committal proceedings which took place in January 1981<sup>19</sup>. The Crown Court Study confirms this figure.

24. Some of those who gave evidence to us argued that what was wrong with committal proceedings was not the principle behind them but the way in which they worked in practice. These witnesses thought that there had to be a means of preventing cases in which the prosecution had insufficient evidence from

<sup>17</sup> *R. v. Epping and Harlow Justices ex p. Massaro* [1973] 1 Q.B. 433 followed in *R. v. Grays Justices ex p. Tetley* 70 Cr. App. R. 11.

<sup>18</sup> P. Jones, R. Tarling and J. Vennard 'The Effectiveness of Committal Proceedings as a Filter in the Criminal Justice System'. In D. Moxon (ed.) *Managing Criminal Justice*, London, HMSO 1985.

<sup>19</sup> In an unpublished Home Office Research and Planning Unit study of 3,000 cases taken from 1989 and 1990, David Moxon and Carol Hedderman could find only 3.5% of cases in which full committals were heard. They were, however, inclined to attribute this to the wide variations that are known to exist between different parts of the country and to the fact that their sample had contained only selected either way offences and not offences which are triable on indictment only. It may be that the defence is more likely to opt for a full committal in the more serious offences that fall into the indictable only category.

reaching the Crown Court and that committal proceedings, if properly conducted, would be the best means of achieving this. Most witnesses, however, took the view that committals, whether full or on paper, served little useful purpose, while full committal hearings put vulnerable witnesses to the stress of having to give their evidence in open court twice over. It was suggested that often the defence deliberately tested key prosecution witnesses in this way in the hope that they would either change their stories under pressure of the ordeal or refuse to go through the experience again in the Crown Court. Some witnesses took a middle view, suggesting that, while committal proceedings in their present form should be abolished, there still needed to be an opportunity for the defendant to argue that the prosecution's evidence was so inadequate that there was no case to answer.

25. We are satisfied that the present system of paper committals has no useful purpose, apart from any associated time limit by which the committal papers have to be ready and served on the defence. Such time limits, which we regard as essential, can be provided for without the mainly hollow procedure of committal under section 6(2).

26. We agree with the Royal Commission on Criminal Procedure and with the Fraud Trials Committee that full committal hearings in their present form should be abolished. We so recommend. We have considered recommending in addition the abolition of the procedure for submitting before trial that there is no case to answer. There is no such procedure in Scotland, and it might be argued that our recommendations for still more rigorous continuing scrutiny of cases by the CPS, combined with our proposals for clarification of the issues through pre-trial procedures, make it unnecessary. Nevertheless, on balance we are persuaded that, in the interests of stopping a demonstrably inadequate case against a defendant at the earliest possible stage, there should remain some opportunity for the defence to take the initiative.

27. We accordingly recommend that, where the defendant makes a submission of no case to answer, it be considered on the papers, although the defence should be able to advance oral argument in support of the submission and the prosecution should be able to reply. Witnesses should not be called: the right place to test their evidence is the trial itself. We do not accept that they should be required in effect to give their evidence twice over. Quite apart from the time and trouble wasted by unnecessary duplication, we agree that there is a significant risk that some of them will feel so intimidated on the first occasion that they will be unable to give their evidence at the trial satisfactorily or perhaps at all. We believe that a hearing on the papers would be sufficient to enable the court to prevent from proceeding to trial cases too weak to deserve it.

28. In recognition of the seriousness of the offence we recommend that in indictable only cases the submission of no case to answer should be made to the Crown Court. In either way cases the responsibility should fall to the magistrates' courts. We do not, however, think that this task should fall to the lay magistracy. The main purpose of the new procedure would be to hear legal argument on the sufficiency of the evidence. Such submissions in the Crown Court are decided by the judge. Stipendiary magistrates are legally qualified and it seems to us appropriate for that reason that they should preside over such hearings and we so recommend.

29. In an either way case, a submission of no case to answer should be made after the mode of trial decision has been made. This is because the question of making such a submission only arises if the magistrates have decided to send the case to the Crown Court. Where the case is to be heard in a magistrates' court, such a submission is made at the trial itself.

30. It is important that there should be time limits for the making of submissions of no case to answer. These should run from the moment the defence receives the prosecution's case. We do not see it as our task to prescribe these or other time limits. We would, however, observe that one effect of

abolishing committal proceedings in their present form should be savings in time, whether or not advantage is taken of the ability to make a submission of no case to answer.

31. If committal proceedings are abolished, it will be necessary to make consequential provision for bail applications. At present these are heard by the magistrates' courts until the case is committed to the Crown Court, from which point that court hears any application for bail. We recommend that the same approach should continue to apply after committal proceedings are abolished. This means that bail applications would be heard by the magistrates' courts until such time as the Crown Court became seized of the case.

32. We are conscious that many of the cases currently resulting in discharge at committal fail because prosecution witnesses do not turn up. There is thus a risk that a similar failure to appear at the Crown Court will result in an increase in the number of cases that have to be withdrawn there after being listed for a contested trial. We recommend therefore that the CPS be required to check before the trial that witnesses are likely to abide by the subpoena or summons by attending to give evidence at the trial, and that the CPS should be alert to any indication that witnesses might have changed their minds about the nature of the evidence which they intend to give. Where for any reason a trial has to be abandoned because of the failure of a witness to appear, or because he or she has indicated a change of mind, the trial judge should ask prosecution counsel for an explanation of why the CPS had failed to alert the court to this possibility at an earlier stage.

## Prosecution disclosure

33. It has long been accepted that Crown Court trials can only proceed on the basis of full disclosure by the prosecution of all the evidence in its possession that is relevant to the case. But there are serious problems over the extent of the disclosure requirements to which the prosecution should be subject. A realistic solution needs to be found which does not bring the criminal justice system into disrepute either because the requirements of disclosure are so wide as to be unduly burdensome on the prosecution or because full and proper disclosure by the prosecution is not achieved.

34. In recent decades the prosecution's duty of disclosure has extended beyond the prosecution's own evidence to material (known as "unused material") that the prosecution does not intend to use but which may be of assistance to the defence. In 1981 the Attorney General issued guidelines<sup>20</sup> to regulate such disclosure. Paragraph 2 of the guidelines states that, subject to certain exceptions, all unused material should normally be made available to the defence "if it has some bearing on the offence or offences charged and the surrounding circumstances of the case." The term "unused material" is defined in paragraph 1 of the guidelines as including "(i) all witness statements and documents which are not included in the committal bundles served on the defence; (ii) the statements of any witnesses who are to be called to give evidence at committal, and, if not in the bundle, any documents referred to in those statements; and (iii) the unedited versions of any edited statements or composite statements included in the committal bundles."

35. The guidelines leave scope for argument as to the extent of the disclosure requirement and require a judgement to be made on whether the material in question has some bearing on the offences charged and the surrounding circumstances of the case. The prosecution do, however, have discretion under paragraph 6 of the guidelines not to disclose unused material in certain circumstances. The paragraph permits the prosecution to withhold disclosure for instance where there is reason to believe that revealing a statement would lead to the defence intimidating a witness or where a statement made by someone close

<sup>20</sup> *Guidelines for the disclosure of "unused material" to the defence in cases to be tried on indictment*. (1982) 74 Cr. App. R. 302. The guidelines, although non-statutory, to all intents and purposes have the force of law.

to the accused is untrue and could therefore be used by the prosecution to cross-examine the witness if he or she were called by the defence. In all such cases, the guidelines say that the name and address of the witness should normally be supplied.

36. Paragraph 6(v) of the guidelines also gives the prosecution a discretion not to disclose statements that are regarded to a greater or lesser extent as “sensitive”. Examples of statements containing sensitive material are those which deal with matters of national security; those which are by, or disclose the identity of, an informant; those made by, or disclosing the identity of, witnesses who might be in danger of assault or intimidation if their identities became known; statements containing details, which, if they became known, might facilitate the commission of other offences; statements supplied only on condition that the contents will not be disclosed; statements relating to other offences by, or serious allegations against, people who are not the accused, and statements which contain private and confidential details about the maker of the statement and/or which might create the risk of domestic strife.

37. Paragraph 7 of the guidelines states that, if there is any doubt as to whether unused material comes within any of the categories in paragraph 6, such material should be submitted to counsel for advice before or after committal.

38. In 1991, in the course of the trial of Saunders and others, commonly known as Guinness One, Mr Justice Henry gave a ruling on the prosecution’s duty of disclosure which considerably extended the duty. The circumstances were that the prosecution had disclosed to the defendants that they had certain material in documentary form that they were not proposing to use in the prosecution case. They disclosed the existence of this material to the defence but not the material itself. It comprised notes made by the police or other investigators in interviewing witnesses or potential witnesses; tape recordings of interviews held with a view to the preparation of statements of witnesses or potential witnesses; transcripts of such tape recordings; first drafts of statements produced by witnesses or potential witnesses or by their legal advisers; first drafts of statements of witnesses or potential witnesses produced by the police or other investigators; and subsequent draft statements approved or amended by witnesses or potential witnesses or their legal advisers.

39. The defence argued that the material in question should be disclosed. The prosecution argued that the material that was subject to the defence’s application neither revealed an inconsistency likely to have a bearing on the case nor affected the credibility of a witness. In their submission, the preparatory material in question was, by virtue of its provisional nature, unlikely to have any real evidential value and the jury’s time would be wasted while insignificant differences between early drafts and the final version were explored in cross-examination. Mr Justice Henry ruled, however, that the material in question was capable of having an impact on the case; it was clearly unused material; and it was clearly material that had or might have some bearing on the offences charged or the surrounding circumstances of the case. The prosecution did not have a discretion not to disclose it and the defendants were right in their submission that the potential evidential value of the material in question was a matter for them, not for the prosecution, to judge.

40. The ruling by Mr Justice Henry raises several difficulties for the prosecution. First, it makes it clear that the term “unused material” may apply to virtually all the material collected during the investigation of a case. Second, the term may apply not only to material in possession of the prosecuting authority but to material in the possession of the police or some other agency, for example a forensic science laboratory, and about which the prosecuting authority may not have been informed because the forensic science laboratory or other agency did not recognise its relevance. Third, because it is no longer open to the prosecution to impose their judgement about whether the unused material has a bearing on the case, it seems that, to enable the defence to reach such a judgement, the existence of virtually all the material collected during the investigation of the

case may have to be disclosed to the defence. This in turn implies a wide ranging system for ensuring that such material in the possession of the police or other agencies is revealed to the prosecuting authority, so that they are in a position to inform the defence of its existence.

41. However reasonable all this may appear on paper, the police service have informed us that the requirement if taken literally is not capable of being met. The police set up large data bases in the course of their investigations, some of which involve a series of linked cases, especially where serial murderers or rapists are concerned, or where professional criminals are responsible for organised crime on a national or international scale. Even in some straightforward cases the amount of material collected during the course of the investigation can be voluminous. In major inquiries, even with computerised logs of all the information collected during the investigation, it is scarcely possible to be sure that all the material that has been generated has been listed.

42. Against this background, the defence can require the police and prosecution to comb through large masses of material in the hope either of causing delay or of chancing upon something that will induce the prosecution to drop the case rather than have to disclose the material concerned. The defence may do this by successive requests for more material, far beyond the stage at which it could reasonably be claimed that the information was likely to cast doubt upon the prosecution case. Although it may be time consuming and wasteful of resources for the police to check all the material requested, they may have to do so if they are to be sure that it can properly be released. For example, the information may have been given to the police in response to a broadcast appeal promising confidentiality to those providing the information. Or some witnesses may have given statements to the police naming third parties. These may in some cases have been interviewed and eliminated from the inquiry as having no actual involvement in the offence. In others their only connection with the case may be that they have been mentioned in witness statements without the need having arisen for them to be interviewed. Similar information on people who have no involvement in the offence may have been obtained as a result of surveillance operations. In all these examples the information on the individuals concerned may be extremely embarrassing to them without, however, having any relevance to the case. The police may well feel that the information should not be divulged and may in some cases decline to divulge it even if it means dropping the case. This does not seem to us to be in the interests of justice.

43. These problems are particularly acute where informants or undercover police officers are concerned. Their lives may be at stake if their existence, let alone their identities, are suspected. Although we recommend below special measures to protect material that would put them at risk if disclosed, it may be that embedded in other documents logged in the police data base are references that would lead the defence to identify such people. The information in the data base may also refer to other material that has not been collected in the course of the investigation of the offence in question but relates to other offences and offenders. Where the defendant is involved in organised crime, a series of police operations may be put in jeopardy if such information is disclosed. The defendant may still be convicted but at the cost of preventing further arrests of major criminals.

44. These problems were exacerbated by the Court of Appeal's judgment in the case of *Ward*<sup>21</sup>. This commented in very strong terms on the failure of the prosecution to disclose unused material which tended either to weaken the prosecution case or to strengthen the defence case. It was important in the circumstances of that particular case that those comments were made. But the judgment had the incidental effect of changing the whole approach to sensitive material and material which may attract public interest immunity. The Attorney General's guidelines leave it to the prosecution, in consultation with counsel as necessary, to decide whether material should be withheld on grounds of public

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<sup>21</sup> [1993] 1 W.L.R. 619.

interest immunity or for other reasons of sensitivity. The court in *Ward* accepted that there might be evidence which the prosecution did not wish to disclose on grounds of public interest immunity but said that it was not for the prosecution to be judge in its own cause on the evidence that could be withheld on those grounds. The prosecution, therefore, had to give notice to the defence of any claim to public interest immunity so that if necessary the court could be asked to rule on the claim. The effect of the Court of Appeal's ruling was to increase the risk that the prosecution might withdraw from prosecuting a case altogether for fear that, if they revealed that information existed that they were not prepared to disclose on public interest immunity or sensitivity grounds, this would alert the defendant sufficiently to put informants or under-cover officers at serious risk of injury or loss of life.

45. This implication of the *Ward* judgment was, fortunately, recognised by the Court of Appeal in the later case of *Johnson, Davis and Rowe*<sup>22</sup>. In this case, the court held that the judgment in *Ward* went too far in saying that the general rule requiring notice to the defence of a claim to public interest immunity admitted no qualification or exception. It held that the proper approach should be as follows:

- (i) In general, it is the duty of the prosecution to comply, voluntarily and without more, with the requirements in paragraph 2 of the Attorney General's guidelines<sup>23</sup>.
- (ii) If the prosecution wish to rely on public interest immunity or sensitivity to justify non-disclosure, then, whenever possible, which will be in most cases:
  - (a) the prosecution must give notice to the defence that they are applying for a ruling by the court;
  - (b) the prosecution must indicate to the defence at least the category<sup>24</sup> of the material that they hold; and
  - (c) the defence must have the opportunity to make representations to the Court.
- (iii) Where, however, to disclose even the category of the material in question would in effect be to reveal that which the Crown contends should not in the public interest be revealed, a different procedure will apply. The Crown should still notify the defence that an application to the Court is to be made, but the category of the material need not be specified and the application will be *ex parte* (that is to say, without the defence being present). If the Court, on hearing the application, considers that the normal procedure under (ii) above ought to have been followed, it will so order. If not, it will rule on the *ex parte* application.
- (iv) It may be that, in a highly exceptional case, to reveal even the fact that an *ex parte* application is to be made, could reveal the existence of sensitive information to an extent which stultified the application. Such a case would be rare indeed, but it could occur. In that event, the prosecution should apply to the Court, *ex parte*, without notice to the defence. Again, if the Court, on hearing the application, considered that at least notice of the application should have been given to the defence or even that the normal *inter partes* procedure should have been adopted, it will so order.

46. The Court of Appeal went on to state that, where a court ruled in favour of non-disclosure before the hearing of a case began, that ruling was not necessarily final. In the course of the hearing, issues might emerge so that the public interest of non-disclosure was eclipsed by the need to disclose in the interests of securing fairness to the defendant. If that were to occur, the court would have to indicate to the prosecution its change of view. The prosecution would then have to decide

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<sup>22</sup> *The Times*, 19 January 1993.

<sup>23</sup> For the effect of paragraph 2 of the guidelines, see paragraph 34 above.

<sup>24</sup> "Category" refers to those listed in paragraph 6(v) of the Attorney General's guidelines.

whether to disclose or offer no further evidence. It would therefore be necessary for the court to continue to monitor the issue and for that reason the Court of Appeal remarked that it was desirable that the same judge who decides the application should conduct the hearing. If that is not possible, the judge who conducts the hearing should be apprised at the outset of the material whose non-disclosure was upheld on the prosecution's earlier application.

47. We believe that the procedure laid down in *Johnson, Davis and Rowe* for the disclosure of material that may attract public interest immunity strikes a satisfactory balance between the public interest in protecting such material and the legitimate need of the defence in some cases to see it or to be aware of its existence. The procedure should enable the police and prosecution to ensure that the identities of informants and officers acting under cover are protected without necessarily endangering the prosecution of the offender. We are not, however, confident that all sensitive information is adequately protected since some of it—for example information given to the police on the understanding that it will be treated as confidential—may not be covered by public interest immunity. Another example is confidential information on commercial security arrangements which, once divulged, results in unacceptable risks to the security of the company and of its staff. Our main concern would be met if the court, under the procedure described at paragraph 45(ii) above, were able to rule in favour of non-disclosure in cases of sensitivity that did not attract public interest immunity. This seems to be implied in the words “or sensitivity” in that paragraph but if it is not we recommend that it should be.

48. We recommend also that, because of the complexity of the issues involved, cases where the disclosure of sensitive material is an issue should only be dealt with by High Court judges or nominated circuit judges. We also think that a number of such judges should be designated as duty judges to hear *ex parte* applications as envisaged in paragraph 45 (iii) or (iv) above before they have been assigned to a judge. In some cases, very early on in the proceedings, the prosecution will need to obtain a ruling quickly on whether material has to be disclosed. We agree with the Court of Appeal that the judge who decides the *ex parte* application should wherever practicable conduct the trial.

49. The present position is not, however, satisfactory where sensitivity is not in issue. We strongly support the aim of the recent decisions to compel the prosecution to disclose everything that may be relevant to the defence's case. But we accept the evidence that we have received that the decisions have created burdens for the prosecution that go beyond what is reasonable. At present the prosecution can be required to disclose the existence of matters whose potential relevance is speculative in the extreme. Moreover, the sheer bulk of the material involved in many cases makes it wholly impracticable for every one of what may be hundreds of thousands of individual transactions to be disclosed.

50. In our unanimous view a reasonable balance between the duties of the prosecution and the rights of the defence requires that a new regime be created with two stages of disclosure. The first stage, of primary disclosure, would subject to appropriate exceptions be automatic. The second stage, of secondary or further disclosure, would be made if the defence could establish its relevance to the case. Where the prosecution and defence disagreed on this aspect, the court would rule on the matter after weighing the potential importance of the material to the defence.

51. We envisage, therefore, that the prosecution's initial duty should be to supply to the defence copies of all material relevant to the offence or to the offender or to the surrounding circumstances of the case, whether or not the prosecution intend to rely upon that material. Material relevant to the offender includes evidence which might not appear on the face of it to be relevant to the offence but which might be important to the defence because for example it raises questions about the defendant's mental state, including his or her suggestibility or propensity to make false confessions (as happened in the Judith Ward case). In addition, the prosecution should inform the defence at this stage

of the existence of any other material obtained during the course of the inquiry into the offence in question<sup>25</sup>. This part of its duty should be discharged by the CPS or other prosecuting authority disclosing to the defence the lists<sup>26</sup> or schedules which it had obtained from the police and other key participants in the investigation such as expert scientific witnesses. This would enable the defence to go through the lists and see whether there was any material which might be relevant to the defence but which the prosecution had not thought to be relevant in its initial selection of items for full disclosure.

52. Once this initial disclosure has taken place, the defence have, as we have noted, almost limitless scope for demanding further disclosure whether of other documents mentioned in the disclosed documents or of documents from the lists or schedules. This potential ability to delay matters almost indefinitely is not in the interests of justice. We have therefore sought a means of further defining, without causing unfairness to the defence, the requirement on the prosecution to disclose additional material. We believe that the answer should start from our proposed requirement on the defence to disclose the substance of its own case. Once it has done that, it can relate its request for further disclosure to the likely relevance of the documents requested to the line of defence disclosed. Where the prosecution does not accept the relevance of the documents requested to the defence's disclosure of the substance of its case, or where it regards the defence case, as disclosed, as irrelevant to the main elements of the prosecution case the matter can, if the defence insist, be referred to the court for a decision. In reaching its decision the court should be guided above all by its view of the likely relevance of the material to the offence, the offender, or the surrounding circumstances of the case and the onus should be on the defence to establish this.

53. We recommend that the general framework for prosecution disclosure should be laid down in primary legislation, with detailed procedures to be governed by appropriate subordinate legislation or codes of practice as under PACE. The rules should cover such matters as the material to be preserved by those involved in criminal investigation, the duty of those collecting such material to disclose it to the prosecution and the duties of disclosure by the prosecution to the defence. Those involved in the various stages of disclosure—police officers, scientists and other prosecution experts and prosecutors—should be required to sign a certificate stating that to the best of their knowledge and belief their responsibility in regard to disclosure under the rules has been discharged. We accept that in some cases it will be difficult for supervising police officers, who are likely to be of the rank of chief inspector or above, to say for certain that everything relevant has been disclosed. We think, however, that they might reasonably be required to declare to the best of their knowledge and belief that everything possible has been done and that this should lead them to make the necessary enquiries of their subordinates. To do otherwise would leave no one personally responsible for the success or failure of the new arrangements.

54. Provision would clearly need to be made in the rules for the kind of exceptions to the duty of disclosure recognised in the current guidelines—for instance to protect a witness from potential intimidation. The rules would also provide for claims for public interest immunity including the regime in regard to sensitive material along the lines now established by the courts. A small but important issue which should also be covered in the rules is the need to protect *bona fide* research which is not involved in the investigation but which might be studying it. Guarantees of confidentiality may be an essential prerequisite for such research. There might usefully also be rules regarding the methods whereby disclosure should be made and obligations on the defence as to the proper use of material disclosed.

55. We further recommend that such codes of practice (if that be their form) be published in draft, like the PACE codes, so as to give scope for the widest degree

<sup>25</sup> We exclude, however, internal working documents such as police reports, internal memoranda of advice from the CPS or other prosecuting authority, and opinions from counsel.

<sup>26</sup> The list would in many cases need to be by reference to categories of document (e.g. pro formas for house to house inquiries on a housing estate) rather than listing every document.

of consultation on their precise terms. We assume that it would be for the Attorney General to have responsibility for this matter.

56. As part of their duty of disclosure, the prosecution must disclose to the defence any known previous conviction recorded against a prosecution witness. In *R. v. Edwards*<sup>27</sup> the Court of Appeal held that the defence were entitled to cross-examine police officers not only about disciplinary findings made against them but also about any earlier trial in which a jury had rejected their evidence in circumstances which indicated that they were not believed. We think that this goes too far. The prosecution should be obliged to disclose to the defence records of adverse findings in disciplinary proceedings against a police officer only, we believe, in so far as those records are relevant to an allegation by the defence about the officer's conduct in the current case. To this extent we disagree with *R. v. Edwards*. Nor do we think that the prosecution should be obliged to disclose cases in which there has been an acquittal following evidence being given by a police officer who, apparently, has been disbelieved by the jury. We cannot see how, given that the reasons for jury verdicts cannot be revealed, the prosecution can be expected to identify cases in which the reasons for the acquittal include disbelief of a police officer's evidence.

## Defence disclosure

57. Although, as we have described, the obligations on the prosecution to disclose their case are extensive, the duty of the defence to reciprocate is limited. Defendants may, without risking adverse comment, decline to cooperate in any way and at any stage of the criminal proceedings against them except where they are intending to call alibi or expert evidence. They need do no more than deny the offence and register a plea of not guilty. If the defence take this course, the prosecution will lead its evidence at trial and the defence, after testing the prosecution case in cross-examination to whatever extent is felt appropriate, will invite the jury to conclude that the prosecution has failed to make out their case.

58. Under section 11 of the Criminal Justice Act 1967, defendants are required to give advance particulars of any alibi and the names and addresses of any witnesses whom they intend to call in support of it. Under section 81 of PACE and the Crown Court (Advance Notice of Expert Evidence) Rules 1987, they must give advance notice of any expert evidence that they propose to lead. The purpose of these provisions is to inhibit the late fabrication of alibi or expert evidence and to prevent juries from being misled by evidence called at the last minute which the prosecution have had no opportunity of checking or rebutting. In practice, however, judges are understandably reluctant to deprive the jury of the opportunity of hearing evidence which, even if it should have been produced earlier, might help to establish the defendant's innocence.

59. With one dissentient<sup>28</sup>, we believe that there are powerful reasons for extending the obligations on the defence to provide advance disclosure. If all the parties had in advance an indication of what the defence would be, this would not only encourage earlier and better preparation of cases but might well result in the prosecution being dropped in the light of the defence disclosure, an earlier resolution through a plea of guilty, or the fixing of an earlier trial date. The length of the trial could also be more readily estimated, leading to a better use of the time both of the court and of those involved in the trial; and there would be kept to a minimum those cases where the defendant withholds his or her defence until the last possible moment in the hope of confusing the jury or evading investigation of a fabricated defence.

60. We do not, as we have said, believe that a requirement on the defence to disclose the substance of their case sooner rather than later infringes the right of defendants not to incriminate themselves. Where defendants advance a defence at trial it does not amount to an infringement of their privilege not to incriminate

<sup>27</sup> (1991) 93 Cr. App. R. 48.

<sup>28</sup> Professor Zander, whose note of dissent is at pages 221 to 235 below.

themselves if advance warning of the substance of such a defence has to be given. The matter is simply one of timing. We emphasise that under our proposals defendants may, if they so choose, still stay silent throughout the trial.

61. A different but related objection might be that requiring the defence to disclose the substance of their case when they wish simply to rebut the prosecution case gives the prosecution an unfair advantage, since they can use what is disclosed by the defence to strengthen their case. An example would be where a person is charged with assault and the defence decide before the trial that their reply will be that the defendant acted in self-defence. After the prosecution witnesses have been heard, however, it may become apparent that the prosecution have failed to prove that a blow was struck. In such a situation the defence may well be able to submit successfully that there is no case to answer. Such a submission might, however, be precluded if they had already disclosed a defence of self-defence and the prosecution were able to refer to that at the trial as indicating that the defendant implicitly admitted that a blow had been struck.

62. This objection can, however, be met in one or other of two ways. The first is to allow the prosecution to refer to the disclosed defence and seek to exploit any subsequent change of direction by inviting adverse inferences to be drawn. The jury will still be free to accept the defence's reasons for the change. The alternative is to provide that any defence disclosed in advance of the trial should not be disclosed to the jury until the defence, or an alternative, is advanced at trial. That would ensure that the defendant was not prejudiced by disclosure before the trial and that the evidence led by the prosecution could not include anything disclosed by the defence. Since it seems to us more consistent with the principle that the burden of proof should lie upon the prosecution, we recommend the second alternative.

63. It is sometimes also argued that a requirement on the defence to make advance disclosure helps the prosecution because they are given more time in which to investigate any evidence disclosed. We do not, however, think that this amounts in any sense to self-incrimination, any more than where a trial is adjourned to enable the prosecution to test new evidence advanced in the course of it. The prosecution have a case, and the defendant may or may not wish to put forward an answer to it. If the defendant does wish to put forward an answer, the arrangements for considering it should be such as to enable the jury to come to its verdict on the fullest possible appreciation of each side of the case.

64. Another possible objection against an extension of defence disclosure is that it is unnecessary. On this view, although it is true that the defence now can keep back its case until the last possible moment, in the great majority of cases this causes few problems for the prosecution at the trial, either because the case is a simple one and the range of possible defences is limited, or because the police, the CPS, and prosecution counsel have done a great deal of work before the trial to try to ensure that they are not "ambushed" by the defence case when it is revealed<sup>29</sup>. We do not, however, agree that nothing needs to be done. The present system encourages late preparation of cases and the holding back of information until the last possible minute. This is undesirable in principle and, even if there are no untoward practical disadvantages in the great majority of cases, the consequences in the minority of cases, often the most serious, are in our view unacceptable.

65. If there are to be further obligations on the defence to disclose their case, we are unanimous that these should be on the basis of the fullest possible disclosure of the prosecution's case. The prosecution case, however, may and

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<sup>29</sup> The relationship between silence and the prosecution being "ambushed" by the defence case at trial is not clear. The Crown Court Study showed that different practitioners seemed either to interpret the phrase "ambush defence" in different ways or to be able to forecast, with differing degrees of success, the potential in the case for various lines of defence. The Study showed that "ambush defences" were considered by prosecution counsel to have occurred in 7% of contested cases, by the CPS in 10%, and by the police in 23%. They were considered by the CPS to have caused "serious problems" in 3% of contested cases, and by the police in 8%.

frequently does get added to or amended between the initial service of the case papers on the defence and the trial. It may therefore be objected that the defence can never be sure which case they are being required to answer. We are not persuaded by this objection. It seems to us that the service of additional material on the defence by the prosecution is seldom of such moment as to alter the nature of the case significantly. Where, however, the defence believe that it has been changed significantly, they should be able to make representations to the court to the effect that they should be allowed to put forward a different defence without risk of adverse comment.

66. Despite the theoretical objections, therefore, all but one of us believe that there should be an extension of the arrangements for defence disclosure. This would involve an obligation on those defendants who intend to contest the charges against them to disclose the substance of their defence in advance of the trial or to indicate that they will not be calling any evidence but will simply be arguing that the prosecution has failed to make out its case.

67. Where the defence is calling evidence it should be required to disclose sufficient for the prosecution to understand what the substance of the defence case will be. We set out how this might work in practice in the next paragraph. If the prosecution thinks that what has been disclosed is not sufficient, it should ask the defence for further clarification. If this is refused, or not provided to the prosecution's satisfaction, it should be able to apply to the court for a ruling on the matter. The present arrangements for alibi evidence and the evidence of expert witnesses should continue to apply. In the case of expert evidence, as we explain in chapter nine, we believe that the defence, in addition to having as now to disclose the evidence, if any, that they intend to call, should be required to say which matters in the prosecution evidence are admitted, which are not admitted and, if not admitted, in which specific respects. Any subsequent departure might then, with the leave of the judge, be subject to adverse comment by the prosecution.

68. In most cases disclosure of the defence should be a matter capable of being handled by the defendant's solicitor (in the same way that alibi notices are usually dealt with at present). Standard forms could be drawn up to cover the most common offences, with the solicitor having only to tick one or more of a list of possibilities, such as "accident", "self- defence", "consent", "no dishonest intent", "no appropriation", "abandoned goods", "claim of right", "mistaken identification" and so on. There will be complex cases which may require the assistance of counsel in formulating the defence. Where counsel are involved, they should if practicable stay with the case until the end of the trial: where this is impracticable, the barrister who has been involved with the pre-trial work should pass on his or her preparation to the barrister who is to present the case at trial.

69. We have considered whether, not only in cases involving an alibi but in all others the defence should be required to reveal in advance the names and addresses of the witnesses that they intend to call, with the safeguard that the police should not interview such witnesses unless a defence solicitor is present. It can be argued that the prosecution in some cases will have little idea of the precise nature of the defence unless there is the opportunity of testing the evidence in this way. We have, however, concluded that we should not recommend that the defence be required to disclose the names and addresses of the witnesses whom it intends to call. For one thing, such decisions are frequently taken in the light of developments as the trial unfolds. For another, such a requirement might lead to a breach of the principle that the defence should not be required to help the prosecution prove its case because the prosecution might itself call any witnesses disclosed by the defence whom the defence in the event decided not to call. Another argument put forward for the advance disclosure of defence witnesses is to enable a check on their criminal records to be made. We believe, however, that any concern in this area can be met by the defence providing the prosecution at the trial with the necessary details to enable criminal record checks to be rapidly made.

70. Where defendants put a defence at the trial without providing in advance an indication of the substance of their case, or where the explanation given at the

trial is different from the one given in advance of the trial, then it seems to us that the prosecution, with the leave of the judge, should be able to invite the jury to draw adverse inferences, and that the circumstances should also be subject to comment by the judge in his or her summing up. If a number of alternative defences are disclosed and the alternatives given seem mutually exclusive (for example if in a rape case the defendant said that he was both somewhere else at the time and that the victim had consented), we think that this should also qualify for comment. We appreciate that it may be difficult to decide, from a number of possible defences, which might afford the greatest chance of success until after the prosecution evidence has been presented in court. Where, however, there is a choice between a number of possible defences those selected should not be mutually inconsistent; if they are, the prosecution seem to us entitled to draw the jury's attention to the fact. The defendant will no doubt usually give reasons for late production of a defence, or for any difference between the defence raised at trial and that disclosed before the trial. It is then for the jury, aided by the judge in the summing up, to decide whether or not they accept those reasons and to reach their verdict in the light of all the evidence.

71. We recognise that there may, in some circumstances, be good reasons for a departure by the defence from the case advanced before the trial. In such cases it should be open to the court to rule that no adverse comment should be permitted, particularly if the reason for the change of direction is a mistake by the defendant's legal advisers or a change of counsel leading to different advice on the best course for the defendant to take. The defence might also argue that a change in the prosecution case was sufficiently fundamental to justify their putting forward a different defence. It would be for the judge, having heard the arguments in the absence of the jury, to decide whether the prosecution should be permitted to invite the jury to draw any adverse inference from the change in the line of defence. It would also be for the judge to decide whether an adjournment was necessary to enable the prosecution to consider the new defence case.

72. We would add that our proposals on prosecution disclosure (see paragraphs 51 and 52 above) also contain some incentive for the defence to disclose the substance of its own case. We have suggested that any additional prosecution disclosure that the defence requests should be related to the substance of the defence that it proposes to run. This means that, the less the defendant chooses to disclose in advance, the less scope he or she would have to demand that the prosecution discloses further material other than the material required to be disclosed under our recommendations in paragraph 51. A defendant who has not disclosed a defence, and merely requires the prosecution to show that the evidence they have is sufficient to prove guilt, should in our view not be entitled to require further disclosure from the prosecution unless able to satisfy the court of its relevance as we propose in paragraph 52. We do not envisage that there will be many cases in which the judge will order further disclosure from the prosecution where the defence has not disclosed the substance of its own case.

73. We are confident that the system will benefit overall from our proposals, which should result in the earlier clarification of what is at issue in each case. It may well be that in a minority of cases the extra attention paid to the case at this stage will result in a longer trial but if so that should be because a longer trial is necessary in order to test the evidence in the case thoroughly. Our proposals relate to Crown Court cases only, since it is only there that there is at present requirement for full disclosure by the prosecution. If the proposals are successfully implemented in the Crown Court, consideration might later be given to their extension to either way offences tried in the magistrates' courts.

# Chapter Seven: Pre-Trial Procedures in the Crown Court (II)

## General

1. In our last chapter we made recommendations for the full disclosure of the prosecution's case and for this to be met by disclosure by the defence of the substance of its own case. On this basis, the case should proceed to trial as swiftly as practicable, particularly where the defendant is in custody. There may first, however, need to be clarification of the issues which, following the exchange of information between the prosecution and defence, are to be decided at the trial. In this chapter we make a number of connected recommendations designed to ensure that cases that come to court are as thoroughly prepared and well presented as they can be. Prosecution and defence counsel must where necessary have consulted each other; and the court needs to have the information on which to estimate as accurately as possible the time that the trial is likely to take. We recommend preparatory hearings to be held on the initiative either of the parties or of the court in prospectively long or complex cases; and a procedure whereby defendants are able in some circumstances to ask a judge what would be the maximum sentence to be passed if a plea of guilty were entered. We also make recommendations on legal aid and cases prosecuted by the Serious Fraud Office (SFO) and comment on the relevance of the proposals in this and our previous chapter to the magistrates' courts.

2. There is already a long and continuing history of attempts to extend the scope of pre-trial reviews for the purpose of clarifying in advance of trial the issues which the jury will be required to decide. These attempts have not, thus far, achieved nearly as much as had been hoped. But the reasons for this will not, we believe, apply to our proposed regime. Two objections to our recommendations are likely to be made. The first is that some practitioners and defendants may be unwilling to comply with them and that sanctions for failure to do so will be ineffective. The second is that in trying to settle as much as possible as early as possible, the process as a whole may be made more cumbersome and costly without compensating gains in shortening the actual trial. We believe, however, that both these risks can be minimised. We have received much strongly-argued evidence from experienced practitioners to the effect that a stricter regime for pre-trial preparation and review of cases is both desirable and practicable. We do not expect that preparatory hearings (as we envisage them)<sup>1</sup> in which both parties appear before a judge will be held in more than a very small proportion of cases. But we do envisage that in all contested cases both counsel will be required at the appropriate stage to certify that the case is ready to proceed to trial and to give the court their considered estimates of the time that the trial is likely to take. We recognise that in many routine and straightforward cases no change in existing procedures may be needed. But we believe that significant benefits will accrue from our recommendations in cases where the jury is likely to be confronted with difficult or contentious expert evidence, long and complex narratives of events, and unexpected changes of tactic or approach. Our recommendations should also lead to a reduction in the number of occasions when the trial has to be interrupted in order to settle disputed questions of law in the jury's absence.

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<sup>1</sup> As with preparatory hearings in serious fraud cases under the Criminal Justice Act 1987, they should be part of the trial, but with the jury not yet empanelled.

3. We recognise that if the scheme for pre-trial preparation which we propose in outline is to be effective, a significant change in the working habits of both solicitors and barristers will be called for. But we refuse to share either the complacency of those who believe that the present system does not call for improvement at all or the scepticism of those who believe that although earlier and better preparation of cases is desirable in principle, it cannot be achieved in practice. It is true that attempted reforms have been frustrated in the past by the failure of practitioners to comply even with practice directions from the most senior members of the judiciary. But that is hardly a creditable argument against making a further and more determined effort to make them do what they ought. We are firmly of the view that the answer lies in a combination of better incentives to them to complete the required pre-trial preparation in good time and more stringent sanctions, effectively enforced, against those who do not.

### Pre-trial reviews/preparatory hearings

4. We accordingly start from the presumption that the best means of enabling the jury to reach its verdict on the clearest possible appreciation of the facts of the case is a pre-trial procedure in which the issues are clarified and defined in advance of the jury's being empanelled. In the less complex cases an exchange of papers between the parties should achieve all that is required. In the more complex cases, but only in these, we recommend that it should be open to either party to require a preparatory hearing in front of a judge in order to secure rulings on the main issues. We also recommend that it should be open to the court, having seen the case papers, or where the parties have failed to co-operate, to direct that such a hearing should take place.

5. We recommend that such hearings are part of the trial, so that decisions made at them are binding throughout.

6. Such arrangements, if properly enforced and kept simple, would have a number of tangible benefits. They would assist counsel before the trial to identify what evidence and points of law are at issue; they would ensure the early identification of the witnesses who will and those who will not be required for the trial; they would contribute to earlier determination of plea in some cases; and they would be a help to the more accurate forecasting of the probable length of the trial.

7. We have reached our conclusions in this area after careful consideration of the present arrangements for pre-trial reviews or plea and directions hearings. These are widely regarded as ineffective and we are well aware of the view of some legal practitioners that it would therefore be a mistake to seek to build upon them. We understand the reasons for this view. But we do not agree that nothing further should be done to engage the parties to the trial in clarification of the issues in advance. On the contrary, we see in the ineffectiveness of the present arrangements a compelling argument for their replacement by different and better ones, and we have been confirmed in our view by the representations we have received from the Bar Council, the Criminal Bar Association, the Law Society, the CPS and the police service, all of whom expressed to us the view that preparatory hearings have a great deal of potential for improving the administration of justice<sup>2</sup>.

8. It is already possible for prosecution and defence lawyers to consult each other informally before trial. If such consultations prove ineffectual, it is open to either party to apply to the court for directions and to the court itself, if the parties have allowed matters to drift, to list the case for directions of its own volition. Practice rules governing such hearings, usually known as "plea and directions hearings", or "pre-trial reviews", were published for the Central

<sup>2</sup> There also appeared in May 1992 the report of a Working Party (Chairman: Robert Seabrook QC) of the General Council of the Bar entitled "*The Efficient Disposal of Business in the Crown Court*". This reached conclusions similar to those which we had ourselves reached on the need to make pre-trial procedures more effective.

Criminal Court in November 1977. These rules have no statutory force but we understand that they, or some close variation on them, are used in Crown Court centres across the country.

9. The purpose of the present rules is to enable discussion to take place and decisions to be made on such matters as the plea; the prosecution witnesses required at the trial; the facts which are admitted and which can be reduced to writing; the probable length of the trial; the exhibits and schedules; the issues, if any, as to the mental or medical condition of any defendant or witness; any point of law; the admissibility of evidence; and any authority on which either party intends to rely. At hearings in open court, the judge who is to try the case may hear and rule upon applications relating to the severance of any count or any defendant, and to amend, or provide further and better particulars of, any count in the indictment. In addition judges may make such orders as are necessary for the proper and efficient trial of the case.

10. In 1982 a Working Party<sup>3</sup> under the chairmanship of Lord Justice Watkins recommended a system of pre-trial discussion based on the exchange of forms giving information about the likely length of the case, the witnesses to be called, pleas and so on, with oral hearings as a last resort. An experiment set up to try out the scheme on a pilot basis produced disappointing results; the use of the forms was patchy (two of them were hardly used at all) and there was a general feeling that an extension of formal pre-trial hearings would be preferable to the completion of forms. The conclusion of an evaluation report prepared by the Lord Chancellor's Department was in effect that prosecution lawyers saw benefits in the system provided that it had the wholehearted support of defence lawyers. Defence lawyers, however, tended not to be in favour of it because they feared that disclosure might be prejudicial to their clients and because the way counsel conducted their practices would require fundamental revision to make the system work as intended. Our recommendations address these weaknesses.

11. The Crown Court Study, which took place in February 1992, throws some light on the existing use of pre-trial reviews under these or similar arrangements. There were pre-trial hearings in about a quarter of the cases covered by the study. 96% of these hearings took up less than half a day. 83% were before a judge other than the trial judge. The most commonly stated objective of pre-trial hearings was to deal with questions of plea (70% of cases). In 13% of cases the objective was to simplify the factual issues, in 12% to enter admissions or agree other evidence, and in 6% it was the resolution of issues of law. In 27% of cases, other reasons were mentioned. The judges responding to the questionnaires issued in the course of the study thought that the pre-trial objectives had been fully realised in nearly one-half of the cases, partly realised in just under one-fifth and not realised in about one-third: in less than one in ten cases did they consider that a fair amount of time or money had been saved.

12. The most recent experiment with a pre-trial hearing procedure was set up in response to Recommendation 92 of the Report of the Working Group on Pre-Trial Issues<sup>4</sup>. This Working Group consisted of representatives of the Lord Chancellor's Department, the Law Officers' Department, the Home Office, the Justices' Clerks Society and the CPS. Recommendation 92 was that a pilot study should be set up to explore the consequences of a rule that all cases committed to the Crown Court should be initially listed there for a plea and directions hearing. It was envisaged that at the hearing defendants who pleaded guilty would be dealt with. Where a not guilty plea was given, a directions hearing (dealing with the matters mentioned at paragraph 9 above and assisted by a specially designed questionnaire) would immediately take place. The general aim was that custody cases would be listed for hearing four weeks after committal and cases where the defendant was on bail six weeks after. The pilot study took place in the Crown Court centres at Croydon, Plymouth and Sheffield between May 1992 and June 1993.

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<sup>3</sup> Unpublished.

<sup>4</sup> See chapter five, paragraph 35, note 9.

13. In March 1993 the National Steering Group set up to oversee the pilot study of recommendation 92 issued an interim report.<sup>5</sup> This seemed to indicate a small increase in the number of guilty pleas entered early and a rather more significant reduction in the percentage of “cracked” trials. These are cases that are listed at the Crown Court for a contested trial before a jury but where, often on the day of the trial itself, the defendant pleads guilty. The effect of recommendation 92 on “cracked” trials, therefore, if it could be repeated across the country, is to be welcomed. One<sup>6</sup> of us believes, for this and other reasons, that building on recommendation 92 may be the best way forward.

14. The rest of us, however, believe that the objective of shorter, fairer and more efficient trials would be much better achieved by a different approach. We are wholly unconvinced that a plea and directions hearing is required in every case. Simple cases do not in our view need such a hearing; if the need arises because lawyers dislike filling in forms, then they must be made to overcome their reluctance. On the other hand, in more complex cases where the defendant intends to plead not guilty, a hearing is unlikely to achieve significant results without a great deal of preparation and prior consultation between the defence and prosecution, for which insufficient time is allowed in the timetables aimed at in the pilot study of recommendation 92. Without such preparation, little is likely to be achieved at the hearing. Recommendation 92 could not in any event be applied across the Crown Court as a whole in the same way as in three of the smaller and less busy Crown Court centres; the pressure on the more heavily loaded courts, and on the Bar if all hearings had to be attended by barristers familiar with the case, would rule this out. This is particularly so in complex cases with a number of co-defendants, each individually represented by counsel, every one of whom may be involved in a different case, in a different Crown Court centre. We do not believe that a listing system could be devised to cope with such a system. Extension of the pilot study to all courts would also mean that approximately 50% of Crown Court cases would require an additional hearing. These are the cases which are not disposed of at the plea and directions hearing but proceed to trial with little having been resolved in advance. We view with dismay the prospect of counsel and solicitors’ representatives having to attend plea and directions hearings in about 50,000 cases a year with few significant decisions being taken at those hearings.

15. We note too that the interim report identifies three significant weaknesses in the scheme, namely

- (i) some defence counsel decline to indicate at the plea and directions hearing how many defence witnesses are to be called, whether any point of law is expected to arise, and so on, despite this being in breach of the Deputy Chief Justice’s practice direction. The judge has no statutory authority to insist on compliance;
- (ii) the structure of remuneration for the legal profession may not support or encourage compliance; and
- (iii) the loss of remand privileges for convicted but unsentenced prisoners may act as a disincentive to the early notification of guilty pleas by defendants who are remanded in custody.

16. All but one of us, therefore, believe that a different approach is needed, one that would not require pre-trial hearings in every single case, however straightforward, but only in the small proportion of cases where they are necessary in order to clarify matters in advance of the trial. We believe, as we have said, that it would be a mistake to conclude from the experience to date that any system of pre-trial reviews will, by its nature, prove ineffective. We do, however, see two particular innovations as essential to the success of a fresh approach to the problem. The first is the introduction of the arrangements for defence disclosure that we have proposed in chapter six. The second is the introduction of clear powers, such as do not exist at present, to enable judges to

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<sup>5</sup> Lord Chancellor’s Department, 31 March 1993, unpublished.

<sup>6</sup> Professor Zander, whose note of dissent is to be found at page 221 below.

rule on matters such as the admissibility of evidence before the jury is empanelled. This might be thought to involve the risk that once these powers were in place one or other of the parties, or perhaps the court itself, would want a preparatory hearing in more than the very small proportion of cases which we envisage. But we do not think this likely. We expect, on the contrary, that the existence of the potential for a judge to make the necessary rulings will act as an incentive to prosecution and defence to reach agreement between themselves.

17. It is not possible to define the cases in which there should be a preparatory hearing. Many factors will be relevant, one of which is the estimated length of trial. We recommend that practice directions be issued to the effect that in trials of a certain length a preparatory hearing should normally occur. The period should be a matter for future monitoring and adjustment in the light of experience. The Lord Chancellor's Department have suggested that as a general rule a hearing should only be considered necessary in cases expected to last for more than two and a half days. This would cover about 6% of the total number of trials. We think, however, that a preparatory hearing will be unnecessary for the great majority of trials expected to last two and a half days and recommend that the criterion be set, initially at least, at five days, although it should be open to either of the parties or the court to require a hearing in shorter cases for reasons other than the expected length of the trial.

18. In this paragraph we outline the procedure for indictable only cases. Many of the details we leave to be worked out later by those responsible. We believe that a scheme on these lines would be practicable. It may well be desirable to permit variations to meet the needs of individual Crown Court centres. Subject to such flexibility where appropriate, after the CPS have delivered the papers to the defence certifying that they have complied with the requirements of disclosure, and if the defence do not propose to make a submission of no case to answer,

- (a) within a prescribed period, the defence would indicate on the form sent to them with the papers whether the defendant pleaded guilty to all or some of the charges, or offered a plea to a lesser offence; the CPS would then state whether the plea was acceptable and if it was a hearing date would be fixed;
- (b) if the defence were pleading not guilty, then within a fixed period of receiving the prosecution case, they would make such defence disclosure as is required, and deal with a number of pre-trial matters<sup>7</sup> including whether in their view a preparatory hearing is required before the jury is empanelled and if so for what purpose; the CPS would then state whether, if the defence did not, they required a preparatory hearing;
- (c) if either party or the court required a preparatory hearing, a date for this would be fixed. To enable the court to take such decisions, all notices and counter-notices should be served on the court<sup>8</sup> as well as on the other side;
- (d) if no preparatory hearing is required, or at the preparatory hearing, the court would fix a date for the hearing of the trial. The listing process should be assisted by the time estimates given in the form.

19. In either way cases the same procedure would apply except that, at the

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<sup>7</sup> These should include:

- (i) the prosecution witnesses they require to be called (or not called);
- (ii) admissions of fact;
- (iii) whether there are any matters of law, including submissions on the indictment;
- (iv) any applications for severance;
- (v) the number of witnesses likely to be called by the defence;
- (vi) an estimate of the time that the trial is expected to take;
- (vii) whether in the defence view any additional prosecution disclosure is required, relating this to its likely relevance to the defence disclosed.

<sup>8</sup> The court should designate an official to remind the CPS or defence solicitor or counsel by telephone if timetables are not being adhered to. He or she should also refer the matter to the judge if there is serious delay. The judge may require a preparatory hearing if there are matters which should in his or her view be resolved before the jury is empanelled.

same time as it serves the papers on the defence, the CPS would indicate whether in its view the case is suitable for trial on indictment or summarily. If the defence agreed with the CPS's proposal, the case would proceed to the court indicated by the CPS, but in the event of disagreement the magistrates would decide the issue<sup>9</sup>.

20. Although the use of forms and time limits is necessary to ensure compliance with the procedures, we would encourage, as part of the process of pre-trial preparation, the greatest possible discussion of the issues by the lawyers on both sides. The best results from the procedures that we recommend are likely to be obtained by the cooperation of lawyers for the defence and for the prosecution. Where they can identify, discuss, and if possible agree on the main issues, it should be possible to proceed direct to trial in the great majority of cases without the need for a preparatory hearing. Equally, sensible discussion will indicate those few cases where a preparatory hearing would bring most benefit.

21. This process, however, must be supported by effective sanctions for non-compliance, whether for failure to complete the necessary forms at the appropriate stages within the time limits set, or for requesting a preparatory hearing where there is clearly no need for one. The whole process should be set out in practice directions and rules of court. The rules should deal in some detail with the need to get the case speedily and properly to trial. Breaches should be subject to comment by the court, to costs sanctions and, if necessary, to disciplinary action by the Bar Council or the Law Society. Judges must have authority to ensure compliance with the rules, by statute if necessary. We recommend that the guides to best practice in the Crown Court for each branch of the legal profession should, among other things, set out the times within which papers should be delivered to counsel (or explanations given as to why they are not) and for counsel to deal with papers once they are received.

22. We further recommend that, within prescribed time limits, the parties be required to certify that they have discussed the case and with what result. Where no preparatory hearing is needed, we recommend that such "certificates of readiness" by counsel record that fact, contain an estimate of the likely length of the case, indicate dates that should be avoided for any reason, and cover similar matters. Penalties in costs must be available, and employed, for failures to comply with these requirements.

23. We recommend that the role of the court in this should be to oversee the general progress of cases and to intervene in order to speed up the process where necessary. The court should be ready, where cooperation between the parties is not forthcoming, to call them together to a preparatory hearing, particularly in cases where the defendant is remanded in custody. Such monitoring should in the first instance be the responsibility of the court administrative staff, where we expect CREST<sup>10</sup> to make a major contribution. In particularly complex cases, it may be necessary to extend the time limits set either by agreement between the parties or by application to the court. But we do not think that the parties should be able to extend more than once except with the leave of the court.

24. A separate problem arises where a solicitor is unable to obtain instructions from the defendant. This can happen for a variety of reasons and the defendant may not always be responsible. Nevertheless, the procedures that we recommend must not be vulnerable to disruption by the absence of instructions from the defendant. We therefore recommend that, where a solicitor reports that he or she has been unable to comply with the new requirements through inability to obtain instructions, the case should be listed for mention. If the defendant does not then attend at the court, a warrant for his or her arrest should be issued.

25. A preparatory hearing may be appropriate where, irrespective of the likely length of the case, agreement cannot be reached between the parties on a

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<sup>9</sup> See chapter six, paragraph 13.

<sup>10</sup> CREST stands for the Crown Court Electronic Support, which is a case management system which provides computer support to the basic administrative functions of the Crown Court office.

pre-trial issue. In addition to the matters set out at paragraph 9 the preparatory hearing would deal with any question arising as to the need for the jury to contain members from the ethnic minorities<sup>11</sup>, venue, agreement on or limitation of expert evidence, and resolution of legal issues. This list is not exhaustive and might also include such questions as the possibility of allowing some witnesses to give their evidence in writing under section 23 of the Criminal Justice Act 1988<sup>12</sup>, the need to limit publicity, liability for deportation, and orders under section 8 of the Children Act 1989 for the protection of the identity of a child. We expect the pre-trial procedures which we have outlined to be capable of addressing and wherever possible clarifying many issues which would otherwise need extensive consideration at the trial itself.

26. A particularly sensitive issue, to which we draw attention in paragraph 45 of chapter eight, is whether witnesses who are willing to give evidence only if they are allowed to remain anonymous can be given such anonymity. Where the case for this is in dispute between the parties, it might well be resolved at the preparatory hearing. It is clearly undesirable that the witness should discover only on the day of the trial that anonymity will after all not be permitted.

27. Counsel for both sides should confer between the fixing of a preparatory hearing and the hearing itself in order to agree as many matters as possible, for example to achieve the calling of the minimum number of witnesses. At the preparatory hearing, the defendant should be arraigned and thereafter all matters will be part of the trial. Similar provisions are already in force whereby preparatory hearings in cases of serious fraud dealt with under the Criminal Justice Act 1987 are part of the trial.

28. We recommend that a judge at a preparatory hearing should be empowered to make a ruling on any question as to the admissibility of evidence and any other question of law relating to the case. This may entail a change in legislation, since it is by no means clear that a judge at a pre-trial review has such powers at present. The judge does already have such powers in relation to serious fraud cases under section 9(3)(b) and (c) of the Criminal Justice Act 1987 and, under subsection (11) of that section, there is a right of appeal to the Court of Appeal from any such ruling. We recognise that there may be a case for a similar right of appeal if similar decisions in non-fraud cases are taken before the jury is empanelled. It is our view, however, that in general it will be more sensible to deal with such matters, if necessary, as part of any appeal against conviction at the conclusion of the case. In serious fraud cases, most of which can be expected to last longer than the norm, it may be sensible to clear any appeals on technical matters out of the way before a lengthy trial begins. The same considerations should seldom arise in other cases and we do not recommend that there should be any right of interlocutory appeal except on the limited ground that a ruling is wholly unreasonable.

29. When remarking on the ineffectiveness of pre-trial reviews held under the present arrangements, many of those who gave evidence to us suggested that this was because the judge presiding at a pre-trial review hearing was seldom the same judge as presided at the trial, and the same applied to counsel. They accordingly argued that pre-trial reviews would only become effective if the trial judge presided over them and if counsel did not change between pre-trial review and the trial. We entirely support the objective of continuity in both cases but doubt whether it is practicable to achieve it in the short term. It seems clear that at present continuity of judge and counsel is the exception rather than the rule. As we have said in paragraph 11, the Crown Court Study suggests that in 83% of cases the judge at the pre-trial hearing was different from the trial judge. For this reason judges were often unable to say whether counsel had been different but where they did know the answer to this question they reported that defence counsel had been different in just over half the cases and prosecution counsel different in well over half of them.

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<sup>11</sup> See chapter eight, paragraph 63.

<sup>12</sup> See chapter eight, paragraph 44.

30. Unfortunately we have not been able to find, nor has any one put to us, any new system that can be relied upon to ensure significantly greater continuity. We expect that implementation of our recommendations will prove an incentive to both judges and counsel to remain with their cases from preparatory hearing to trial. In the very small number of cases in which disclosure, severance or the admissibility of evidence is particularly sensitive and likely to be of critical significance, we recommend that the trial judge be nominated as soon as the CPS have alerted the court to the situation and that the judge takes over management of the case from that point through to the conclusion of the trial. Only where this happens can a judge conducting the trial have sufficient knowledge and understanding of the facts at issue to ensure that the risk of a miscarriage of justice is as far as possible avoided, for example where material which it was ruled pre-trial need not be disclosed turns out to have greater significance to the case than was previously assumed.

31. But we do not believe that our proposals for pre-trial preparation should stand or fall by the achievement of such continuity. Even if the number of preparatory hearings is small enough for it to be achievable in most of them, the system must still be capable of operating in those where it is not. We therefore recommend that the trial judge should be bound by any orders or rulings made by the judge who presides over the preparatory hearing and that counsel for the defence and the prosecution should similarly be prohibited from seeking to reopen any matter that has been decided at that hearing.

32. It cannot promote public confidence in the system that so many cases are handled by barristers who have only been given the brief on the day of the trial or the evening before. We recommend that those responsible do more to address this problem. The client has the right to expect that the solicitor will deliver the brief to counsel's chambers in good time, and that the barrister who is instructed will advise promptly on the preparatory steps that need to be taken before the trial. If the brief has later to be "returned"<sup>13</sup>, this should be on the basis that the necessary preparatory work has been done and can be relied on and there is time for the counsel to master the brief before trial. We recommend that the Bar and the Law Society make and enforce appropriate rules that ensure that these things are done.

33. We recommend also that solicitors should put the name of counsel on the brief whenever possible. If they have not done so, the barristers' clerk should allocate it to a particular barrister after consultation with the instructing solicitors as soon as the brief arrives in chambers. We further recommend that the Bar Council makes rules of conduct requiring the introduction of effective internal management systems in chambers in order to ensure that briefs are read within a specified time of receipt and that, if a barrister becomes aware that he or she will be unable to present the case, it is reassigned promptly. Failure to observe such arrangements should lead to judges imposing sanctions in costs or reporting the barrister concerned to the Bar Council and to the Professional Conduct Committee of the Bar.

34. The present structure of counsel's fees may well be a disincentive to spending the appropriate amount of time in pre-trial work, since the fee for advocacy in court is materially higher. If, however, counsel are to be encouraged, as we believe they should be, to ensure by more thorough preparation that the trial itself is shorter and easier for the jury to comprehend, then the scale of fees should reflect this. We therefore recommend that the scales be revised in order to provide proper remuneration to counsel at the pre-trial stage. We are not in a position to say what the scale of fees should be but recommend that it should be so designed as to provide sufficient incentive for counsel to achieve the proper balance between preparatory work and advocacy at the trial itself.

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<sup>13</sup> The "returned brief" is a term used to describe the situation where the original barrister is unable to appear in the case, usually because he or she is involved in another case. The brief is, strictly speaking, "returned" to the instructing solicitor, who briefs another barrister. But more often the case is, after a telephone call to the solicitor, simply transferred to another barrister without being physically returned to the solicitor.

35. As a further incentive to thorough preparation of cases, we recommend that counsel for both prosecution and defence should be required, on being given a brief, to certify that they have read it within a specified time of receipt. As we say in chapter five, such a system would enable prosecution counsel to advise promptly whether the case stands a reasonable chance of resulting in a conviction. It would also provide an incentive to counsel, having done this preliminary work, to stay with the case at trial. We appreciate that the implementation of this recommendation depends on solicitors delivering the brief to chambers in good time and on chambers having an effective system for allocating briefs (as recommended in paragraph 33 above) without delay.

36. Although a system of pre-trial preparation on these lines seems to us preeminently desirable, we have taken seriously suggestions put to us that the defence lawyers called upon to make it work will in practice ensure that it fails, both because delay and obfuscation usually operate in favour of the defendant and because the culture and approach of the Criminal Bar is based on the last-minute preparation of cases. We have, however, already made clear that we do not accept that these are good reasons for ruling out our proposals. It seems to us wholly wrong that a system apparently so wedded to delay and to the last-minute preparation of cases should be encouraged and condoned. We can see no justification for lawyers refusing to do the work necessary to ensure that the system operates as effectively and as efficiently as possible, whatever grounds there may be for seeking more time to prepare in any individual case. The judge should have available a range of sanctions against poor performance or limited cooperation and should be able, after consideration of the options, to select the one appropriate to the case. The sanctions should, in our view, include a report from the judge on the competence of the lawyer to the taxing officer dealing with his or her fees; or a report to the barrister's head of chambers or to the leader of the circuit or to the Bar Council; or a wasted costs order.

## Listing

37. Cases that are due for a Crown Court trial are listed for hearing and at each court this is the responsibility (under the supervision of the judiciary) of a member of the Lord Chancellor's Department's Court Service known as the listing officer. The listing officer, acting on judicial directions issued by the Lord Chief Justice, has to set a date either for a hearing before a jury, or, if the plea is one of guilty, for sentence, or for a pre-trial hearing for plea or directions. As the Lord Chancellor's Department have pointed out to us, many people need to be brought together for the trial of a case to be effective. The interests and availability of the parties, their legal advisers, witnesses, jurors, police, prison officers and others involved need to be considered and balanced. There is a great deal of criticism of the results of the present arrangements, particularly from barristers, solicitors and other court users who complain that, despite the need to balance the interests of a number of people involved in the case, the overriding priority seems to be to ensure that judges and courtrooms are kept occupied for the maximum time possible. The Crown Court Study in particular revealed a great deal of general discontent on this issue, although the questionnaire answers on actual cases showed few specific complaints about listing.

38. The matter is of some importance in considering the steps to be taken in preparing for the trial. Listing procedures are said to contribute to the general inability to provide continuity of judge and counsel between pre-trial hearings and the trial and to the frequency of late returns of briefs, often within 24 hours of the start of the trial. The Crown Court Study indicated that half the prosecution barristers and nearly one-third of defence barristers only received their briefs on the day before the hearing or the day of the hearing itself. This, as we have already said, is an undesirable state of affairs, even if 95% of prosecuting barristers and 93% of defence barristers nevertheless said that they had had enough time to prepare for the case. In view of the widespread dissatisfaction with the system, we welcome the steps that are being taken, particularly through

increasing computerisation (mainly through the CREST<sup>14</sup> project) and national listing guidelines to improve matters.

39. We hope that such developments can embrace barristers' clerks, since they are in a position to supply crucial information that may affect listing decisions. We received evidence from a group of barristers' clerks in London to the effect that a pilot project linking them to listing officers via computer terminals had had to be abandoned for financial reasons among others despite having proved successful. We understand that an alternative scheme is being tested. We hope that an appropriate link is either incorporated in the Lord Chancellor's Department's overall plans for computerisation or that this particular aspect can be looked at again. Such links might assist barristers' chambers in the better allocation of work between counsel, since the problems do not all stem from difficulties at the listing officer's end. Heads of chambers and the Bar generally must take further measures to prevent individual counsel being allocated more cases than they can handle at any one time.

40. We have no one solution to the listing problem and, despite all the complaints made to us about it, no different system was suggested to us that was obviously better than the present one. To the extent that the listing officer has to reconcile the conflicting interests of a variety of people needing to attend the court at the time of the trial, this is perhaps not surprising. The greater emphasis that we propose on pre-trial preparation may cut both ways as far as the problems of listing officers are concerned. To the extent that our proposals lead to a demand for preparatory hearings, their problems will be exacerbated because there will be more hearings to list. On the other hand, preparatory hearings and pre-trial preparation generally should lead to better prepared cases, and reduced disruption, and some earlier pleas of guilty. There should also be more reliable estimates of the length of time contested trials are likely to take. In these respects the load of the listing officer may be significantly lightened.

### Sentence discounts, "cracked" trials, sentence "canvass" and "plea bargaining"

41. For many decades defendants who plead guilty in the Crown Court have been regarded by the Court of Appeal as usually entitled to a discount or reduction in their sentence. The usual range of discount is 25% to 30%. The primary reason for the sentence discount is to encourage defendants who know themselves to be guilty to plead accordingly and so enable the resources which would be expended in a contested case to be saved. A subsidiary reason, applicable in some types of cases, is to recognise that the defendant by pleading guilty has spared witnesses the trauma of having to give evidence at court.

42. Provided that the defendant is in fact guilty and has received competent legal advice about his or her position, there can be no serious objection to a system of inducements designed to encourage him or her so to plead. Such a system is, however, sometimes held to encourage defendants who are not guilty of the offence charged to plead guilty to it nevertheless. One reason for this is that some defendants may believe that they are likely to be convicted and that, if they are, they will receive a custodial sentence if found guilty after a contested trial but will avoid such a sentence if they plead guilty. This risk cannot be wholly avoided and, although there can be no certainty as to the precise numbers (see next paragraph) it would be naive to suppose that innocent persons never plead guilty because of the prospect of the sentence discount.

43. In the Crown Court Study defence barristers were asked: "An innocent defendant sometimes decides to plead guilty to achieve a sentence discount or reduction in the indictment. Were you concerned that this was such a case?" In 53 cases the defence barristers answered "Yes". Since the Crown Court Study was conducted over two weeks this appeared at first sight to mean that there were

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<sup>14</sup> See paragraph 23, note 10.

some 1,400 possibly innocent persons pleading guilty every year. Closer examination of these 53 cases showed, however, that there was little if any evidence that persons who were innocent of all the charges brought against them had pleaded guilty to one or more of those charges because of the sentence discount. It was clear that in many instances the defence barristers had misunderstood the thrust of the question they were asked. Thus in some cases the defendants were said to be not guilty only to one of several charges. In some cases too the barristers made it clear that they did not think that the client was innocent, only that he or she was claiming to be—sometimes in the face of considerable evidence to the contrary. \*

44. The position of the defence barrister is dealt with in the Bar's Code of Conduct as follows:

“Where a defendant tells his counsel that he did not commit the offence with which he is charged but nevertheless insists on pleading guilty to it for reasons of his own, counsel must continue to represent him, but only after he has advised what the consequences will be and that what can be submitted in mitigation can only be on the basis that the client is guilty.”

Defence barristers should and normally do advise clients that they should not plead guilty if they are not guilty, but that the decision is one for them.

45. Against the risk that defendants may be tempted to plead guilty to charges of which they are not guilty must be weighed the benefits to the system and to defendants of encouraging those who are in fact guilty to plead guilty. We believe that the system of sentence discounts should remain. But we do see reason to make the system more effective. In particular we believe that a clearer system of graduated discounts would help to alleviate the problem of “cracked” trials (see paragraph 13 above). The Crown Court Study showed that “cracked” trials were 26% of all cases or 43% of cases other than those listed as guilty pleas<sup>15</sup>. “Cracked” trials create serious problems, principally for all the thousands of witnesses each year—police officers, experts and ordinary citizens—who come to court expecting a trial only to find that there is no trial because the defendant has decided to plead guilty at the last minute. This causes in particular unnecessary anxiety for victims whose evidence has up to that point been disputed.

46. At present, the sentence discount is available at any stage until the beginning of the trial but the Court of Appeal has stated in terms that, other things being equal, an earlier plea ought to attract a higher discount and that late tactical pleas should not attract the same discount:

“This court has long said that discounts on sentence are appropriate, but everything depends upon the circumstances of each case. If a man is arrested and at once tells the police that he is guilty and cooperates with them in the recovery of property and the identification of others concerned in the offence, he can expect to get a substantial discount. But if a man is arrested in circumstances in which he cannot hope to put forward a defence of not guilty, he cannot expect much by way of a discount. In between come this kind of case, where the court has been put to considerable trouble as a result of a tactical plea. The sooner it is appreciated that defendants are not going to get a full discount for pleas of guilty in these sorts of circumstances, the better it will be for the administration of justice.”<sup>16</sup>

47. We agree with the view expressed by the Court of Appeal that, other things being equal, the earlier the plea the higher the discount. In broad terms, solicitors and barristers should advise their clients to that effect. Judges must, however, retain their discretion to deal appropriately with the particular

<sup>15</sup> Of the total of cases listed, 39% were listed as guilty pleas, 26% were listed as not guilty pleas but “cracked” (i.e. became guilty pleas), 31% were actually contested before a jury and 3% ended without a plea where the defendant was bound over or the charges were allowed to lie on the file.

<sup>16</sup> *R. v. Hollington and Emmens* (1986) 82 Cr. App. R. 281.

circumstances of the individual case. Subject to these points, a system of graduated discounts might work broadly as follows:

- (a) The most generous discount should be available to the defendant who indicates a guilty plea in response to the service of the case disclosed by the prosecution.
- (b) The next most generous discount should be available to the defendant who indicates a guilty plea in sufficient time to avoid full preparation for trial. The discount might be less if the plea were entered only after a preparatory hearing.
- (c) At the bottom of the scale should come the discount for a guilty plea entered on the day of the trial itself. Since resources would be saved by avoiding a contested trial even at this late stage, we think that some discount should continue to be available. But it should be appreciably smaller than for a guilty plea offered at one of the earlier stages.

We do not think that clearer articulation of the long accepted principle that there should be greater sentence discounts for earlier pleas will increase the risk that defendants may plead guilty to offences which they did not commit. We would on the other hand expect that it would lead some who would at present plead guilty to do so earlier.

48. We believe, however, that still more could be done to reduce the incidence of “cracked” trials. As the Seabrook Committee<sup>17</sup> argued, the most common reason for defendants delaying a plea of guilty until the last minute is a reluctance to face the facts until they are at the door of the court. It is often said too that a defendant has a considerable incentive to behave in this way. The longer the delay, the more the likelihood of witnesses becoming intimidated or forgetting to turn up or disappearing. And, if the defendant is remanded in custody, he or she will continue to enjoy the privileges of an unconvicted remand prisoner whereas, once a guilty plea has been entered, the prisoner enters the category of convicted/unsentenced and loses those privileges. Although this last disincentive can be removed, as we recommend below, the problem of last minute changes of plea can never be completely eradicated. We believe, however, that a significant number of those who now plead guilty at the last minute would be more ready to declare their hand at an earlier stage if they were given a reliable early indication of the maximum sentence that they would face if found guilty.

49. The defendant will be interested not so much in the discount on sentence that he or she might receive as the actual sentence and in particular whether it will be custodial or not. It used to be possible for defence counsel to ask the judge for an indication of the sentence that his or her client might receive if found guilty after a contested trial, as opposed to the sentence that might be passed if the plea were changed to guilty. But the discussion of likely sentences with judges is now severely constrained by the Court of Appeal’s judgment in *R. v. Turner*<sup>18</sup>. According to this, judges may say that, whether the accused pleads guilty or not guilty, the sentence will or will not take a particular form. They must not, however, state that on a plea of guilty they would impose one sentence while on conviction following a plea of not guilty they would impose a severer sentence. The court took the view that this would be placing undue pressure on defendants, depriving them of that complete freedom of choice which is essential.

50. Many witnesses, particularly from the judiciary and the Bar, urged on us the desirability of reverting, in essence, to the system as it applied before the judgment in the case of *Turner*. The Crown Court Study also showed that, among the judges and barristers who responded, there was overwhelming support for change<sup>19</sup>. We do not support a total reversal of the judgment in

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<sup>17</sup> See paragraph 7, note 2.

<sup>18</sup> [1972] W.L.R. 1093.

<sup>19</sup> Judges and barristers were asked whether “*Turner* should be reformed to permit full and realistic discussion between counsel and judge about plea and especially sentence”. Close to 90% of barristers and two-thirds of judges answered “Yes”.

*Turner*, since we agree that to face defendants with a choice between what they might get on an immediate plea of guilty and what they might get if found guilty by the jury does amount to unacceptable pressure. But the effect of *Turner* and related judgments appears to have been to make judges reluctant to discuss sentence with counsel at all. We think that there is a case for a change of approach. We recommend that, at the request of defence counsel on instructions from the defendant, judges should be able to indicate the highest sentence that they would impose at that point on the basis of the facts as put to them. A request for such an indication might be made at a preparatory hearing, at a hearing called specially for this purpose, or at the trial itself.

51. We envisage that the procedure which we recommend would be initiated solely by, and for the benefit of, defendants who wish to exercise a right to be told the consequence of a decision which is theirs alone. Where a defendant would need the protection of an appropriate adult during inquiries carried out at a police station<sup>20</sup>, the system must be operated with particular care. The sentence “canvass”, as we have called it, should normally take place in the judge’s chambers with both sides being represented by counsel. A shorthand writer should also be present. If none is available a member of the court staff should take a note to be agreed immediately by the judge and both counsel. The judge may give the answer to the question “what would be the maximum sentence if my client were to plead guilty at this stage?” but to no other. The judge’s indication should be based on brief statements from prosecution and defence of all the relevant circumstances, which should include details of the defendant’s previous convictions if any and, if available, any pre-sentence report required by the Criminal Justice Act 1991.

52. We emphasise that a judge should not be required to give an indication of the maximum sentence that would be imposed if he or she felt that to do so would be for any reason inappropriate. But we do not see the absence of a pre-sentence report as normally ruling out such an indication. The fact that the indication concerns maximum sentence leaves room for the pre-sentence report when available to be taken into account in mitigation. More likely reasons for the judge declining to give an indication of likely maximum sentence might be because there were co-defendants, or because the judge wished to defer the decision until more information had been obtained. In the case of co-defendants, if only one has instructed counsel to canvass sentence, the judge may take the view that that defendant’s role is not identifiable until some or all of the evidence has been heard.

53. If, having considered the judge’s sentence indication, the defendant decides to plead guilty, the case should then move to the sentencing stage in open court. Parties would there rehearse, and might elaborate upon, matters already mentioned in chambers, and sentence would be passed. Where the case is not immediately capable of conclusion, for instance because a report or reports are unavailable, the defendant would not enter a guilty plea, but would indicate his or her intention of doing so provided his or her position remained unprejudiced once the further reports became available. If the case later comes back before the same judge, he or she would have a note of the sentence indication. It is unthinkable that the judge would impose a heavier sentence than had been indicated, unless in the meantime new information had come to light justifying such a course. In that event, we believe that the judge should be obliged to warn counsel that this was so, in order that the defendant could reconsider his or her intention to plead guilty.

54. Obviously it would be preferable to avoid a change of judge. Where this is unavoidable, the second judge should be made aware of the earlier indication. Though technically he or she could not be bound by it, we would regard it as undesirable for the second judge to impose a heavier sentence unless new facts justified such a course. In that case, the defendant should be advised of any such risk, so that he or she could reconsider the contemplated guilty plea.

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<sup>20</sup> See chapter three, paragraph 81, note 23.

55. The opportunity for a sentence canvass should arise once the case has reached the Crown Court, and remain available until the judge feels it is no longer appropriate. We envisage circumstances in which the evidence of one particular witness, for example, could be agreed to be essential in completing the information necessary before an indication could be given.

56. The availability of a sentence discount for a guilty plea and the practice of asking the judge to give an indication of the possible maximum sentence should not be confused with the discussions that commonly take place between the prosecution and the defence over charge. This is what is normally described as “plea bargaining”, although it might be more accurate to call it “charge bargaining”; the defence may offer to plead guilty to a lesser charge than the one brought by the prosecution or the prosecution may offer to accept a plea of guilty to a lesser charge. We see no objection to such discussions, but the earlier they take place the better; consultation between counsel before the trial would often avoid the need for the case to be listed as a contested trial.

57. As we have previously noted, it may be a disincentive to remand prisoners to plead guilty that, by doing so, they lose the privileges enjoyed by unconvicted prisoners. We recommend that the additional privileges enjoyed by unconvicted prisoners be extended to convicted prisoners awaiting sentence. We understand that this reform is already under consideration by the Prison Service.

58. We are also aware that Roger Hood’s research<sup>21</sup> provides evidence that the current system of sentence discounts, combined with the greater tendency of members of certain ethnic minority communities to maintain a plea of not guilty, puts black and other ethnic minority offenders at a greater risk of being sentenced to custody and serving longer sentences. We therefore support the recommendation made by Hood that the policy of offering sentence discounts should be kept under review. This means that it is essential for the Crown Court to monitor the ethnic origin of everyone who appears there. Only with information on all sentences, analysed by ethnic origin, would it be possible to detect whether sentencing patterns are being established which might be unfavourable to particular minority groups. The Home Office is exploring with the Lord Chancellor’s Department the feasibility of introducing ethnic monitoring of all court outcomes and we welcome this development.

### Application to cases of serious fraud

59. The recommendations in this and our previous chapter apply to all criminal cases prosecuted in the Crown Court. As a result, however, of the recommendations of the Fraud Trials Committee<sup>22</sup> there are already arrangements in force under the Criminal Justice Acts of 1987 and 1988 which have anticipated some of our recommendations so far as serious fraud cases are concerned. Where our recommendations have not been so anticipated, they should apply to cases of serious fraud if that would be sensible. Where there are already separate arrangements for serious fraud cases, those arrangements should continue to apply, subject to the modifications we propose below, and not be superseded.

60. There are already special arrangements whereby committal proceedings in serious fraud cases can be by-passed by initiating transfer proceedings in the Crown Court under sections 4–6 of the Criminal Justice Act 1987. The Fraud Trials Committee saw this as an interim measure pending implementation of the recommendations of the Royal Commission on Criminal Procedure, whose proposals for replacement of committal proceedings are not dissimilar to our own. It is therefore for consideration whether the special arrangements for transfer proceedings in the 1987 Act should be replaced by the procedure which we recommend in chapter six. The 1987 Act does not apply to all fraud cases and

<sup>21</sup> See chapter one, paragraph 25, note 11.

<sup>22</sup> *Report of the Departmental Committee on Fraud Trials*, London HMSO, 1986.

it follows that our recommended procedure would in any case apply to those fraud cases not dealt with under sections 4–6 of the 1987 Act. We are inclined to think that, for the sake of consistency and because we have been told that the 1987 Act provisions have proved time-consuming and cumbersome, all cases should be subject to the new procedures that we propose. Although we have been assisted by the research in this area conducted on our behalf by Michael Levi<sup>23</sup> we have been unable to go into the matter in great depth and, if there are exceptional features in serious fraud cases which make it sensible to retain sections 4–6 of the 1987 Act as they are, then we would see no objection. If so, however, we recommend that the Act be amended so that cases that are serious or complex are amenable to the transfer procedures. At present a case has to be both serious and complex to qualify and we understand that this has meant that several cases have had to go through full committal proceedings although they would have been suitable for transfer proceedings. The problem will disappear if committal proceedings are abolished as we propose.

61. The Criminal Justice Act 1987 also provides for preparatory hearings which are part of the trial and are based on the requirement that the defence discloses its case in advance. In the particular context of serious fraud trials, experience seems to have shown that it is not enough for the defence simply to disclose the general nature of its case. Defendants need to indicate in some detail the points on which they disagree with the prosecution case if the arrangements are to work satisfactorily and as originally intended. We believe that the arguments of the Fraud Trials Committee for recommending special arrangements in serious fraud cases are valid and that the legislation should be changed accordingly to require more detailed advance disclosure from the defence. The defendant's lawyers should be required to certify that they have had instructions on all matters and to indicate on the basis of those instructions what facts contained in the prosecution's case statement are denied by the defence, what facts admitted, and what facts are neither denied nor admitted in advance of their being proved or not by the prosecution. Any later change in the defence position should be liable to adverse comment by the prosecution or the judge in the presence of a jury. Where the defence do not cooperate in any such requirements, we think that in addition to costs sanctions where defence lawyers are at fault, the provisions of the Contempt of Court Act 1981 may have to be applied against the defendant. This would allow the court to deal summarily with defendants by imposing a short term of imprisonment from which we would expect them to be released as soon as the requisite cooperation was forthcoming.

62. We emphasise that there remains an important place for informal pre-trial agreement and discussion between prosecution and defence in serious fraud cases as in any others.

63. In some cases of fraud and related offences, it can be argued that the public interest would be best served not by prosecution but by regulatory action. Such action would need to be capable of ensuring that any person found guilty by the appropriate regulatory tribunal lost the ability to operate in the market in which he or she was regulated and where requisite made reparation or restitution to the victims. We understand that discussions are taking place between those involved, particularly the SFO and the Securities and Investments Board, about mechanisms which might lead to more such cases being handled by the regulator with the agreement of the prosecuting authority, and we welcome this development. We doubt whether more than a very small proportion of cases will in practice be more appropriately dealt with by regulators. Where the offence is of a technical nature, there has been no specific loss or risk to any member of the public (or if there has, where restitution can be made), and the predominant issue relates to the protection of the integrity of markets rather than to serious dishonesty as such, then it may be that regulatory action is both appropriate and sufficient. Indeed, it may also be that in such cases regulatory action will be quicker, cheaper and more likely to succeed. But serious criminal offences must

<sup>23</sup> *The Investigation, Prosecution and Trial of Serious Fraud*: Royal Commission on Criminal Justice Research Study No. 14, London, HMSO 1993.

continue to be prosecuted as such, and if regulatory rather than criminal penalties are to be imposed for lesser offences, they must be sufficiently severe that it could not be alleged that so-called “white-collar crime” was being more leniently handled than other equivalent offences.

64. We believe, however, that even if there are only a handful of cases per year which would pass the necessary criteria for the imposition of regulatory rather than criminal penalties, the arrangements should be in place to enable them to be dealt with by the regulators. In particular, we would like it to be possible, given the necessary close cooperation between the prosecuting and regulatory authorities, for the decision to prosecute and the choice of charge to take into account the defendant’s readiness to accept a sufficiently severe regulatory penalty in exchange for dropping the prosecution or reducing the charge. This would require the defendant’s agreement to the regulatory penalty and, if he or she were to be prosecuted on a lesser charge, to pleading guilty to that charge. It would also require amendments to section 2 of the Administration of Justice (Miscellaneous Provisions) Act 1933 to enable the prosecution to prefer an indictment without transfer proceedings and to amend an indictment to reflect any reduced charge. Both these steps should only be taken by agreement. We accordingly recommend that arrangements along these lines be introduced when the details have been fully worked out by those concerned.

65. We recommend that the trial judge should have power to grant a legal aid certificate at the stage of the preparatory hearing in a serious fraud case. This would cover such matters as the need for information technology and witnesses’ expenses, as well as changes in legal representation. We further recommend that it should be made possible for the defence to obtain an extension to a legal aid certificate in advance of the defendant’s first appearance before the trial judge. We understand that at present defendants can be left with the legal aid that they have been granted by the magistrates’ courts, even though that has ceased to be sufficient.

66. We have considered suggestions that the right of appeal against interlocutory rulings under section 9 of the Criminal Justice Act 1987 should be abolished. Their potential for delaying the trial seems in the past to have been considerable but there seems to us to be insufficient experience of the workings of this provision to justify recommending its abolition at present. We note, however, that there have been difficulties in the prohibition under section 11 of the same Act against reporting such rulings. This has led to problems in at least one ruling, that of Mr Justice Henry in the Guinness One case on the interpretation of the Attorney General’s guidelines on disclosure. We recommend that the reporting restrictions should be relaxed, enabling any matter of general relevance to be reported while continuing to restrict the publication of material that might have a prejudicial effect on proceedings in the case in question or related cases.

67. Finally, although the Criminal Justice Act 1987 provides for a system of preparatory hearings as part of the trial itself, experience has shown that these hearings can be so complex that they themselves can benefit from preliminary meetings to discuss how they should be handled. It appears that this can be done without legislation and we recommend that the use of such hearings be considered as appropriate.

### Application to magistrates’ courts

68. We have made most of the recommendations in this and the preceding chapter in the context of Crown Court trials. Some will be applicable also, albeit with considerable modifications, to magistrates’ courts. For example, in suitable cases we see no reason why justices’ clerks should not chair pre-trial review hearings in order to clarify the main issues in advance. In such cases, it may well be sensible for more disclosure to take place on both sides at the magistrates’ courts level than happens at present. From the evidence that we have received

from the Magistrates' Association and the Justices' Clerks Society, as well as the developments outlined in the Government's White Paper on the management of the magistrates' courts entitled: "A New Framework for Local Justice"<sup>24</sup>, it is clear that much useful work is being done by magistrates' courts in this area. Procedural matters, and case preparation and case management, are all capable of being carried forward effectively under the guidance of the courts' professional staff without the intervention of the magistrates. "Block" listing of similar cases or cases dealt with by the same solicitors is an innovation that seems to be paying dividends. Attention is also being given to the need to avoid unnecessary adjournments.

## Legal aid

69. Preparation for trial by the defendant depends crucially on the quality of the legal advice that he or she receives under the arrangements for criminal legal aid. It is rare for defendants in criminal cases to pay for their legal representation. The need for the defendant to receive adequate legal advice arises first at the police station and we have made recommendations on this aspect in chapter three. Here we address the situation at the magistrates' courts and beyond.

70. Criminal legal aid has until now been administered by the courts. The Government is considering whether to transfer its administration to the Legal Aid Board. The criteria for the grant of legal aid are first, whether it is in the interests of justice, and second, the defendant's means. The Government has come forward with proposals designed to ensure both that the interests of justice criterion is strictly applied and that, as far as means are concerned, fewer people are eligible for free legal aid while more are required to pay a contribution (some over a longer period) or not receive legal aid at all. We do not question the need to control public expenditure in this as in other fields, although criminal legal aid makes up only 5% of the overall total of expenditure on the criminal justice system. We would, however, be very seriously concerned if the Government's proposals were to have the effect of increasing the number of defendants who have no legal representation, particularly in the Crown Court.

71. Legal advice at the police station is free but representation at the court is, as we have already stated, subject to the defendant making a contribution to the cost in proportion to his or her means. It seems clear that this initial means test gives rise to difficulties of administration and we are inclined to think that it would be better postponed until the outcome of the trial is known. The assessment of means could then be part of the procedures for collecting fines, enforcing compensation orders, recovery of the proceeds of crime and so on. The initial contribution, if it had to be retained at all, could then be at a flat rate which applied to everyone unless they were receiving unemployment benefit or income support. This scheme was recommended by the Lord Chancellor's Department's Legal Aid Efficiency Scrutiny in 1986 and seems to us to have much to commend it. We recommend that its advantages and disadvantages be further explored with a view to its introduction if that proves to be justified.

72. In long cases, serious delays can occur before the final bill is paid. Such delays can cause considerable hardship. The Lord Chancellor's Department have told us that their Taxing Division has been set the target of paying 75% of bills within three months of their becoming ready to tax. They propose, where a determination by the central taxing team has not taken place within those three months, to introduce a scheme to allow interim payments of 40%. This seems to us to be an inadequate response to the problem. We can see no reason why payment of at least 75% of fees should not be made immediately, with any overpayment being recovered if necessary from future claims. We recommend that priority be given to accomplishing this. We have already commented on the need to reconstruct the scale of fees to encourage counsel to give adequate priority to pre-trial preparation.

73. Standard fees (as opposed to fees directly related to the cost of the actual work done in a case) are already a feature of legal aid in Crown Court trials.

<sup>24</sup> London, HMSO, 1992 Cmnd. 1829.

Their introduction in the magistrates' courts has been a matter of great controversy, on which we received evidence from both the Lord Chancellor's Department and the Law Society. We were not given the remit of setting legal aid fees, nor do our terms of reference require us to act as arbitrators in this area. We recommend, however, that the fees be kept under review to ensure their adequacy in attracting sufficient numbers of competent solicitors, properly trained to perform this very necessary work. Equally important is the need to keep standards of performance under review, since we are concerned about the risk that standard fees may be a disincentive to solicitors to do the amount of work on a case that it requires. There may also be a danger, with cases on the borderline between two standard fees, that solicitors may be tempted to spend more time on a case than it requires in order to qualify for a higher rate of standard fee. We have been informed that the arrangements under discussion between the Legal Aid Board and the Law Society for the franchising of legal aid services over the next few years will include an initial assessment of management competence and, as the scheme progresses, monitoring of files for competent performance. We welcome these developments, which we understand will be supplemented by empirical research directed to monitoring actual performance. As regards the standards to be attained, the Law Society have recently produced a guide to the preparation of cases in the magistrates' courts which seems to us to deal admirably with the role of the solicitor at that stage.

74. A particular problem for both defence solicitors and private sector forensic science experts is the delays and uncertainties over legal aid payments in cases where the defence need to commission their own forensic science tests or ask their own experts to evaluate the prosecution's scientific or other expert evidence. It is our firm view that clear rules should be laid down on what the defence can and cannot do and on the rates of payment that should apply. Provided that the defence keep within those rules, they should be free to instruct their own experts in the knowledge that reimbursement will be made promptly and in full. We so recommend. We understand that the new franchising arrangements to which we have referred above may incorporate arrangements of this kind and if so we welcome this. But similar arrangements should also apply to firms operating outside the franchising arrangements.

# Chapter Eight: The Trial

## General

1. As will be apparent from our earlier chapters, our intention is to ensure that cases arrive at the Crown Court with the defendant's plea, so far as possible, decided and disclosed in advance and, if the trial is to be contested, with the issues in dispute clarified as far as practicable. This should enable cases to be listed on the basis of a more reliable estimate of the length of time that the trial is likely to take. Clarification of the issues should also ensure that the evidence is put before the jury in such a way that the risk of a miscarriage of justice from its verdict is kept to a minimum.

2. The role of the judge under our proposals is crucial in securing the orderly and timely conduct of the proceedings. We recommend arrangements, to be supervised by the resident judge at the Crown Court centre, to prevent cases from languishing from any failure by either the prosecution or the defence to take the necessary action at each stage. At the trial itself we do not think that the judge should leave the control of proceedings to counsel for each side. It is the judge who is in charge of the trial, and it is the duty of counsel and solicitors to assist the judge in achieving the proper and efficient administration of justice. Judges must be prepared to intervene as and when necessary to expedite the proceedings, to see that witnesses are treated by counsel as they should be, to curtail prolix or irrelevant questioning, to prevent the jury from being confused or misled, and to order the payment of costs when they have been wastefully or unnecessarily incurred<sup>1</sup>. We are aware that some practitioners have reservations about this approach, mainly on the grounds that it risks alienating the jury or giving it the impression of bias towards one side or the other. We are confident that this can be avoided by appropriate reliance on and reference to the pre-trial procedures and decisions on which the conduct of the trial itself should, under our recommendations in chapter seven, be based.

3. Consistently with the objective of making the issues which they need to decide as readily comprehensible as they can be made to the jury, we make recommendations for more particularised indictments which, since they will set out more precisely what it is that the defendant is alleged to have done, should be a more effective starting point of the trial. We also make proposals on the conduct of the trial and on the rules of evidence, again with the aim of improving the way in which the essential issues are presented to the jury. We consider how juries are selected and what assistance they need to be able to follow the trial and come to a correct verdict. We also consider the needs of victims and other witnesses and the arrangements required to ensure that interpreters, where necessary, are provided to the requisite standard.

4. Special arrangements will remain necessary for complex and serious fraud trials. These particularly, although not uniquely, illustrate the need for thorough preparation, highly trained practitioners, competent case management by all concerned on both sides and by the judge, and a credible system of sanctions to ensure that the rules are adhered to. Finally, since much of what we recommend is affected by the actual lay-out and construction of courtrooms and their precincts, we say something on the subject of court design.

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<sup>1</sup> The circumstances in which this may be appropriate are described in *A Guide to the Award of Costs in Criminal Proceedings*, London, HMSO, 1991.

## Conduct of the trial

### *(i) Indictments*

5. The defendant is brought to the Crown Court on the basis of the indictment, a document that lists his or her alleged offences, with the briefest of facts to support the allegations. In theory the indictment should provide a clear starting point for the jury by explaining what the trial is all about. Largely for historical reasons, the indictment nowadays is a formal document which gives very little information about the facts that are alleged to make up the offence charged. In many cases it fails to meet the requirements of section 3 of the Indictments Act 1915, which provides that an indictment shall contain a statement of the offence or offences with which the accused is charged “together with such particulars as may be necessary for giving reasonable information as to the nature of the charge.”

6. We agree with the Law Commission, whose criminal law team has produced a paper on the subject<sup>2</sup>, that “there are strong reasons of justice and efficiency why the particulars in each count in an indictment should contain sufficiently clear factual allegations to inform the jury of the issues it will have to decide, and more generally, to enable the indictment to operate as a practical agenda for the trial.” We understand that the Law Commission’s paper and a supplement<sup>3</sup> are under consideration by the Lord Chancellor’s Department, the Home Office and the CPS, and we recommend that, if this has not already been done, the judiciary and legal practitioners are consulted in order to explore the issues further. We are confident that a system of particularised indictments would be of benefit to the clearer and more efficient conduct of trials.

### *(ii) Opening the trial*

7. We considered the practice in Scotland whereby the prosecution does not make an opening speech. There the judge, aided by narrative indictments<sup>4</sup>, may make a brief opening statement to the jury of the issues that they will be called upon to decide at the end of the trial. The prosecution then calls the first witness. If the Law Commission’s proposals on particularised indictments are enacted, there will be no need for a prosecution opening speech in many trials in England and Wales. In the more complex cases an opening speech will almost certainly continue to be necessary. On the other hand, all that will be needed in routine and straightforward cases is an opening statement from the judge explaining the burden and standard of proof and such matters of law as he or she thinks necessary for the jury’s understanding of the case. The judge should not, however, do more than identify, without discussing, the factual issues to be decided in the case. Those should be set out in the indictment.

8. We recommend that prosecution counsel’s opening speech should be no longer than fifteen minutes unless the judge gives leave. He or she might give such leave at any preparatory hearing or on the day of the trial if no preparatory hearing has been held. The clarification of the issues that had taken place at the preparatory hearing if held, or the judge’s preliminary reading of the case papers, would enable him or her to decide whether a speech longer than fifteen minutes was justifiable.

9. Opening speeches should be restricted to an explanation of the issues involved in the trial. They should not seek to suggest that particular matters will be proved by the prosecution. Whether such matters are proved can be decided only during the trial. There should be a rule of best practice that the prosecution should only refer to the evidence that they are going to call or to matters of law if this is essential to the jury’s understanding of what is to follow. Counsel should not rehearse comprehensively the evidence that each witness is expected to give, while references to matters of law, which are primarily a matter for the judge, should be kept to a minimum.

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<sup>2</sup> Counts in an Indictment, 1992.

<sup>3</sup> Counts in an Indictment: Draft Examples, January 1993.

<sup>4</sup> A narrative indictment sets out each offence charged by giving an account of the facts alleged to constitute it. The facts are sometimes set out at some length.

10. At present, the defence have a right to make an opening speech only where they are intending to call evidence as to fact other than the evidence of the defendant. This right is rarely exercised. When it is, the speech must be made at the opening of the defence, which takes place after the prosecution have closed their case. There is an argument for giving the defence the right to make their opening speech immediately following the opening speech for the prosecution, so that the trial can begin with a brief statement of the case on both sides. If the defence took up this option, it should not be open to them to make a second opening speech when the prosecution had closed its case and in practice it seems to us unlikely that the defence would take up the option in many cases. Even so, despite the risk that the length of the trial may be marginally increased in some instances, we recommend that the option be available to the defence in all cases with the same time limit as would under our proposals apply to prosecution opening speeches.

*(iii) Examination and cross-examination of witnesses*

11. One consequence of the pre-trial preparation recommended in our previous chapter is that every trial should start with an estimate, certified by counsel and subject to discussion with the judge, of the length of time that the trial is expected to take. Examination and cross-examination of witnesses will normally take up the greater part of this time. To some extent, the length of time required is unpredictable, since much depends on the course that the examination and cross-examination take. Nevertheless, the experience of judge and counsel, together with the background knowledge that both will gain as part of the pre-trial procedures<sup>5</sup>, should enable a reasonably accurate estimate to be made in most cases. The judge should explain to the jury that such an estimate has been arrived at as a result of pre-trial exchanges and that the jury are not to assume bias if the judge feels it necessary to intervene to prevent unnecessary delay and procrastination. Where it seems to the judge that, as a result of time wasting tactics by counsel, the trial has unreasonably exceeded its estimated length, there should be a power to order a reduction in counsel's fees, subject to a right of appeal, or to suggest to the taxing officer that counsel's legal aid claim be critically examined in the light of the time wasted in court.

12. The judge should also explain that he or she will not hesitate to intervene if it seems necessary to do so to prevent the harassment or intimidation of a witness by counsel for either side. At the moment judges may not always act quickly enough to prevent the bullying of witnesses, including experts. We accept that counsel sometimes need to pursue a line of questioning that is distressing or even offensive to the witness. But it is possible to do this in a courteous way, and it is for the judge to ensure that counsel does so.

13. Our attention has been drawn to Rule 403 of the United States Federal Rules of Evidence. This empowers judges to exclude evidence if

“although relevant, its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence”.

If such a power were to be given to judges under our system, it would be important that counsel should have the right to reapply for the evidence to be heard if its value could be demonstrated in the light of subsequent evidence and argument. Although it is normally for the parties to decide on what evidence they intend to rely, we think that such a rule would encourage judges to be more robust in preventing juries from having to sit through evidence which will add little or nothing to what is already before them, and that this would apply particularly in the cases where there had been a preparatory hearing. We accordingly recommend the introduction of such a rule.

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<sup>5</sup> These, as we explain in chapter seven, should normally be conducted through forms and discussion and will require preparatory hearings only in a minority of cases.

14. We emphasise that we make these recommendations not simply in order to save time and money but because we believe that, without sacrificing fairness to the defendant, shorter trials will make it easier for juries to keep in their memories the essential facts of the case. Nor can we see that it will ever be in the interests of justice that witnesses should be subjected to bullying and intimidatory tactics by counsel or to deliberately and unnecessarily prolonged cross-examination. We have, therefore, no hesitation in recommending that judges should act firmly to control such tactics. It has been suggested to us that many judges will be reluctant to intervene in the ways that we would like to see because of fears that the Court of Appeal will overturn any subsequent verdict of guilty. We hope, however, that the Court of Appeal will take the same view of these matters as we do and that it will look carefully at future cases against the criterion of whether injustice was actually caused by a judge's intervention. Indeed, we would expect the Court of Appeal to share our belief that it is right in principle that the judge should try not only to achieve a trial no longer than is necessary but to prevent any deliberate attempt by counsel to obscure or complicate the issues before the jury in what counsel believes to be the interests of the client.

15. One or two cases have been brought to our notice which proved exceptionally lengthy and intractable because the defendant was not represented by counsel. We have considered whether it should be possible to require a defendant, if the judge sees fit, to be represented by counsel without the defendant's consent. We are agreed that defendants should have the right in principle to represent themselves and that it would be neither feasible nor desirable for the court to impose counsel on them. Without the defendant's instructions, counsel might in some cases be able to test the prosecution evidence and in any event should be able to point to any apparent weakness in the prosecution case. But he or she would not be able to present a positive defence, and the jury might assume that what counsel said represented the views of the defendant when this was not the case. If, therefore, a defendant refuses to be represented, it will remain necessary for the judge to grant him or her somewhat more latitude than would be the case with counsel. Nevertheless, this latitude should be carefully limited. Where there has been a preparatory hearing, the judge may need to explain to the jury that the defendant has been given ample opportunity for becoming familiar with the issues in the case. Where there has been no such hearing, the judge may need to explain the issues in more detail. But in either case there may well come a point when, if the defendant proves unreasonably obstructive, he or she must be excluded from the courtroom and the trial allowed to proceed in his or her absence.

16. Where a defendant has been excluded for this reason we recommend that an *amicus curiae* should, where the judge thinks appropriate, be appointed. (We do not rule out the appointment being made earlier if there are points of law to be argued.) Despite the difficulties indicated in the preceding paragraph, restricted representation seems to us to be preferable to the absence of anyone at all to look after the interests of the defendant. The *amicus* would be able to argue points of law and, within the limits created by the absence of instructions, could look after the interests of the defendant. We recognise the risk that defendants ineligible for legal aid might behave badly in order to achieve the free appointment of a lawyer whom they could then instruct. But we think that the risk would be minimal, and we would look to the judge in such cases to make if appropriate an order as to costs if the defendant were convicted.

*(iv) Formal admissions*

17. It is a long standing tradition of a Crown Court trial in England and Wales that evidence is given orally. This is clearly right when the evidence is central to a disputed issue and needs to be subjected to the test of cross-examination by the other party. But many matters of which evidence has to be given at a criminal trial are not in dispute at all and there is no need to give oral evidence of each and every one of them. We recommend that, as provided for by section 10 of the Criminal Justice Act 1967, such matters wherever possible be reduced to writing

beforehand and read out by counsel as an agreed statement. Where in the view of the judge this has not been done, he or she should ask counsel after the case for the reasons and, in suitable cases, impose penalties in costs, subject to a right of appeal, or recommend to the taxing officer that the legal aid claim should be reduced to the extent that the time of the court had been spent unnecessarily.

*(v) Power of judge to call witnesses etc*

18. A judge in a criminal trial has the power to call a witness or to suspend the trial to permit further investigations to take place. These powers are very seldom used, but we believe that there are cases where they should be exercised. If judges exercised the power more often, this might constitute an incentive to counsel to ensure that the jury are allowed to hear all the relevant witnesses in a case. The Crown Court Study found that in 19% of contested cases judges reported that they knew of one or more important witnesses who had not been called by either side. We recommend that judges be prepared in suitable cases, where they become aware of a witness who may have something to contribute, to ask counsel in the absence of the jury why the witness has not been called and, if they think it appropriate, urge them to rectify the situation. In the last resort, however, judges must be prepared to exercise their power to call the witness themselves.

*(vi) Close of case*

19. At the end of the evidence, the jury will hear closing speeches from the prosecution and the defence, followed by the judge's summing up. The prosecution and defence speeches are not themselves evidence and we believe that they should not in normal circumstances exceed thirty minutes. If the limit is exceeded the judge must consider whether the excess was justified and in appropriate cases impose costs sanctions. We so recommend.

20. Before the jury retires to reach their verdict, the judge sums up the case in order to enable them to understand their task. The summing up should include reference to the burden and standard of proof and the respective roles of jury and judge, as well as a succinct and accurate summary of the issues of fact as to which a decision is required. The judge gives directions on any points of law that have arisen during the progress of the case and it will usually be helpful if these are specifically related to the facts of the case. The extent, however, to which the judge should refer to the facts of the case is the issue that has caused us the most difficulty in this area. Many witnesses have suggested to us that it is not possible for a judge to sum up on the facts without running a risk of unfairness to one side or the other. Since the evidence in most cases will have been led in greater quantity by the prosecution, a summary of the evidence given on either side may often give the impression that the evidence for the prosecution outweighs that for the defence. It is also not unknown for judges, while emphasising that matters of fact are for the jury and not for the judge, to comment on the facts in such a way as to attempt to influence the jury in one direction or the other.

21. For these reasons it has been suggested to us that judges should not sum up on the facts at all. This is said to be the position in many jurisdictions in the United States of America and we have studied jury charges<sup>6</sup> from the State of New York which avoid almost any reference to the facts of the case. Such jury charges are in effect a string of explanatory notes by the judge to the jury on the legal points which have arisen during the case. The position in Scotland appears to be rather more similar to that in England and Wales, although we were given the impression that judges were likely to make less reference to or comment on the facts in Scottish summings up. We were told that in some cases it was the practice for the judge or sheriff to say that there was little to add to the evidence as it had been presented by the prosecution and the defence and to go straight into the directions on the law.

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<sup>6</sup> As summings up are termed in the USA.

22. We do not think that it would be sensible to lay down a rule on how far a judge should sum up on the facts. The circumstances will vary from case to case. The overriding duties of the judge in summing up are to ensure that the issues have been put to the jury in the clearest possible way and to be fair to both sides. The first consideration dictates that reference to the facts should be limited to what is necessary to relate the explanation of any points of law to the case and to the issues that the jury must decide. We do not believe that it is necessary in every case to give a summary of the evidence for and against the prosecution case, although that may sometimes be the clearest way of proceeding<sup>7</sup>. We therefore agree with the views of the Court of Appeal in *R. v. Wilson*<sup>8</sup>, where the appeal was based on the fact that, at the end of a very short trial, the judge had told the jury that they had heard the evidence and that he did not need to review the facts. The Court of Appeal took the view that there was no reason why the judge should not take that line. We share the view of the Court of Appeal that it was a line which, in a case as short and simple as the one under appeal, might well be more generally adopted always provided that in the judge's view no miscarriage of justice would be caused. We therefore disagree with the more recent Court of Appeal decision in *R. v. Gregory*<sup>9</sup>, which suggests that there must be a reminder of the facts in all cases. We note, however, that the decision makes no reference to *R. v. Wilson*.

23. The second consideration (the need to be fair to both sides) requires that judges should be wholly neutral in any comment that they make on the credibility of the evidence. It is appropriate for judges to identify for a jury questions, which are for them to decide, of a witness's credibility; it is inappropriate for judges to intrude their own views of whether or not a witness is to be believed. This is consistent with the need in some cases, for example where there is identification or confession evidence, for special guidance to be given as to its reliability. The precise balance between law and fact in a judge's summing up will be a matter for the judge to decide in the light of the facts of each case. We are well aware that summing up is an extremely difficult task, often calling for the exercise of great skill and judgement.

24. An issue not satisfactorily dealt with in the existing rules is the extent to which defence counsel should be required, if the judge makes a mistake in the summing up, to draw it to his or her attention so that it can be corrected before the jury retires. There is a potential conflict here between a barrister's duty to the court and his or her duty to the defendant, who may have grounds for appeal if the mistake is not corrected. Since it is our view that, where such technical grounds are made out on appeal, the result should not necessarily be that the defendant goes free, the case for saying that defence counsel's duty to the defendant overrides his or her duty to the court in these circumstances seems to us to be a weak one. It may be that counsel's view of the law differs from that of the judge and we do not suggest that counsel interrupt the summing up if that is the case. Where, however, the judge has plainly overlooked or misinterpreted a legal matter, we feel that counsel should have a duty to intervene and that the Bar's Code of Conduct should be amended to make this clear. We so recommend.

## Hearsay evidence<sup>10</sup>

25. A striking feature of our present system is the insistence on direct oral evidence from the person who saw or heard the fact or facts about which the evidence is being given. Despite an accumulation of often complex exceptions, which makes a comprehensive account of the rules of hearsay impracticable within the scope of this report, the general rule is that a fact may not be established by calling one person to testify to something which someone else has

<sup>7</sup> In only a quarter of the cases in the Crown Court Study did the judges consider that the jury would not have managed without a summing up on the facts.

<sup>8</sup> 1991 Crim. L.R. 838.

<sup>9</sup> 14 January 1993, unreported.

<sup>10</sup> In this and the following three sections we are indebted to Professor Sir John Smith CBE, QC of Nottingham University, who supplied us with a valuable paper elucidating the various issues.

told him or her. The purpose of the rule is to exclude evidence that may be unreliable because, for example, the originator has not given it on oath and cannot be directly cross-examined about it, or the witness repeating it may have misunderstood it in some way. Its effect, however, is to exclude relevant evidence from consideration by the jury. It has been put to us that, provided the judge draws attention where appropriate to the dangers and weaknesses of such evidence, it could in many cases be suitably admitted and that the interests of justice would be better served if it were. The exceptions to the rule in criminal cases have in fact been recently increased by the provisions governing documentary evidence and children's evidence in the Criminal Justice Acts of 1988 and 1991<sup>11</sup>, which we welcome.

26. We think that, in general, the fact that a statement is hearsay should mean that the court places rather less weight on it, but not that it should be inadmissible in the first place. We believe that the probative value of relevant evidence should in principle be decided by the jury for themselves, and we therefore recommend that hearsay evidence should be admitted to a greater extent than at present. We are, however, conscious that the state of the law on hearsay is exceptionally complex and difficult to interpret. We think that before the present rules are relaxed in the way that we would like to see, the issues need thorough and expeditious exploration by the Law Commission. We recommend accordingly.

### Evidence of co-defendants

27. Where the prosecution lead evidence of a confession, it is (as the judge must tell the jury) admissible only against the maker. Where more than one defendant is on trial, the confession of one becomes admissible against another only if the maker repeats or adopts it from the witness box. The judge will, however, warn the jury that they must treat the evidence with caution. In the absence of the maker's evidence, an earlier statement by him implicating a co-defendant and led by the prosecution requires a direction to the jury to ignore matters prejudicial to that co-defendant.

28. A number of witnesses have suggested to us that, where more than one defendant is accused of the same offence, justice can only be done if each defendant receives a separate trial. This argument is based on what are said to be the general difficulties inherent in trying two or more defendants together. It seems to us that the present rules of hearsay evidence contribute to these difficulties, and we therefore envisage the problem being addressed by the review of hearsay evidence that we recommend should be undertaken by the Law Commission. Meanwhile, however, we endorse the practice of the courts in such cases and do not agree that there should normally be separate trials. The presumption in our view should be in favour of a single trial, albeit with the existing safeguards being rigorously applied by judges in order to ensure that no defendant is unfairly treated. For example, separate trials might well be appropriate in a case where the judge takes the view that the evidence against a co-defendant is not very strong and that a miscarriage of justice might occur if the jury wrongly take into account allegations made in a confession which is not admissible against that co-defendant.

### Previous convictions and previous conduct

29. The general approach in England and Wales, as in almost all common law jurisdictions, is that evidence showing only that the accused has a disposition to commit the kind of offence charged, or crimes in general, is inadmissible for the purpose of showing that he or she committed the offence charged. We agree that a defendant's previous convictions should not in general be admissible as evidence against him or her in a subsequent case. The present law does,

<sup>11</sup> The Criminal Justice Act 1991 amends the Criminal Justice Act 1988 to enact certain of the recommendations in the *Report of the Advisory Group on Video-Recorded Evidence* (The Pigot Committee) Home Office, London, December 1989. In particular it provides for the admissibility in evidence of interviews with child witnesses (in place of examination in chief) in trials on indictment.

however, recognise exceptions to the general rule. One such exception is the common law rule under which the court may admit evidence of criminal conduct other than that covered by the indictment if the other conduct can be related to the offence charged in some specific way so as to make it of particular relevance to an issue in the case. This goes wider than simply the fact of previous convictions, since in the majority of cases it is the circumstances of the conviction that are relevant rather than the mere fact of the conviction itself. This rule embraces the so called “similar fact” exception under which evidence of conduct may be admissible because it shows a disposition to commit the kind of offence charged in a particular manner or according to a particular method of working. Examples are cases of obtaining property by deception where the criminal uses the same deception over and over again or cases of burglary where the offender uses the same distinctive means of gaining entry to the premises.

30. We fully agree with this approach. But the common law rule that governs it is, as the Criminal Law Revision Committee<sup>12</sup> (CLRC) remarked, “difficult to summarise because it is exceptionally complicated and because opinions differ greatly as to the effect of some of the decisions and as to whether the law is entirely consistent in itself”. The decisions in *Boardman v. DPP*<sup>13</sup> and, more recently, *DPP v. P*<sup>14</sup> have made it clear that the rule is wider than had previously been thought and is not restricted to cases where there is a “striking similarity” in the evidence. The law in this area is, however, difficult to comprehend, embodied as it is in a series of judgments that are not always readily reconcilable. We recommend therefore that this matter be considered by the Law Commission as part of the review of the law of evidence that we recommend at paragraph 26 above.

31. The CLRC recommended a specific additional exception to the similar fact rule in their Eleventh Report, namely that it should be open to the prosecution to bring in evidence of an accused’s previous convictions where he or she admits the conduct of which he or she is accused but denies that it was performed with any criminal knowledge or intent. In such circumstances the CLRC believed that it should be permissible simply to adduce evidence of previous misconduct of the kind alleged without having to prove similarity of circumstances or facts surrounding the conviction. They recommended therefore that when a defendant admits the basic facts alleged by the prosecution and the question is only one of knowledge or intent, the fact that he or she has previous similar convictions should be made known to the jury. We recommend that the CLRC’s proposals in this regard be implemented.

32. As a further exception to the general rule, a defendant’s previous convictions are admissible if the defendant gives evidence and claims to be of good character or makes imputations against the witnesses for the prosecution. In the United States of America, previous convictions can be cited against the defendant in a far wider range of circumstances. For example, the Federal Rules of Evidence provide that, if the defendant goes into the witness box, the defendant’s credibility may be impeached by the introduction of evidence that the defendant was convicted of a prior felony, as long as the court determines that the probative value of admitting evidence of the felony outweighs its prejudicial effect. Prior convictions are also admissible to prove matters such as motive, opportunity, intent, plan, knowledge, identity, or absence of mistake or accident. The discretion to admit such evidence is often exercised and it is said that as a result those with previous convictions seldom enter the witness box.<sup>15</sup> If similar rules were adopted in England and Wales, a similar result might occur.<sup>15</sup> It is not a result which we would favour and we therefore do not recommend adoption of the United States Federal Rules.

33. We accept, however, that where a defendant claims to be of blameless reputation it must continue to be possible for the prosecution to prove that this is

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<sup>12</sup> *Eleventh Report: Evidence (General)*, paragraph 78, London, HMSO 1972. Cmnd. 4991.

<sup>13</sup> [1975] A.C. 421.

<sup>14</sup> [1991] 2 A.C. 447.

<sup>15</sup> According to the *Crown Court Study*, 71% of defendants with previous convictions gave evidence as compared with 83% of defendants who did not have previous convictions.

not so by being able to cross-examine on previous convictions. Similarly, we see no reason for abolition of the general rule that, if the defendant attacks the reputation or character of a prosecution witness, he or she should be open to similar attack from the prosecution. We agree, however, with the recommendation of the CLRC in its Eleventh Report that this rule should not apply where the judge is satisfied that imputations made by the defendant against the prosecution evidence are central to the defence. We recommend that this proposal be implemented. Where the main purpose of the attack by the defence on a witness for the prosecution is to shake his or her credibility as a witness, the defendant must expect to be subject to cross-examination in his or her turn. But where the attack is central to the defence, it should not of itself expose the accused to cross-examination on his or her previous convictions. Nevertheless, judges must be vigilant to distinguish between gratuitous disparagement of a witness and proper cross-examination in accordance with the principles that the CLRC outlined. The former must be firmly discouraged.

34. The present rules on revealing the previous criminal convictions of the defendant only apply where the defendant gives evidence. This has the unfortunate effect of enabling an accused who does not go into the witness box to attack, through his or her advocate, the credibility of the prosecution's witnesses or in murder cases the character of the deceased while avoiding any counter-attack. The reasoning seems to be that the purpose of bringing in previous convictions in these circumstances is to impugn a person's credibility as a witness: if, however, a person does not go into the witness box, he or she is not a witness and therefore the question of his or her credibility does not arise. A better approach seems to us to be that, since the defendant, through his or her advocate, is seeking to undermine the credibility of the prosecution evidence, it should be open to the prosecution to suggest, by bringing in the defendant's criminal record, that the person who has cast doubt on the credibility of the prosecution's evidence is a person of bad character. It does not seem to us to be reasonable that a defendant can avoid the consequences of the present rule by the simple expedient of staying out of the witness box. If, therefore, a defendant attacks the credibility of a prosecution witness, or a victim in a case of murder, we believe that it must be possible for the prosecution, after the conclusion of the defence case, to lead, with the leave of the court, evidence of the defendant's previous convictions even if the defendant has not given evidence.

## Corroboration

35. We have discussed corroboration in relation to confessions in chapter four. We noted that one aspect of the rules of evidence which has over the years caused particular confusion to juries has been addressed by the Law Commission in its Report "Corroboration of Evidence in Criminal Trials"<sup>16</sup>. Under common law, the jury must be warned in sexual cases of the danger of convicting on the uncorroborated evidence of the complainant. A similar warning must be given by the judge in a case where evidence is given against the accused by an accomplice. There is also a statutory requirement of corroboration when an accused is charged with perjury or an offence of procuration under the Sexual Offences Act 1956. Evidence that is capable of amounting to corroboration has to meet the test laid down by the courts in the case of *Baskerville*<sup>17</sup>. Because these rules have proved inflexible, complex, and productive of anomalies, the Law Commission have recommended their abolition. Since implementation of their recommendations seems likely to simplify the issues in the minds of the jury, we readily endorse the Law Commission's approach. It may still be necessary for the judge in these cases to warn the jury of the dangers of accepting evidence from particular witnesses. We agree, however, with the Law Commission that the approach should be not that the same warning should be applied inflexibly to

<sup>16</sup> See chapter four, paragraph 63, note 28.

<sup>17</sup> See chapter four, paragraph 62, note 27.

every case but that, if a warning is required, the judge should tailor it to the particular circumstances of the case.

## Victims and other witnesses

36. The efficient management of a trial and the clear presentation of issues to the jury depend heavily on the willingness of victims and other witnesses to testify. It should be a key objective of the system that their cooperation is freely given, that everything possible is done to ensure that waiting and other facilities are adequate, that they are protected from intimidation and that in all other ways they are given the support and encouragement that many will need when undergoing the daunting and sometimes distressing experience of appearing in court.

37. Before the trial it is current best practice for the police to refer to the voluntary organisation, Victim Support, all cases of domestic burglary, assault, robbery, arson, criminal damage to private property and many cases of theft. If the victim (or, in cases of homicide, the relatives) consents, the police will also refer cases of homicide, sexual offences and domestic violence. We understand that Victim Support would like to extend its support to other witnesses who fear or are suffering from intimidation, and does so already in areas where it has sufficient resources.

38. Victim Support has embarked on a programme of support schemes which in time should cover all the main Crown Court centres. The aim of these schemes is to ensure that victims and other prosecution witnesses know what to expect and that, when they arrive at the court for the trial, they know where to turn to for advice and help should they need it. We were told by Victim Support that all inner city areas would have a scheme by the end of 1992 and that all Crown Court centres would be covered by 1995, provided that Government funding was available. We recommend that the necessary priority is given to establishing such schemes in all Crown Court centres.

39. An important feature of the witness support schemes that we have described is that they help to prevent a witness from feeling isolated in what may well be unfamiliar and intimidating surroundings. This may be particularly necessary when the victim goes into the witness box, especially if he or she has been the victim of a sexual offence or an offence of violence<sup>18</sup>. We judge that it is perfectly acceptable in such circumstances for the witness to be accompanied by a friend or supporter who sits in the body of the court, although he or she should not accompany the witness into the witness box nor sit close to the witness box while the witness is giving evidence. This is to avoid any suggestion that the witness is not giving his or her evidence unaided. We understand that it may still be the case in some Crown Court centres that a friend or supporter of the witness will be excluded from the court or placed in the public gallery. This seems to us to be wrong; the admission of the witness's friend or supporter to the body of the court though not to the witness box itself seems to us to be an acceptable compromise.

40. Before the trial begins, several agencies may be involved in providing victims and other witnesses with information about what they should expect. The police and CPS may well be in touch; the Home Office produce a leaflet, which is used by Victim Support among others. We have been told that this leaflet is being updated and improved, and that the possibility of different leaflets for the magistrates' courts and the Crown Court is being considered. The CPS intend to provide better information for witnesses by sending them detailed letters about court procedures, what is expected of them and how long they may be required. It seems to us that there may be a need for coordination between these agencies so as to ensure that there is no unnecessary duplication of effort or inconsistency

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<sup>18</sup> It is not unknown, however, for victims in rape cases to be permitted to give their evidence from the main body of the court out of sight of the accused without going into the witness box. We would not wish to rule out such an arrangement.

in the information provided from the different sources. But we welcome the general intention behind these initiatives.

41. For the reasons given at paragraphs 51 and 52 of chapter five, seven of us consider that prosecution barristers should be allowed to meet witnesses before the trial and that they should be particularly encouraged to do this where witnesses may be distressed or vulnerable. This majority believes that the same should apply to defence barristers. For the reasons given in paragraph 50 of the same chapter, four of us do not agree.

42. We recommend that, where the case is known to be a sensitive one and the victim may be in a distressed or vulnerable state, the case should wherever possible be given a fixed date for hearing.

43. In keeping with our wish to see judges take a more interventionist approach where necessary, we recommend that they should be particularly vigilant to check unfair and intimidatory cross-examination by counsel of witnesses who in the nature of the case are likely to be distressed or vulnerable. The needs of child witnesses have recently been considered by the Pigot Committee<sup>19</sup>, some of whose recommendations were implemented in the Criminal Justice Act 1991. It seems to us that any further changes, including extension of the Act's provisions to vulnerable witnesses other than children, should await experience of how the Act works in practice. It has, however, been suggested to us that the use of screens or live video links may tend to prejudice the defendant in the minds of the jury and we recommend that, where this is not already being done, the judge should, in any opening introductory remarks at the trial, explain to the jury the reasons for using such links or screens.

44. Witnesses may find the publicity, or threat of it, surrounding their appearance in the witness box a powerful disincentive to giving evidence. We accept that a trial must in principle continue to be a public proceeding. Nevertheless, we think that certain steps can and should be taken to mitigate the fear of publicity. We believe that witnesses who do not wish to have their addresses read out in court should be allowed to hand them into court or be able to use accommodation addresses, with the leave of the judge. We also believe that greater use could be made of section 23 of the Criminal Justice Act 1988. This section allows the court to give leave for the statement of a witness to be read out where the witness is afraid to give oral evidence. Section 26 provides that the court should not give leave unless it is in the interests of justice to admit the statement. It is rare for section 23 to be used where the intimidated witness is the main witness, as the defendant would not be able to cross-examine. We would, however, like to see more use made of the section for other witnesses. One difficulty is that the CPS have no way of knowing in advance whether the statement will be admitted or not. We therefore suggest that this is one of the matters which ought to be resolved prior to trial in accordance with the procedures which we have proposed in chapter seven.

45. We further recommend that, in certain sensitive cases, there should be guidelines for judges to follow when deciding whether or not to exercise their discretion to allow a witness to remain anonymous. We received disquieting evidence of cases in which witnesses, for example victims of blackmail, had been led to expect anonymity only to discover that the judge was not prepared to allow it. It seems to us that witnesses should be told what to expect in such circumstances. Anonymity, however, raises difficult issues for a trial process which assumes that, whenever possible, justice must be seen to be done. We accept that it should only be permitted where the case for it is fully made out. We recommend, however, that, where it becomes an issue, it is resolved in the course of the pre-trial procedures that we recommend in chapter seven, with the judge being asked to rule as early as practicable at a preparatory hearing if the defence and prosecution do not reach agreement.

46. We also recommend that, at the conclusion of cases that involve sexual offences, victims' statements should be returned to the instructing solicitor. The

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<sup>19</sup> See paragraph 25, note 11.

defendant must have the right to read them before and during the trial but he or she should not have the right to retain them after it. We were disturbed by evidence that we received that victims' statements were being freely circulated for various dubious purposes quite unconnected with the trial.

47. Finally, it was put to us that, particularly if a plea of guilty has been entered, the victim may have slurs cast upon him or her during the defence speech in mitigation of the likely sentence. Such remarks are privileged and may be reported by the press with impunity and with no opportunity for the victim to obtain redress. This is a difficult problem since we have no wish to restrict the freedom of the press and the defendant's counsel is under a duty to carry out his or her client's instructions. Nevertheless, we believe that it should be possible to prevent wholly unfair attacks on the victim during speeches in mitigation. In appropriate cases, the prosecution should intervene and the CPS have told us that it is their policy to do so where the defence depart from the facts in a material aspect. Such a course, however, cannot be embarked upon lightly since there may have to be a separate hearing, following an adjournment, if the defence persist in their version of the facts. We believe that, if prosecuting counsel intervened more often, defendants would become less prone to launching unsupported attacks on the characters of victims and other witnesses (or even on occasion people who have not appeared at the trial at all), since such attacks would be likely to be counter-productive when it came to sentence. We recommend, however, that a power be vested in the judge to prohibit in the last resort the reporting of unsupported allegations made during a speech in mitigation. We envisage this as a discretionary power to be used in the extreme case of a defendant apparently using the opportunity of a speech in mitigation to do as much damage as possible to the reputation of the victim or a third party without any risk of retaliation.

## Interpreters

48. Where defendants are deaf or have difficulty in understanding English, an interpreter is required not only to translate any evidence given by them but also to translate for them the other evidence given at the trial so that they understand the proceedings. It is, however, customary for translation for the latter purpose to be dispensed with if the defendant is legally represented and his or her counsel applies for such dispensation, always provided that the judge is satisfied that the defendant substantially understands the case against him or her and the evidence to be given.

49. We have received disquieting complaints about the inconsistent quality of interpreters. Clearly, in the court setting, the highest standards of interpretation are called for. There is no place for the makeshift arrangements which, when discussing the provision of interpreters at the police station in chapter three, we reluctantly accepted might sometimes be unavoidable. Given the importance of the matter, it seems to us surprising that the responsibility for providing interpreters at trials is in effect divided. Either the court provides the interpreter at the request of the defence out of central funds or the interpreter is provided directly by the defence and the cost is covered by legal aid. Most of those giving evidence to us believed that it should be the court's responsibility and we so recommend.

50. We recommend that there should be central coordination to ensure that national and local registers exist from which interpreters of the required standard may be drawn as needed. The arrangements should be overseen by the Lord Chancellor's Department, with court user committees having delegated local responsibilities. The aim wherever possible should be to use only interpreters who are on these registers. We expect that as time goes by admission to the register will become increasingly dependent on interpreters reaching prescribed standards of competence and being governed by a code of practice covering such matters as impartiality and confidentiality. The Nuffield Foundation is seeking to establish national standards and training for interpreters on the basis of its

Nuffield Interpreters Project, which has the support of the Home Office, the Lord Chancellor's Department, the Law Society and the police service. We welcome this as a first step towards the developments that are needed. We also welcome the steps already taken by the Nuffield Foundation in collaboration with the Institute of Linguists to develop a set of qualifications for interpreters working with the public services, including the legal services. These include a certificate in community interpreting which would vouch for the skills of interpreters in the legal system among other spheres. We recommend that a glossary of legal terms should be prepared in all the main languages as this will help interpreters understand the system. Finally we welcome the fact that the Nuffield Foundation is also looking at training for those who employ interpreters.

51. Defendants may feel some unease about the impartiality of an interpreter first brought into the proceedings by the police. Wherever possible therefore the interpreter at the court should not be the interpreter used at the police station. As we say in chapter three, the defence should have the right to employ their own independent interpreter at the stage that instructions are taken from the defendant. This interpreter should be paid for by legal aid. It must, however, be acknowledged that for some languages these objectives may not be immediately achievable, since it may be very difficult to find more than one qualified interpreter, or to find one within a reasonable time if the suspect is detained at a police station.

## Juries

52. As we have said in chapter one, we believe that it should be possible for properly authorised research to be carried out into the way in which juries reach their verdicts and we have recommended that section 8 of the Contempt of Court Act 1981 be amended accordingly. Given, however, the presumption that juries will remain the arbiters of fact at criminal trials in the Crown Court in England and Wales, our recommendations have been designed to ensure that, within the existing trial framework, the issues are presented to them in the clearest possible way. In this section, we consider the best means of presenting the issues to the jury before it retires, together with the arrangements for summoning, selecting, and vetting jurors, whether any special arrangements are needed to ensure a racial balance among jurors, and related matters.

### *(i) Selection of jurors*

53. The initial summoning of jurors is done at random from the names of electors on the electoral register. This seems the best available means of ensuring that juries reflect the composition of the population as a whole. Although complaints are made that people may wrongly be omitted from the electoral register, no one has identified a convincing alternative means of selecting jurors. We would urge electoral registration officers to take every possible step to ensure that the electoral rolls are comprehensive and include everybody who ought to be included. This is important for the purpose of securing jurors who are properly representative of the general population. It is also particularly important to continue and expand present efforts to persuade people from the ethnic minority communities to register.

54. When the jury summonses have been issued, many will be returned pleading various reasons for being unable to sit on a jury on the dates in question. These excuses may or may not be accepted. Jurors themselves seem to accept that a certain amount of pressure on them to serve is reasonable; the Crown Court Study shows that 92% of those jurors who had tried and failed to have themselves excused jury service thought that their requests had been dealt with fairly. Where the reasons given are acceptable, we do not suggest that they be overridden in the interests of ensuring a representative sample at all costs. We do, however, recommend that, unless there is a statutory bar on the person

serving, every effort is made to offer alternative dates at a time that will be more convenient or that gives an adequate opportunity to rearrange his or her affairs in order to leave time for the jury service to be performed.

55. We have been told that some of the catchment areas from which potential jurors are drawn for individual courts produce an inadequate geographical spread with the result that people are selected to serve on a jury who live close to each other or know each other and may also be known to the defendant. This can be difficult to avoid if jurors are not to be asked to travel unreasonable distances and if contiguous parts of the electoral register are used. We recommend, however, that jury summoning officers take whatever steps are practicable to keep to a minimum the risk that individual jurors sitting on the same jury will be known to each other or to the defendant. At the larger court centres this should be possible by using widely separated parts of the electoral register.

56. One likely disincentive to people serving as jurors is the present rate of financial loss allowance that is offered to them<sup>20</sup>. This seems to us wholly inadequate to compensate for loss of earnings in most cases, especially for those who are self-employed. We recommend that the rates be reviewed as a matter of urgency.

57. Certain people are ineligible to serve on juries for various reasons. We do not feel that we have any strong basis to recommend any changes to the present position except in one area. We do not see why clergymen and members of religious orders should not be eligible for jury service and recommend that they should be removed from the list of the ineligible. On the other hand, where practising members of a religious sect or order find jury service to be incompatible with their tenets or beliefs, that should entitle them to be excused jury service and we recommend accordingly.

58. Certain people are disqualified from serving as jurors on the grounds of their criminal record. The main categories are those who have ever been sentenced to life imprisonment, detention at Her Majesty's pleasure, or to more than five years imprisonment; those who have served any period of imprisonment or have received a suspended sentence or a community service order during the previous ten years; and those who have been placed on probation during the previous five years. It is thus possible for a person to sit on a jury while on bail for an offence that is similar to the one for which the defendant is to be tried. Also a person may sit on a jury after a conviction for a criminal offence, provided that the sentence has not been served during the previous ten years (or five years if placed on probation).

59. We are not convinced that these rules are the best that could be devised but before changing them there needs in our view to be proper research into their possible influence on jury verdicts. If such research were to show that defendants with criminal convictions played an improper role in jury deliberations, that might be a basis for changing the current rules. Research might, however, show that, contrary to general belief, the role played by jurors with prior criminal convictions is indistinguishable from the role played by any other category of juror. We recommend that suitable research be conducted once the amendment to section 8 of the Contempt of Court Act 1981 that we have proposed has been made. The only change that we at present recommend is the disqualification from serving on a jury of any person who is on bail.

60. Whatever the precise definition is to be, it is important that the jury summons clearly identifies the categories of people who are disqualified on the grounds of their criminal records and that there are efficient arrangements for

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<sup>20</sup> *Financial loss allowance*

- (a) Where the period of time over which earnings or benefit are lost or additional expense is incurred is not more than four hours, the sum of £20.70.
- (b) Where the period of time is more than four hours, the sum of £41.40 for each day of the trial.
- (c) Where a juror has served on more than ten days, for each day over the tenth the sum may exceed that specified above but must not exceed £77.00 for each further day of the trial.

checking on any who may be tempted to ignore their disqualification. At present there is a system of sample checks but the Association of Chief Police Officers have told us that there have been substantial shortfalls in the number of checks made. This is either because courts are not submitting their quotas of names on the prescribed sample basis or because the information given is insufficient to enable a search of the records to be made. The Association has suggested that, once the new national criminal record system is running as an independent agency, the routine screening of jurors for criminal convictions should be arranged direct with the agency by the courts themselves. We agree and so recommend. In addition, we recommend that the form sent to potential jurors should require the juror to affirm that he or she does not have a disqualifying conviction and that he or she understands that this may be checked and that a prosecution may follow if false information is given.

61. Although the initial summoning of persons from the electoral rolls is done on a random basis, several factors may affect that randomness by the time a jury is selected. The rules on eligibility and disqualification that we have already mentioned are relevant factors, as are the various reasons that people may advance for wishing to be excused jury service on a discretionary basis. It may for example be that some women find it more difficult to serve as jurors on account of domestic commitments. The Crown Court Study did in fact find that women were slightly underrepresented on juries compared with what might have been expected. Comparison with the 1991 census, however, indicates that on a national basis ethnic minority groups were not seriously underrepresented. Non-white jurors made up 5% of jurors as compared with 5.9% of the total population.

62. We are reluctant to interfere with the principle of random selection of juries. We are, however, anxious that everything possible should be done to ensure that people from the ethnic minority communities are represented on juries in relation to their numbers in the local community. The pool from which juries are randomly selected would be more representative if all eligible members of ethnic communities were included on the electoral roll. Even if this were to be achieved, however, there would statistically still be instances where there would not be a multi-racial jury in a case where one seemed appropriate. The Court of Appeal in *Ford*<sup>21</sup> held that race should not be taken into account in selecting juries. Although we agree with the court's position in regard to most cases, we believe that there are some exceptional cases where race should be taken into account.

63. We have therefore found very relevant a proposal made to us by the Commission for Racial Equality (CRE) for a specific procedure to be available where the case is believed to have a racial dimension which results in a defendant from an ethnic minority community believing that he or she is unlikely to receive a fair trial from an all-white jury. The CRE would also like to see the prosecution on behalf of the victim be able to argue that a racial dimension to the case points to the need for a multi-racial jury. In such cases the CRE propose that it should be possible for either the prosecution or the defence to apply to the judge before the trial for the selection of a jury containing up to three people from ethnic minority communities. If the judge grants the application, it would be for the jury bailiff to continue to draw names randomly selected from the available pool until three such people were drawn. We believe that, in the exceptional case where compelling reasons can be advanced, this option, in addition to the existing power to order that the case be transferred to another court centre, should be available and we so recommend. However, we do not envisage that the new procedure should apply (as proposed by the CRE) simply because the defendant thinks that he or she cannot get a fair trial from an all-white jury. The defendant would have to persuade the judge that such a belief was reasonable because of the unusual and special features of the case. Thus, a black defendant charged with burglary would be unlikely to succeed in such an application. But black people accused of violence against a member of an extremist organisation

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<sup>21</sup> 3 A.E.R. 445.

who they said had been making racial taunts against them and their friends might well succeed.

64. The CRE considered whether the judge should have power to order that the three jurors from the ethnic minority communities should come from the same ethnic minority as the defendant or victim. They concluded, however, that this would be impracticable. While this may be so, we believe that it should be open to the defence or prosecution to argue the point and to the judge to be able to order in appropriate cases that one or more of the three jurors should come from the same ethnic minority as the defendant or the victim. We so recommend.

*(ii) Guidance and assistance to jurors*

65. In cases that seem likely to last weeks or months jurors may well be subject to more than usual strain. We recommend that in such cases the judge gives some consideration to whether it might not be possible to stagger the courts' normal hours so that jurors have some time off during normal working hours to see to their personal business. Early starts may be a problem if the defendant is in custody; we see no reason, however, why courts should not sit into the evening after a longer break than usual at midday. Or it may be possible in some cases to have longer sitting days alternating with days on which the court sits for the morning or the afternoon only. The judge might take into account the jurors' views on this at the outset of a particularly long case.

66. Before they are empanelled, jurors are usually given some explanation by the jury bailiff of their responsibilities as jurors and what they may expect. The Lord Chancellor's Department has recently produced an explanatory video film to assist in this process. We welcome this useful innovation. But we also recommend that, in the light of our other recommendations, the film be remade in due course so as to include some explanation to jurors of the pre-trial discussions (including preparatory hearings where necessary) that may have taken place in order to narrow down and clarify the issues for their benefit. The film should also go on to explain that the judge may intervene in order to prevent irrelevant questioning or argument by counsel, to protect witnesses, to clarify the issues, and to keep the case broadly within any timetable that may have been agreed. It is most important that jurors should not regard such interventions as indicating bias on the part of the judge towards one side or the other.

67. Before the case begins, the judge will normally establish rapport with the jury by explaining to them, without reference to the case, certain features of criminal trials in general, such as the burden and standard of proof. We think that this is an important part of the procedure and that judges could do more by way of opening comment than some of them now do to make jurors aware of what they are to expect. Two matters that might be covered, and that do not always seem to be mentioned at present, are the extent to which jurors should ask questions during the trial and whether or not they should take notes. Although some judges, according to the Crown Court Study, are doubtful about the wisdom of encouraging jurors to ask questions, the same study indicates that jurors often wish to ask questions but are normally reluctant to do so (46% of jurors said that they had wanted to ask a question during the trial but only 8% said that they had actually done so). It is true that the video film to which we refer above clearly explains that jurors may pass notes to the judge via the jury bailiff. The judge may nevertheless wish to add further encouragement or explanation of the sort of matters where questions would be appropriate. Two-fifths of the jurors responding to the Crown Court Study said that they had taken notes during the trial and of this number 80% said that they had found the notes useful. 77% of jurors, however, reported that note taking was neither encouraged nor discouraged and in 30% of cases they said that writing materials had not been provided. We think therefore that it would be useful for the judge to explain in his or her opening remarks that jurors may take notes and so recommend. We also recommend that the provision of writing materials should be standard procedure.

68. In complex cases, and in all cases where there has been a preparatory hearing, we recommend that the judge should consider whether one or more

written documents might with advantage be given to the jury. These might include an account of the facts of the crime drawn up by counsel, summaries of the agreed written evidence (including medical reports), and possibly a list of the witnesses to be called by either side. In complex and lengthy cases it may also be appropriate for some form of weekly summary of the evidence given during the trial to be given to the jury. Technological aids, such as charts or tables that can be shown in colour on visual display units, should always be provided where this would assist in the presentation of complicated facts to the jury.

69. Before the jury retires, the judge should consider what materials are likely to be of most help to them in coming to the correct verdict. We have already referred to written documents that they may have been given before, at the opening of and during the trial. At the conclusion, there may well be parts of the judge's summing up that it would be useful for them to have in writing. The standard directions on the law, tailored to the facts of the case, are an obvious example. The jury may also benefit from written guidance on points of law generally, although difficult points of law should be discussed with counsel before the summing up takes place so that what goes to the jury is not in dispute. In appropriate cases juries should be issued with a written list of the questions that they need to address in the course of their deliberations, with written guidance on the bearing that the various possible answers are likely to have on the verdict. In addition, juries should be given any other guidance on the issues that the judge considers would be helpful. We do not suggest that it is necessary to provide the jury with these aids in every case. But they should be seriously considered in all lengthy, complex, and serious ones.

70. Where points of law are argued at a trial, it is customary to exclude the jury from the court, particularly where admissibility of the evidence is in question. We hope that these occasions will be kept to a minimum by our recommendations on preparation for trial in chapter seven since it seems to us that it must detract from jurors' concentration if they are constantly sent out of the courtroom. Jurors may also become irritated by the practice, especially if they feel that important parts of the evidence are being kept from them. Where the need for legal argument has not been identified earlier, we recommend that wherever possible such arguments are taken (together with other matters requiring attention) before the jury is empanelled. Occasionally, they will only be capable of being dealt with in the course of the trial proper. In either case, however, we believe that the length of such interruptions can be kept to a minimum if counsel supply beforehand skeleton outlines of the arguments that they propose to adduce in support of their view of the law. This should assist the judge to arrive at better informed decisions and to keep the interruptions short.

### *(iii) Other matters*

71. We have considered whether the judge should be required to warn the jury that they should not be prejudiced in cases where there is a black defendant or other racial dimension. We believe that judges should always be alert to the desirability of such a warning and not hesitate to give one when appropriate. There may, however, be cases in which the warning would be inappropriate or even counter-productive and we think that this must be left to the discretion of judges.

72. We have placed in this chapter and elsewhere great emphasis on the need for the jury to be able to understand the issues in the trial. This naturally raises the question whether jurors should be subject to some kind of test of their literacy or comprehension. The Crown Court Study does not suggest any overwhelming need for action to be taken on this since a majority of jurors including their foremen claimed to understand the issues in the cases that they were trying. It has, however, to be said that, apart from the necessarily subjective nature of this assessment, there was a minority of cases where jurors and even whole juries were said to be confused. As we have said in chapter one, this should be a matter for further research once section 8 of the Contempt of Court Act 1981 has been amended.

73. Service on a jury may expose people to the risk of bribery and intimidation by unscrupulous defendants. Every effort should be made to protect jurors from such approaches and the guidance given to them should clearly set out the steps which they should take if they feel intimidated in any way. Court layout and design also have an important role to play. If the public gallery in a particular courtroom is sited in such a way as to facilitate intimidation of the jury by members of the public, then sensitive cases should if practicable be assigned to another courtroom in the same Crown Court centre. (We discuss courtroom layout in more detail in paragraphs 106-109 below.)

74. Jurors are usually called upon to serve for a set period of a fortnight and in that time they may hear more than one case. It is not unknown for juries to move en bloc from one case to another. Over two-fifths of the jurors responding to the questionnaires in the Crown Court Study reported that their juries had included four or more jurors who had sat together on a previous jury. In 13% of cases more than eight jurors from the same previous case served together on the new case. We recognise that it may not be possible to disperse a jury completely when allocating jurors to subsequent cases; this is because the time at which cases finish and new ones start cannot be predicted and if a jury has to be found at short notice there are limits to what is practicable. It is fair also to point out that we received no evidence to the effect that keeping juries together from case to case in whole or in part had any serious disadvantages. This may well be another matter for future research to clarify.

75. During our deliberations we considered the case for introducing into England and Wales the Scottish verdict of “not proven”. This is available in Scotland as an alternative to “not guilty” although it still counts as an acquittal. Most of those who gave evidence to us did not favour such a verdict. We too regard it as an unsatisfactory option, particularly from the point of view of the defendant, who is left with a cloud hanging over his or her reputation. If the jury does not convict, it means that the prosecution have been unable to discharge the burden of proof and the defendant should in our view be entitled to a verdict of not guilty.

## Fraud trials

76. The recommendations that we make above apply in many cases even more strongly to fraud trials. These tend to be longer and more complex and therefore require greater efforts to be made to assist the jury to understand the issues. We have indeed had put to us suggestions that, as recommended by a majority of the Roskill Committee<sup>22</sup>, juries should no longer be used for trials of complex and serious fraud. As we explained in paragraph 8 of chapter one, however, the statutory bar on research into juries means that we have no basis for making any recommendations for dispensing with juries, whether for serious and complex fraud or for other long trials. Nevertheless we draw attention in the rest of this section to a number of points which should give juries greater assistance in fraud cases.

77. We have already stressed the importance of the role of the judge, particularly if our recommendations are to be effectively implemented. This is particularly important in long and complex fraud trials. Judges for such trials should therefore be well trained, carefully selected, and provided with effective administrative support. We understand that steps are being taken in all these directions and we welcome this. Those responsible for allocating judges to long fraud cases must recognise that specialist knowledge and experience is important and allocate accordingly.

78. Many of those giving evidence to us have suggested that fraud trials would be simpler to determine if the substantive law of fraud were reformed. Apart from the common law offence of conspiracy to defraud, there is no specific offence of fraud in England and Wales and fraudulent conduct has therefore to

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<sup>22</sup> See chapter seven, paragraph 59, note 22.

be brought under the ambit of various offences. The Law Commission has had this area under examination for many years now and we hope that the results of this work will be published without undue further delay. We have not ourselves regarded the reform of the substantive criminal law as falling within our remit nor thought it sensible to attempt to duplicate the efforts of the Law Commission.

79. One possible effect of the absence of a statutory offence of fraud is that the counts or their particulars on the indictment in a typical serious fraud case have tended to be particularly numerous. The Court of Appeal commented adversely on this in its judgment in the *Blue Arrow* case<sup>23</sup> and the prosecution authorities must be vigilant to ensure that in future cases the number of counts or particulars on the indictment is kept to the minimum even where there is a need to show a pattern of fraudulent behaviour over time. The outcome of the Law Commission's work on the indictment should also be relevant.

80. Given the detailed separate provisions in the Criminal Justice Act 1987 for preparatory hearings in cases of serious fraud, we believe that there is scope as part of this process for targets to be set for the amount of time to be occupied by each stage of the trial. These time limits would have to be flexible and subject to review by the judge on application from either of the parties. The arrangements for preparatory hearings appear to us to give counsel plenty of scope for suggesting to the judge what the time limits for the various stages of the trial should be, although it must be for the judge to reach the final decision. Equally, although counsel must be able to ask for changes to these limits in the light of developments during the trial itself, the judge, as a result of the knowledge of the case gained at the preparatory hearing, should be in a much better position to assess whether the case for relaxing the limits is a sound one. Where points of law in fraud trials have to be argued in the absence of the jury, there should where practicable be time limits imposed on oral arguments by counsel in support of written skeleton arguments submitted in advance. There also seems to us to be scope in long fraud trials for judges to use more often their power under section 24 of the Criminal Justice Act 1988 to admit written documents as evidence without supporting oral evidence.

81. It seems to us that it may be desirable in some long fraud trials for judges themselves to have the ability to put the issues before the jury at the outset of the trial. Unfortunately this would appear not to be possible at present by virtue of section 10(3) of the Criminal Justice Act 1987. We doubt whether this is an intended or necessary consequence of that subsection and we recommend that it be amended accordingly.

## Training and sanctions

82. Whatever the system for preparing for and conducting criminal trials, the quality of service and standards of performance on the part of all those involved in the criminal justice system are of paramount importance. We have already made recommendations in chapters two and three on police discipline and training and in chapter three on the quality of advice offered by solicitors to clients at the police station. In chapter five we comment on the need for the highest quality of performance of its duties by the CPS. It is equally important that barristers presenting cases for the defence and for the prosecution should be adequately trained and fully competent in their duties. Also, as we have already noted, our recommendations will require a more informed and decisive control of trials by judges and their training and performance in this enhanced role must be regarded as essential matters. Adequate arrangements must be in place to monitor the performance of all these groups. There also needs to be a proper system for dealing with incompetence and inefficiency, including provision for a series of formal warnings, temporary suspension or, in the last resort, removal, disbarment or striking from the roll.

83. The responsibility for ensuring that satisfactory training and standards are in place for barristers and solicitors lies with the Lord Chancellor's Advisory

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<sup>23</sup> *The Times*, 13 July 1992.

Committee for Legal Education and Conduct. The Bar and the Law Society are reviewing their arrangements in this area and have introduced or intend to introduce considerable improvements in training. But there is room for further improvement and we make some broad observations below on what the main objectives should be.

84. Those undergoing vocational training need to achieve the skill to practise competently in their intended profession. Where they intend to specialise, they need to acquire the additional skills and knowledge that are necessary for that specialisation. Entry into the profession does not mean that training should come to an end. Practice alone does not ensure that initial skills remain or new skills are acquired. Training is required throughout a professional career to keep practitioners up to date and to help them adhere to best practice.

85. We have been told by the Law Society that a new legal practice course will replace the Law Society final examinations from the autumn of 1993. This will cover criminal procedure, and will also include advocacy training. We welcome this development. Thereafter, students will enter a training contract, which will take the place of articles. This will also include an advocacy course. Most solicitors already undergo compulsory continuing education and in due course this will apply to all members of the profession. It is up to solicitors to choose what areas they will study, and they obviously cannot be expected to spend time on areas in which they do not ever intend to practise. But many solicitors have a mixed practice. It is important that the Law Society ensures that solicitors do cover on a sufficiently regular basis criminal law and procedure if this is an area where they practise or are likely to practise. It is also important that the Law Society satisfy itself as to the quality of the continuing training offered.

86. We have been informed by the Bar Council that the Bar Vocational Course now offers practical advocacy training and we welcome this. Following success in this course, the new barrister is required to undergo twelve months' pupillage. From October 1992, all pupils have had to undergo a further compulsory advocacy course before the end of their pupillage. But a pupil barrister is able to take any case after six months whether or not he or she has gone on the advocacy course. As noted by the Bar Council's working party on continuing education and training, this is a remarkably short period of professional training, shorter than exists in any of the other professions considered for comparison<sup>24</sup>. We agree with the suggestions of the working party that there should be some restrictions on the work which the new barrister should be able to undertake during the second six months of pupillage and that he or she should not appear in a jury trial or in the Court of Appeal unless led by a senior barrister.

87. We have been provided by the Bar Council with an account of how pupil masters should monitor the progress of pupils over the period of the pupillage in order to ensure that the right sort of experience is gained. This seems to us to make little or no provision for qualitative or quantitative scrutiny of the work undertaken. We recommend that the Bar should ensure that these arrangements are improved so that they provide a solid basis for assessment as to whether the new barrister has sufficient experience to practise unsupervised at the Criminal Bar.

88. The Bar is, we understand, considering plans for further compulsory education in the first three years of independent practice and for further training following this. We believe that these plans should be implemented with the minimum of delay. We agree with the suggestion by the Bar Council's working party on continuing education and conduct that the barrister should only obtain an annual practising certificate if he or she satisfies the requirements for continuing education.

89. We have one specific further training recommendation for both barristers and solicitors. Once they have decided to specialise in criminal law, we believe

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<sup>24</sup> Appendix 2 to the working party's first report, December 1990.

that they should undergo additional training in the main issues raised by scientific and statistical methods, forensic pathology, forensic science, psychiatry and psychology. We note that certain organisations, for example the Criminal Bar Association and the London Criminal Courts Solicitors' Association, run courses on scientific issues on a voluntary basis. Such developments are welcome. We would, however, like to see this training offered as part of continuing compulsory training of both barristers and solicitors.

90. On standards of conduct, we note that the Bar has a Code of Conduct, while the Law Society publishes a Guide to the Professional Conduct of Solicitors. We recommend that, using these as a starting point, a code of practice be drawn up to govern the conduct of advocates, whether barristers or solicitors, in court (magistrates' courts as well as the Crown Court). The code should cover professional practice and conduct and ethical standards. The code should be drawn up jointly by the Law Society and the Bar Council in consultation with the Inns of Court and the views of the Lord Chancellor's Advisory Committee on Legal Education and Conduct should be sought on it at the draft stage.

91. An adequate system for investigating and adjudicating on complaints is important if public confidence in the integrity of the practitioners concerned is to be maintained. Our enquiries of the Solicitors Complaints Bureau suggest that clients seldom complain about inadequate professional advice from solicitors in criminal cases. It seems to us that for those who do wish to complain the Solicitors Complaints Bureau provides an adequate machinery which is well publicised, and is a body independent of the Law Society. Dissatisfied complainants may also take their cases to the Legal Services Ombudsman. Given, however, the small numbers of people who complain about solicitors in criminal cases, there need to be additional ways of assessing and maintaining standards. The most promising method of achieving this appears to us to be regular research and we recommend that the Law Society, through its research unit, looks into such questions as consumer satisfaction, efficiency and operational problems in the system. We also recommend that the Legal Aid Board periodically commission further research into the quality of work done by members of the profession, either independently or in conjunction with the Law Society.

92. The most obvious sanction against poor performance by barristers is for solicitors not to brief them again. This used to be a straightforward matter, since solicitors attended court and were able to observe the performance of counsel whom they had briefed. Nowadays, however, solicitors are seldom able to attend court in person and are represented by clerks who do not have the same ability to assess the performance of the barrister. The responsibility therefore falls much more on the Bar itself to maintain high standards of preparation and representation and to ensure that the arrangements for the efficient and speedy conduct of trials, including preparation for trial on the lines that we recommend in earlier chapters, are not undermined by careless or dilatory work on the part of counsel. We see the same kind of role for empirical research into the work of barristers as we recommend in paragraph 91 in regard to the work of solicitors.

93. We received complaints, albeit from only a few of those who gave evidence to us, that a small number of barristers were incompetent, prolix and poorly prepared. But the important issue is not the numbers but the steps taken to correct the incompetence. Our impression is that, in the few cases where things go wrong, action is seldom taken to put them right or to prevent a recurrence. We were, however, told by the Criminal Bar Association that a report was being prepared on systems for improving competence and bringing incompetence to the notice of heads of chambers and leaders of circuits. We welcome this development, particularly the proposal that judges should report ineptitude or incompetence on the part of counsel to the Professional Conduct Committee of the Bar Council, with copies of the report being sent to the barrister and to his or her head of chambers. As we understand the proposal, where a complaint was upheld, the barrister would have the right of appeal to a full committee of the Bar Council, but where more than a certain number of complaints had been upheld

against a particular barrister within a specified period, suspension for a mandatory period would follow.

94. We also envisage that the extension of rights of audience to solicitors may in the longer term improve the overall competence of advocates, since they should provide an incentive for barristers to improve their standards as a means of competing with solicitors. We are, however, concerned that the level of fees available for those practising at the criminal bar may constitute a serious disincentive to the maintenance of high standards there. We recommend that this problem be looked at urgently by the Lord Chancellor's Department. Judges also have a role to play in maintaining standards and should, as we have already indicated, be readier than at present to recommend the imposition of penalties in costs and reduction in fees and formal disciplinary measures by the relevant Inn of Court.

95. The training of judges is the responsibility of the Judicial Studies Board (JSB). The first step on the judicial ladder for anyone who is to preside over a trial in the Crown Court is appointment as assistant recorder. The JSB runs a week long induction course for newly appointed assistant recorders. During this course they will attend or take part in a mock trial. They are then likely to sit with an experienced judge for a short period. But after that there will be no further general training on conduct of a trial. Nor are new assistant recorders assessed on how well they have performed during their course. Following their initial training they are invited back three and a half years later to attend a refresher seminar. Further refresher training is offered at five year intervals. This concentrates to a considerable extent on sentencing, but also includes specific topics or new legislation. Annually all assistant recorders, recorders and circuit judges are required to attend a one day seminar. In addition the JSB sometimes runs specialist seminars, as it did on the Criminal Justice Act 1991. There has also been some special training in awareness of race issues, although this is an area where we recommend that there be an increased effort to improve and extend such training. Consideration should also be given to extending this training to awareness of gender issues.

96. Some of us have ourselves attended several of the courses, mock trials, and refresher seminars, and regard the function of the JSB in all these areas as extremely important. We are, however, of the view that substantially more resources need to be allocated to judicial training than at present. Given the importance which we attach to judges actively controlling the conduct of criminal trials, as well as the increasing length and complexity of certain categories of cases, it is hardly possible to doubt the cost-effectiveness for the system as a whole of significant additional investment in judicial training. Not only do the interests of justice require competent judges who are fully abreast of the latest developments in law and practice, but mistakes avoided at first instance prevent time wasted on appeal.

97. We also see two specific problems which call for attention. The first is the lack of monitoring of the performance of judges during training. For their training to be fully effective, they need an indication, such as is normally given in other areas of professional training, of how well or badly they have done. We see this as being done by other members of the judiciary (not by the executive) who attend and help to run the courses. The second problem is that the intervals between refresher training are too long. The JSB itself has told us that it would like to see the intervals between training reduced to three years. We recommend that in addition to the annual seminars there should be a residential training course every three years and that assistant recorders in particular be recalled for their first refresher training courses after two years, not three and a half years. Circuit judges, in particular, are in danger of getting out of touch, and a number of them have told us that they are aware of it. We also question whether members of the judiciary should only be invited, not required, to attend refresher seminars. Although we are assured that the invitation is never refused, we see no reason why these courses should not be compulsory.

98. Where serious inefficiency among judges occurs, it must be possible to secure the removal of the judge in view of the damage that he or she may do.

Powers to remove judges do exist and we make no recommendations for changing them. We are satisfied that the Lord Chancellor can use, and on occasion has used, the threat of exercising these powers to procure the resignation of judges whose continuance in office would prejudice the interests of justice. We are, however, less satisfied that adequate monitoring arrangements are in place and find it surprising that full-time judges seldom if ever observe trials conducted by their colleagues. We acknowledge that there is always present the sanction of adverse comment in the press as well as (in the event of leave to appeal being granted) by the Court of Appeal. But we recommend that the judiciary as a profession should have in place an effective formal system of performance appraisal.

99. Presiding and resident judges<sup>25</sup> should in our view have the leading roles to play in such a system. They already undertake a form of judicial assessment, since decisions have to be made as to which judges are suitable to hear certain types of case or to act as deputy High Court judges. But we would like to see time found for resident judges to attend trials so that they can assess the performance of judges in their courts. Alternatively or additionally, recently retired judges could fulfil this function, possibly under the auspices of the JSB. Their findings should be made known to the judge being assessed and possibly to the presiding judge. The findings should be kept within the judiciary, in order not to put at risk their independence. We also recommend that systematic procedures be adopted whereby the views of members of the Bar on the performance of judges can be channelled, through the leader of the circuit and the Chairman of the Criminal Bar Association, to the resident or presiding judge and then to the judge concerned. The fact that such systems existed could help to improve public confidence in the judiciary. We recommend therefore that these aspects be looked at by the Lord Chancellor in consultation with the judiciary.

100. Most of our recommendations on training are directed specifically at the judiciary or at the individual professions. It has, however, been put to us that there are major advantages in training courses which involve a mix of persons from different agencies and disciplines in the criminal justice system. We agree. This was an approach adopted successfully by the JSB in the mixed seminars organised to provide an introduction to the Children Act 1989. We accordingly recommend that training courses of this kind should be included wherever possible in the extended training arrangements that we recommend. Training also has a role to play in impressing upon all practitioners in the criminal justice system the need for clear communication using plain English at all stages. This is particularly important when issues are being addressed in open court in the presence of defendants, victims, other witnesses and jurors. These are all to some extent strangers to the law and should not be confused by the overuse of legal jargon. We recommend that training courses be developed to address this need and to ensure that all practitioners take steps to guard against the use of obscure terminology in the course of the trial.



## Management of courts and of cases

101. If the trial and pre-trial procedures that we recommend are to work efficiently, there must be an effective system of managing cases and caseloads both nationally and at individual court centres. This applies as much to the magistrates' courts as to the Crown Court. It seems to us that, as a result of the establishment of the National Consultative Council on Criminal Justice, with its area committees, in combination with the court liaison and court user groups that exist at individual courts, the framework now exists for ensuring that national policies are communicated to courts and effectively implemented by them. It is equally important that any problems emerging at the courts should be communicated to the relevant national bodies so that the necessary action by them can be taken.

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<sup>25</sup> England and Wales is divided into six circuits. Each circuit has at least two presiding judges, who are responsible for the running of judicial business within the circuit. At each Crown Court centre there is a resident judge responsible for the listing of cases and their allocation to individual judges.

102. The overall running of Crown Court centres, including the listing of cases and their allocation to individual judges, is the responsibility of presiding and resident judges. Usually they will set guidelines to be worked to by members of the Lord Chancellor's Department's Court Administration but often they take an interest in the progress of individual cases, as well as ensuring that backlogs of cases do not build up or, if they do, initiating the action necessary to dispel them. When it comes to individual cases, we recommend that wherever practicable in complex cases judges should take on responsibility for managing the progress of a case, securing its passage through the various stages of pre-trial discussion to preparatory hearing and trial and making sure that the parties have fulfilled their obligations both to each other and to the court. Clearly, judges will need the full support of the court administration in taking on such responsibilities. But we see no reason why this should not be forthcoming, especially given the new computer systems such as CREST<sup>26</sup> that we have been informed are on the verge of introduction nationally and should ensure that the necessary information is available.

103. At the magistrates' courts, the main developments for the future will lie in the implementation of the White Paper "A New Framework for Local Justice"<sup>27</sup>. We envisage that a notable contribution to efficient administration will result from the introduction of computerisation through systems such as MASS.<sup>28</sup> We have two specific recommendations to make. The first is that there should be a more systematic approach to the role of stipendiary magistrates in the system. We believe that their contribution to the overall efficiency of magistrates' courts can be considerable and can be made without causing distrust of their role on the part of lay magistrates. It has been suggested to us that such distrust sometimes results in stipendiary magistrates being used on work that does not make the best use of their special skills and qualifications. In our view this should be corrected. We also support the suggestion that the administration of stipendiary magistrates be overhauled, possibly by arranging them in two departments, one covering London and the other the rest of the country. This might enable a more systematic approach to be taken to their most effective deployment. We have no intention in making these recommendations of in any way reducing the overall role of the lay magistracy in the criminal justice system. We do believe, however, that the judicious deployment of stipendiary magistrates on a slightly wider scale than at present would lead to a more effective system of justice in the magistrates' courts overall.

104. We have been informed that in certain magistrates' courts the magistrates are not represented on local court user committees. We regret this. Such representation is, in our view, entirely compatible with the judicial independence of the magistracy. It may not be necessary for a magistrate to take the chair at court user groups—it may be more sensible in most cases for that to be done by the justices' clerk—but magistrates should always be represented on such groups.

105. As part of the move towards the use everywhere in the courts of plain English, we recommend a complete overhaul of all forms and leaflets in use in the courts which have to be filled in or read by members of the public, including defendants, witnesses and jurors. The assistance of the Plain English Campaign should be sought in this exercise.

## Court design

106. It has been borne in on us that the design of court centres and courtrooms is not always conducive to best practice. This impinges on some of the recommendations we make above. In general the question of the best design for particular types of cases needs to be kept under review. We were impressed for example by the arrangements made at Chichester Rents in Chancery Lane,

<sup>26</sup> See chapter seven, paragraph 23, note 10.

<sup>27</sup> See chapter seven, paragraph 68, note 24.

<sup>28</sup> MASS stands for the Magistrates' Courts Standard System.

Central London, for the trial of serious and complex fraud cases with their special requirements for visual display and the handling of large quantities of documents. We mention below certain other specific matters that have struck us.

107. The strain of jury service is exacerbated if jurors are required to endure unsatisfactory conditions. A large number of suggested improvements were proposed by jurors in answer to a question in the Crown Court Study. These included more leg room in the jury box, better refreshment facilities, and separate smoking and non-smoking areas. In addition, as we have already remarked, the proper treatment and encouragement of victims and other witnesses is much assisted by adequate court facilities. These should include separate waiting rooms, facilities for the disabled, and adequate parking space. We have been informed that provision is made when new court centres are built for these features to be incorporated. We recommend that this be done, or continue to be done. It will not, however, address the main problem, which is at the older courts, which may be expected to be in use for many decades yet. There needs therefore to be a programme, tailored to the available resources, designed to improve the facilities at existing courts to complement the progress that is being made when new courts are built. We so recommend.

108. To make the identification of individual jurors more difficult, and to protect jurors from threatening behaviour from spectators, jury boxes should wherever possible not be sited opposite the public gallery. So far as practicable, jurors should not have to wait or eat in areas to which ordinary members of the public have access and, to the extent that the design and layout of the court centre allows, separate areas should be set aside as waiting rooms and restaurants for jurors.

109. Several witnesses suggested to us that the dock should be abolished because of its likely prejudicial effect on the jury. We have some sympathy with their arguments but are not persuaded that security at many courts could be adequately maintained if the dock were not there. We would not wish armed police to have to be present in courtrooms in criminal trials, as is the case in, for example, Germany as well as the United States. We do recommend, however, that as new courts are built and old ones refurbished, the dock should be made to appear as far as practicable similar to the other compartments of the court. It is also important that it should be positioned as close as possible to the defendant's solicitors and barristers, since to our minds the biggest disadvantage of the dock is not the likely prejudicial effect on the defendant but the obstacle that it sometimes presents to effective communication between the defendant and his or her legal advisers<sup>29</sup>. We also recommend that the size of the dock should not be unnecessarily large. It is possibly the case that the dock in some courtrooms has to be large enough to accommodate a number of co-defendants securely but this cannot be necessary in all courtrooms. There should be a flexible approach to the question, with single defendants being assigned wherever possible to courtrooms with smaller docks.

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<sup>29</sup> According to the Crown Court Study nearly two-thirds of defendants had information that they wanted to give to their barristers which they were unable to give because they were too far away. A third of defence solicitors thought that it would have been helpful to have had the defendant sitting close to the lawyers.

# Chapter Nine: Forensic Science and Other Expert Evidence

## General

1. Subparagraph (iii) of our terms of reference invites us to consider the role of experts in criminal proceedings, their responsibilities to the court, prosecution, and defence, and the relationship between the forensic science services and the police. We have already referred in earlier chapters to various aspects of the role of experts. But it has seemed to us desirable, in view of the treatment of the topic in our terms of reference and its prominence in several of the miscarriages of justice which preceded our appointment, to bring all the relevant considerations together in a separate chapter. This concentrates on the provision of forensic science facilities and the conduct of forensic scientists as witnesses, but very similar considerations apply to expert witnesses in other fields.
2. We accordingly begin by considering the organisation of forensic science facilities in England and Wales. We then review the adequacy of the arrangements that are intended to ensure that properly qualified forensic scientists perform their task objectively and impartially, and subject to adherence to measurable standards of quality of performance. The miscarriage of justice cases in which forensic science evidence played a prominent part had already, before we were appointed, prompted a reappraisal of these arrangements by those responsible for them. We have been impressed by the resulting introduction of quality control procedures, and by the general level of awareness of their importance. But it is not yet possible to judge just how effective the innovations made have been in practice or whether further changes may be desirable in the future. We therefore propose that a Forensic Science Advisory Council be set up to keep under continuing review the performance and efficiency of forensic science provision in England and Wales. We also comment on the need to ensure that the necessary services in the fields of forensic pathology, psychiatry and psychology continue to be provided to an adequate standard.
3. We go on to consider and where appropriate to make recommendations on the need for adequate liaison and cooperation between forensic scientists and the bodies responsible for investigation and prosecution. We pay particular attention to the needs of the defence, since we see it as essential that a defendant is not precluded unreasonably from access to expert advice and the opportunity of testing the prosecution's scientific evidence.
4. When it comes to the trial, our main concern has been with the need to ensure that scientific issues are presented in such a way that everyone involved—counsel and judges as well as juries—can understand their nature and their significance to the case. Because these issues may be difficult for non-scientists to understand, expert witnesses at the trial should be given every assistance in explaining scientific matters to the jury. The more important for their verdict scientific evidence is likely to be, the more important it is that the issues should have been clarified as far as possible in pre-trial discussion, including preparatory hearings if necessary.
5. In reaching our conclusions we have been much assisted by the work of a parallel inquiry into forensic science by a Sub-Committee of the House of Lords Select Committee on Science and Technology chaired by Lord Dainton. We

were kept informed of the evidence supplied to the Sub-Committee and of the progress of its work. Its report<sup>1</sup>, which reaches similar conclusions to our own, appeared in March 1993 and we are grateful for the assistance that it has given us.

## Organisation of forensic science facilities

6. Outside London, forensic science services are provided to the police by the Forensic Science Service (FSS) through six laboratories at Aldermaston, Birmingham, Chepstow, Chorley, Huntingdon and Wetherby. The service has a research and development laboratory at Aldermaston<sup>2</sup> and its headquarters is based at the same building as the Birmingham laboratory. There are some 600 staff, of whom about two-thirds are scientists. The full economic costs of the organisation in the financial year 1991–92 were £21.1m. The service has recently been reorganised and was established as an executive agency of the Home Office with effect from 1 April 1991. As well as the 41 police forces outside London, customers of the agency include the CPS, HM Customs and Excise, coroners and defence solicitors, although the last only when it is possible for the service to be provided from a laboratory other than the one which is advising the police in the case.

7. The Metropolitan Police Forensic Science Laboratory (MPFSL) is the largest forensic science laboratory in Europe. It employs a total of 315 staff, including 230 scientists, of whom 200 are graduates. Its estimated full economic cost in 1991–92 was £12.8m. The laboratory is directly accountable to the Assistant Commissioner heading the Specialist Operations Department of the Metropolitan police. The laboratory also serves the City of London police. It is working towards the provision of advice to defendants provided that the cases concerned arise outside London and neither of the two London police forces are involved.

8. Two further public sector agencies are involved in the provision of forensic science services. The Laboratory of the Government Chemist (LGC) is an executive agency of the Department of Trade and Industry. The laboratory has approximately 375 staff, 200 of whom are graduate scientists, but only a minority of these, about 40, are engaged on work relevant to the criminal justice system. This work mainly involves illicit drugs and documents that are suspected of being forged. The principal customer is HM Customs and Excise. The laboratory also advises other Government Departments and the Serious Fraud Office and undertakes a small but rapidly increasing amount of forensic work for the police. In addition it takes work from the MPFSL on a contract basis to assist in reducing backlogs of cases. The LGC accepts a limited amount of work from defendants.

9. The Defence Research Agency (DRA) is an executive agency of the Ministry of Defence. It was established in 1991 and incorporates the four former non-nuclear defence research establishments, including the Royal Armament Research and Development Establishment (RARDE). The DRA is organised into a number of sectors, one of which incorporates the Forensic Explosives Department located at Fort Halstead in Kent. This provides a national capability for the forensic investigation of the illegal use of explosives. The Home Office meets most of the costs of its contribution to criminal investigations. The total strength of this department is some 44 scientists and support staff and there is a police liaison officer.

10. Also in the public sector must be counted the in-house laboratories maintained by police authorities outside London. These handle routine work that does not need the extensive facilities provided by the main public sector laboratories nor the same input from fully qualified scientists. Police authorities also directly employ Scenes of Crime Officers (SOCOs)<sup>3</sup>. These are either police

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<sup>1</sup> *HL Paper 24*, London, HMSO, 1993.

<sup>2</sup> Although at the time of writing our report it was in the process of moving to Birmingham.

<sup>3</sup> We understand that these officers are, as the posts come to be held increasingly by civilians, now known in many areas as "Scenes of Crime Examiners". We adhere in this chapter, however, to the more familiar term, which is also the one used by the House of Lords Select Committee in its recent report (see paragraph 5 above).

officers or, increasingly, civilians, who, under the direction of the investigating police officers, examine scenes of crime for traces that can be sent for forensic science analysis. Some forces have also appointed full-time fully qualified forensic scientists as scientific support managers. These are responsible for all the scientific support staff within the police force, including SOCOs, the Photographic Department and the Fingerprint Bureau. They take responsibility for the coordinated management of the examination of crime scenes, liaison with the FSS, responsibility for the packaging and transport of samples that are sent to that service for examination, and responsibility with the investigating officer for deciding in which cases forensic science samples should be sent to the FSS for analysis.

11. As we have noted, the main public sector laboratories are increasingly prepared to do work on behalf of defendants, provided that the same laboratory is not analysing samples on behalf of the prosecution. We have been told, however, that defence scientific experts seldom require further or repeated analyses to be carried out and that there is seldom dissatisfaction over the way that the main public sector laboratories have carried out tests. Rather, any differences which arise are in the interpretation of the results. It is likely that in most cases where defendants wish to challenge the scientific evidence they will have recourse to one of the firms in the private sector who offer scientific advice or laboratory facilities in cases of this kind. There appears to be no comprehensive information available on the number of firms offering such services or the number of freelance experts to whom the defence may turn. Our impression is that the number of fully qualified scientists engaged in this work in the private sector is limited by the scope for remuneration under current arrangements for legal aid. Moreover, laboratory facilities in the private sector are limited; they cannot match the resources available to the public sector in this respect. It is, however, possible for defence scientists to use the facilities of public sector laboratories to check the results that the prosecution claim to have obtained. It may also be possible for both public sector and private sector scientists to seek help from science departments in the universities. As far as we are aware only the University of Strathclyde and the University of London (King's College) have departments that specialise in forensic science.

12. We have visited, either collectively or as individuals, the FSS's headquarters and laboratory at Birmingham, the FSS laboratories at Aldermaston and Chepstow, the MPFSL at Lambeth, the LGC at Teddington and the DRA at Fort Halstead. We discussed the main issues with forensic scientists during those visits and in addition held a seminar attended by lawyers, police officers and scientists, including representatives from the universities and a private sector firm. These visits and discussions, when taken with the written and oral evidence that we received on the subject, have enabled us to consider in some depth the issues that arise, and we are grateful to all those concerned for their help.

13. One of the first questions that we were asked by our witnesses to consider was whether the FSS and the MPFSL should retain their present places as part of the Home Office and Metropolitan police respectively. The alternative would be their reorganisation and amalgamation as, or as part of, a new national forensic science organisation independent of the police and the Government. It was put to us that, if the FSS were dissociated from the Home Office, and the MPFSL from the Metropolitan police, the independence of the laboratories concerned would be enhanced and it would be easier for them to provide services to the defence. If they came to be regarded as potential sources of advice to the defence as well as the prosecution, this would counteract the tendency of the scientists working in those laboratories to see themselves as part of the prosecution. It was further argued that forensic scientists are often keen to be regarded as working impartially for the courts rather than for the prosecution or the defence, and that this desire to see objectivity and impartiality as the key objective of forensic science work would be promoted if the organisations concerned were no longer regarded as part of either Government or the police. The financial independence of the new organisation might be assured by the ability, recently acquired by the FSS, to charge customers for the services provided.

14. There are, on the other hand, a number of arguments against such a reorganisation. The need for it is by no means self-evident, since the public sector laboratories enjoy a high reputation for their work, and recognise the need for their experts to be objective and impartial. Nor would standards necessarily improve: indeed the reverse might occur since it is possible that amalgamation of the main providers would lead to loss of competition and hence complacency and a reduction in standards. In any case, a reorganisation could not easily include the LGC and the DRA, which are only in part engaged in forensic science work in support of criminal prosecutions. Nor could it readily embrace the police in-house laboratories other than the MPFSL, which exist only to support police operations. This argument also applies to an extent to the MPFSL and to the FSS which, despite their increasing willingness to assist the defence, are bound to take most of their work from the police and prosecution.

15. Whatever reorganisation were to be effected, it seems to us unrealistic to suppose that it would remove the laboratories concerned from identification with the police and prosecution. However forensic science is organised, its results will be used, as they always have been, in support of police investigations and the prosecution case. That this is so does not in any way remove the need for objectivity and impartiality on the part of the scientists concerned, or for proper arrangements for quality assurance and performance monitoring. Many of our recommendations are designed to support these aims. We also found, as we later describe, that a great deal of progress has already been made since the miscarriage of justice cases<sup>4</sup> of recent years which caused such concern about the quality of forensic science evidence.

16. We have not conducted a comprehensive review of the case for and against a major structural reorganisation of the public sector forensic science laboratories. We do not feel convinced, on the basis of the evidence submitted to us, that such a reorganisation should form part of our recommendations. We do, however, recommend that a continuing review of the effectiveness of the organisational arrangements be included in the remit of the Forensic Science Advisory Council<sup>5</sup> which we recommend in paragraph 33 below.

17. It has also been proposed to us that the scientists employed in the main public sector forensic science laboratories should, instead of being part of a Government Department or the Metropolitan police, be in some way independent of the prosecution and defence and be appointed by the courts. Presumably the aim of this proposal is to confer on the scientists concerned the same kind of independence as is enjoyed by the judiciary. In practical terms, we doubt whether such a change could be implemented. The forensic science laboratories concerned would be difficult to bring under the direct management of judges, whereas if they became part of the Lord Chancellor's Department's court service they would still be part of a Government Department. In any case, we would regard such a change as wrong in principle since it would lead to a confusion of roles of precisely the kind that we believe the criminal justice system should avoid. Moreover, since we are firmly of the view that where disagreement persists it must remain possible for the issues to be tested in examination and cross-examination at the trial, it follows that the experts who give evidence must do so on behalf of either the prosecution or the defence and not on behalf of the court.

18. Some anxiety has been expressed to us about the place of police in-house laboratories (other than the MPFSL) in the system that we have described. There is concern that in the interests of obtaining quick results or of avoiding the costs of sending exhibits to the FSS, the police may be tempted to use their own facilities although these will in general be no match for those available at the FSS laboratories. It has also been suggested to us that the police sometimes send exhibits to private sector laboratories where these offer a cheaper service than the FSS, with results that may be unsatisfactory if the laboratory concerned is

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<sup>4</sup> For a brief description of the main cases in question, see Appendix 5 of the Report of the House of Lords Select Committee on Science and Technology to which we refer in paragraph 5, note 1.

<sup>5</sup> We refer to this in succeeding paragraphs of this chapter as "the new Council".

unfamiliar with such requirements as the need to prove the continuity of evidence<sup>6</sup>. The FSS themselves have not suggested to us that their laboratories should be the only suppliers of scientific expertise to the police outside London. They point out that the FSS would be able to give a quicker service on the more important cases if routine and straightforward work that was capable of being performed to acceptable standards under recognised routine procedures was done in police facilities. In any case, competition with the private sector is clearly inherent in the introduction by the FSS of charging for their services.

19. In our view, it is incumbent on the police, if they do go to the private sector rather than the FSS, to be satisfied that the quality of service that they receive is at least equal to that which they would obtain from the FSS. To the extent that they are able to perform straightforward forensic science work in their own laboratories, we can see no objection to this provided that those facilities are brought under the same arrangements for quality and performance control that we recommend below.

20. Of the main public sector laboratories, the FSS and LGC charge customers, including police forces, for their services. The MPFSL will soon be charging defence clients in a similar way. We understand that the FSS aims to achieve trading fund status in the autumn of 1993 and that this should give it scope to vary its charges on a more commercial basis. We welcome this if it enables the laboratories to respond more flexibly to the demands of customers (mainly police forces) but not if in the search for higher profits charges rise so far as to deter the police from seeking forensic science assistance in cases that need it.

21. It has been suggested to us that the introduction of charging arrangements has had the unfortunate effect on police forces outside London of deterring them from sending exhibits to FSS laboratories. There do seem to us to have been problems, but it is not clear whether these have arisen from the existence of a charging system as such or from the difficulties inherent in the transition from one method of funding the FSS to another. Under the previous arrangements, police authorities outside London made a substantial contribution to the overall cost of the provision of forensic science facilities. This was because they had to make *per capita* contributions to the Common Police Services Fund out of which the FSS laboratories were paid for. This system made it difficult if not impossible to relate the calls which police forces made on the services of the laboratories to the financial contributions made by their police authorities.

22. In principle, the more transparent arrangements that the introduction of charging has brought have much to commend them and we can see little advantage in reversion to the previous system. In addition, competition appears to us to be a good way of ensuring that the charges made by the public sector laboratories are reasonable and that the services offered meet the customer's needs. The creation of a single organisation, on the other hand, would mean that the benefits of market pressures would be lost. We look to the new Council to ensure that undue competitiveness does not lead to a diminution in standards. Standards should also be safeguarded by our recommendation that forensic science laboratories should operate in future under the Council's scrutiny and subject to its approval.

23. We see no objection to the continuing use of charging as a mechanism for funding the service. This means that police forces will have to make choices as to how to allocate their budgets between public sector laboratories, private sector firms and their own in-house facilities. But this is as it should be, so long as the choice is made on the basis of which is best suited to provide the scientific advice that is needed in the particular case. If police budgets are so constrained that the money cannot be found to pay for the advice at all, that is a problem stemming from the allocation of resources to and by police forces, not from charging by the FSS.

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<sup>6</sup> "Continuity of evidence" describes strict proof of an exhibit's passage along an unbroken chain of procedures from gathering to presentation in court.

24. As we have already noted, the FSS and the LGC take on work on behalf of the defence provided that the same laboratory is not doing work on behalf of the prosecution in the same case. We believe that this is the correct approach and welcome the intention of the MPFSL to follow suit in due course. We recommend that, subject to the need to avoid work on behalf of both prosecution and defence in the same case at the same laboratory, all the public sector laboratories should look upon themselves as equally available to the defence and the prosecution and we would expect to see considerable development of the provision of services to the defence as time goes by.

25. The MPFSL is to offer services to the defence on the basis that any additional scientists recruited and employed for the purpose, together with other related costs, will be paid for by the income from the new business. We welcome this, although it is important that the close working relationships between the laboratory and operational police officers are not weakened. We recommend that the new Council be charged with keeping the arrangements under continuing review.

26. Where it is not possible for a public sector laboratory to assist the defence, either because it is already acting for the prosecution or because facilities are not available, we recommend that it advise the defence on where it might go for the scientific analysis or advice that it requires. It might for example, refer the defence to another public sector laboratory or to a list of firms or of scientific experts providing the necessary services in the private sector.

27. We have received a great deal of evidence from the public sector laboratories on the steps that they have taken and are taking to ensure the highest possible assurance of quality and standards of performance. Following the bad examples in the 1970s of scientists who gave inadequate or misleading evidence in very serious cases<sup>7</sup>, the FSS have introduced procedures that are designed to identify and curtail the activities of any scientist whose practice or interpretation of results is in any way open to question. As part of its move towards quality management systems, the FSS have told us that they are developing formal remedial processes that will ensure that quality problems and their consequences are identified. The service has also introduced a proficiency testing programme under which designated staff, known as core experts, are asked to review the performance of their colleagues on specimen cases and to make recommendations. If the performance of any individual is found to fall short of the standards laid down, we have been assured that he or she will be required to undergo retraining and assessment before being permitted to resume his or her duties.

28. The FSS have also told us that, in the light of the criticisms made in past cases of the unsupervised nature of the work of forensic scientists, they have introduced quality assurance and quality control procedures that should ensure that there is no recurrence of the problems that arose in those cases. In particular, specialist evidence groups have been set up with the remit of achieving better practices and standardisation and, since 1977, Assistant Directors have been in post with responsibility for quality in each laboratory. One of the most important requirements of the new controls is that, regardless of the seniority of the scientist, all significant results have to be checked by a colleague with the appropriate experience. In addition, the FSS have told us that they have conducted quality assurance trials in all their laboratories by sending in dummy cases which are allocated and worked on as though they were real ones. In some of these cases, the laboratories know that they are trials but in some they do not. Externally and internally produced proficiency tests are also conducted in FSS laboratories.

29. We accept that these and other similar measures being taken by the FSS and the other public sector laboratories will do much to ensure that the mistakes of the past are not repeated. We nevertheless feel bound to question the absence

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<sup>7</sup> See paragraph 15, note 4.

of external scrutiny and assessment. We appreciate that the world of forensic science is a relatively closed one in which in many cases the leading experts are employed by the public sector laboratories themselves. We believe that, despite this, procedures need to be in place to provide an external audit of the practices of the major public sector laboratories. We note that, in evidence to the House of Lords Select Committee on Science and Technology, the FSS accepted that it was in the public interest to make the results of its various internal quality management trials known as a way of developing public confidence in the work of the forensic science community. The FSS also supports discussion to determine what form of external scrutiny would best fulfil this requirement and is itself considering these issues drawing on the experience of other organisations. We for our part welcome this assurance but recommend that, as part of the work of the new Council, arrangements are devised for the external inspection and assessment of the work of both the public and the private sector laboratories.

30. We have been pleased to learn that the public sector laboratories are already some way along the road to external assessment. As far as laboratory procedures are concerned, the crucial step that they are all taking or considering is accreditation under the National Measurement Accreditation Service (NAMAS). NAMAS is part of the National Physical Laboratory of the Department of Trade and Industry and aims to establish national and international recognition of the competence of accredited testing laboratories. A NAMAS working group has produced a guidance document for forensic science laboratories which sets out in general terms the criteria which they must meet to achieve accreditation. Not all scientific procedures are susceptible to NAMAS accreditation but where they can be covered the accreditation provides an assurance that the tests have taken place within strictly controlled conditions that are as far as possible the same in all the laboratories accredited. In the absence of such controls, the same tests carried out in different laboratories can produce widely varying results.

31. It is true that NAMAS accreditation is an expensive and time-consuming process and this may be a deterrent to its widespread application in the private sector and to the smaller police in-house laboratories. The larger public sector laboratories are not yet fully accredited. The FSS, for example, is working towards accreditation for most of the relevant procedures at its laboratories by the end of 1993. The pace of accreditation will therefore vary across the system for some time. Again, this is a matter that we envisage as being overseen by the new Council. In due course, it may be possible for NAMAS accreditation to cover interpretation and opinions, not just matters of scientific fact. We understand that work has begun on this and that, despite the difficulties of introducing concepts of measurement into this area, some progress has been made.

32. As far as the basic competence of forensic scientists is concerned, the main qualification should no doubt continue to be degrees and higher degrees in the scientific disciplines concerned. But we welcome the development of specific qualifications for forensic scientists since these may assist the courts in assessing their professional competence, particularly as expert witnesses. We were informed in evidence from the FSS that a "lead body" is being set up for forensic science within the National Council for Vocational Qualifications (NCVQ) programme, which is supported by the Department of Employment. The "lead body" includes representatives of all the main organisations involved in forensic science and will award vocational qualifications under the aegis of NCVQ. These awards could become part of the assessment of the development and qualifications of an individual and his or her competence to act as an expert witness. But they can never be more than desirable additions to the basic professional qualifications guaranteed by membership of the appropriate professional body for the discipline concerned, whether it be chemistry, physics, biology, mathematics, statistics or some other relevant field of science.

33. We commend these developments and recommend that continuing efforts be made in these areas. But we are, as we have already said, concerned at the

lack of external oversight of the steps being taken. We therefore see great attraction in the proposal put to us by the Royal Society for Chemistry that a Forensic Science Advisory Council should be set up which would report to the Home Secretary on the performance, achievements and efficiency of the forensic science laboratories. As we have already made clear, we recommend the establishment of such a body. It should also assist chief constables in deciding to what extent they should use their own in-house laboratories in preference to the forensic science service. It should regard as part of its remit the performance and standards of such laboratories as well as of the larger public sector laboratories and the firms and experts in the private sector.

34. The main responsibility of the new Council would be to report annually on the state of forensic science services in England and Wales. It is, however, noteworthy that, apart from the Forensic Science Unit at the University of Strathclyde and the MSc course in forensic science provided by King's College, London, the direct contribution of the universities to forensic science seems limited. This may be partly because forensic science is applied rather than original science, and partly because of the priorities historically determined by universities in the light of the funds available. However, the contribution of research scientists working in an academic environment should not be underestimated. Professor Alec Jeffreys' work on DNA profiling is an excellent example<sup>8</sup>. A number of important forensic problems may be amenable to research, which might in consequence narrow the range of possible disputes between prosecution and defence. We recommend that it be part of the responsibilities of the new Council to encourage the development of expertise and centres of excellence, embracing applied research, in the universities as well as in public sector and commercial laboratories.

35. We note that codes of practice for forensic scientists have been drafted—one for the FSS is published on page 10 of the service's Annual Report for 1991–92, and another has been published by the British Academy of Experts. But doubts have been expressed about the feasibility of enforcing them. It has also been suggested to us that it is unnecessary for a breach of a code of practice to lead to disciplinary action in view of the Civil Service disciplinary procedures which already exist. Nevertheless the introduction of a code of practice for forensic scientists and technicians seems to us a course worth pursuing, and we hope that the FSS and MPFSL will introduce one. Such a code should cover such vital matters as professional ethics and duties of disclosure. We recommend that the new Council oversee progress in this area.

36. If such a code were applied to all forensic scientists, including those in the private sector, the new Council might be given regulatory powers itself or asked to recommend how such a code should be enforced in some other way. In addition to these responsibilities for codes of practice and the regulation of the profession, we envisage that the new Council should keep under review the arrangements for the training of forensic scientists and their assistants and the means by which they are kept up to date with the latest scientific discoveries. If, too, it was thought sensible to introduce a system of accreditation of expert witnesses, a matter that we discuss at paragraphs 75 and 76 below, the new Council should oversee the arrangements for accrediting forensic scientists.

## Pathology

37. In murder investigations the role of the forensic pathologist is crucial in determining the cause of death and other matters. We received some evidence that it had become increasingly difficult to provide forensic pathology services to the necessary standard, mainly due to a lack of resources and a declining number of experienced forensic specialists among those working in the pathology profession. These problems were considered by a Home Office working party in 1989. This particularly recognised the decline in the teaching of forensic

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<sup>8</sup> See chapter one of *DNA Fingerprinting: Approach and Applications*, eds T. Burke, G. Dolf, A. J. Jeffreys and R. Wolff, Birkhäuser Verlag, Basel, 1991.

medicine over the past twenty years. It noted the low priority which the subject has received in medical schools and recommended that the Home Office should fund a number of senior lectureships in departments of forensic pathology and forensic medicine. They suggested "these posts should be devoted principally to the development of the subject as an academic discipline, to the training of the next generation of forensic pathologists, and to extending the frontiers of the subject through a programme of research, seminars, and international meetings." The working party further noted the limited amount of research and development in forensic pathology in this country, and gave specific examples of how it would increase effectiveness in crime investigation and detection. It therefore recommended an increase in the funds devoted to research and development in the field of forensic pathology.

38. We agree with the working party's assessment of the potential contribution of forensic pathologists to the detection and investigation of crime, and of the importance of ensuring that the discipline not only survives but also develops. We welcome the establishment in 1991 of the Home Office Policy Advisory Board for Forensic Pathology. This board has suggested new commitments totalling £300,000 per year which include an extended list of pathologists now able to undertake police work, changes in the funding arrangements of full-time forensic pathologists, and eventually the creation of a few senior lecturer posts. We endorse these developments and support the Board's further aim of developing lecturer posts to ensure an effective career progression for forensic pathologists. The Board's proposals are necessary to prevent a decline in this vital service and we recommend that they be implemented where this has not already been done.

## Forensic psychiatry and psychology

39. Although the same organisational issues do not arise as with forensic science, we think it essential that expert witnesses in forensic psychiatry and psychology continue to be provided by the relevant departments in hospitals and universities. If, as some have suggested, funding difficulties put such services at risk, this should be addressed by the Home Office in the same way that similar problems with forensic pathology services have been addressed. The Department of Health and the Department for Education, who have the major responsibilities in this area, should also, in line with recommendations from the recent review of services for mentally disordered offenders (the Reed Committee)<sup>9</sup> give increased funding to these important fields of work. The evidence of forensic psychiatrists and clinical psychologists about a defendant's mental state can be crucial in cases where intent is an issue or where the courts have to assess the reliability of confession or identification evidence<sup>10</sup>. Lack of funds should not be permitted to put the availability of this kind of expert evidence at risk. We believe that the principles of university development and an increase in funding for research and development are as applicable in forensic psychiatry and psychology as they are in forensic pathology.

## Investigation

40. We have commented in chapter two on the importance of the police, wherever practicable, making full use of the available forensic science facilities in their investigations. Here we consider how the contribution of the forensic science laboratories to the investigative process might be enhanced. The main issue that we have had to consider has been the distance in most cases of the forensic scientist from the scene of the crime and his or her consequential reliance on the police officers who investigate at that scene, assisted by the scenes of crime officers (SOCOs) who look for and gather the exhibits likely to be of evidential value. The FSS have pointed out to us that it is important to ensure

<sup>9</sup> *Review of Health and Social Services for Mentally Disordered Offenders and Others Requiring Similar Services*, London HMSO, 1992, Cm 2088, page 29.

<sup>10</sup> As shown by the Court of Appeal judgment in *R. v. Silcott, Braithwaite and Raghip*. See chapter four, paragraph 36.

that SOCOs are properly trained and supervised, as well as being subject to external scrutiny, particularly in the matter of properly documented procedures for searching for and logging exhibits.

41. As far as the management of SOCOs is concerned, we recommend no change from the present position but propose that the FSS and MPFSL should be responsible for setting standards, auditing performance and establishing a code of practice for SOCOs. And we regard it as of paramount importance that training such as is provided by the Durham Constabulary should continue, be kept under review, and benefit from the greatest possible contribution from forensic scientists from the FSS, MPFSL and other public sector laboratories. We note in this connection that the research conducted for us by Paul Roberts and Chris Willmore<sup>11</sup> suggests that the efficiency and effectiveness of forensic science in support of police investigations would be improved by better liaison between the FSS and the police and other investigative agencies. The approach to the training of SOCOs that we recommend should ensure that there is a sound basis for communication between the two services.

42. The FSS also drew to our attention the problem, which goes wider than the training and management of SOCOs, of how the police should distinguish those cases which would benefit from analysis in a forensic science laboratory from those which do not call for scientific investigation. We refer in paragraph 44 of chapter two to two initiatives of the Association of Chief Police Officers in conjunction with the forensic science services which are designed to address these problems and recommend that these be vigorously pursued.

## Prosecution

43. Our concern for adequate means of liaison and communication applies also to the relationship between the CPS, and any counsel briefed by them, on the one hand and the forensic science and other similar services on the other. The research by Roberts and Willmore to which we have referred<sup>12</sup> found that, if the police decide at an early stage that forensic science assistance is not required, the CPS can find it difficult to reverse that decision when the case reaches them. In any event it may then be far too late. This is not only a matter of liaison between the CPS and the forensic science services; the exhibits concerned will usually be in the hands of the police, who may decline to accede to the CPS's request that they be sent to the laboratories for analysis. The recommendations that we make in chapter five on the relationship between the CPS and the police should go some way to solving this difficulty, where it occurs. There is also, however, a need for the CPS to be open to the possibility of wider consultation with the forensic science services in suitable cases and to recognise the need to understand the implications of the scientific evidence that is available.

44. This should in turn lead to identification of those cases where consultation is necessary between forensic scientists and the barrister who is to present the case. Forensic scientists told us that such consultation almost always takes place between defence counsel and defence experts, but they complain that this is far less frequent between prosecution counsel and forensic scientists. This may have serious consequences because, if consultation does not take place when it should, there may be confusion in the presentation of the prosecution case. We recommend that every opportunity is taken of ensuring by means of case conferences (over the telephone where appropriate) that prosecution counsel are fully aware of the implications of any scientific evidence in the case. The need for this is recognised by the Bar's Code of Conduct which, although it discourages barristers from interviewing witnesses generally, makes a specific exception for expert witnesses.

45. Where the police or CPS have had the exhibits in a case sent to a forensic science laboratory for analysis, the requirements on the prosecution to disclose their evidence to the defence operate with particular force. Sir John May's

<sup>11</sup> *The Role of Forensic Science Evidence in Criminal Proceedings*, Royal Commission on Criminal Justice Research Study No. 11, London HMSO, 1992.

<sup>12</sup> See paragraph 41, note 11.

Inquiry into the case of the Maguires<sup>13</sup> and the Court of Appeal judgment in the case of Judith Ward<sup>14</sup> demonstrate the serious risk of a miscarriage of justice if the fullest possible disclosure of scientific evidence is not made by the prosecution to the defence. Forensic scientists are therefore under a categorical obligation to disclose to the police, and the police to pass on to the CPS, all the scientific evidence that may be relevant to the case.

46. This duty of disclosure extends to anything which might arguably assist the defence and is not limited to the documentation on which the findings or opinions of the forensic scientist are based. Following disclosure, the defence are entitled to access to notebooks and test results and to information about similar evidence discovered in other or related cases, especially where this tends to undermine the identification of the defendant as the offender. We interpret the Court of Appeal judgment in *Ward* as meaning that, if expert witnesses are aware of experiments or tests, even if they have not carried them out personally, which tend to disprove or cast doubt upon the opinions that they are expressing, they are under an obligation to bring the records of them to the attention of the police and prosecution.

47. Although in some respects, as we have argued in chapter six, the present requirements on the prosecution to disclose are excessive, we have no hesitation in endorsing the main thrust of the Court of Appeal's judgment in *Ward* as regards the disclosure of scientific evidence. We are pleased to be able to report that this is also accepted by the public sector laboratories concerned and, for example, we were told on our visit to the DRA that steps had long been in place to prevent a recurrence of the kind of non-disclosure criticised by the Court of Appeal in *Ward*. We welcome this. It is clearly wrong that test results should be concealed where they may affect the validity of the evidence that the prosecution expert is giving.

48. If the defence believe that there may be material at the laboratory which throws doubt on the tests on which the prosecution is relying, they should in our view be entitled to have access to the original notes of the experiment in order to test that belief. We believe that this is in fact the position, since we have been told by defence experts that they now have full access to everyone and everything relevant to the case in question. We have been told by the DRA that issues of public interest immunity seldom arise, although inevitably there are some areas of their work which may cause problems. For example, the DRA would be reluctant, and rightly so, to publicise the reasons why terrorist devices had failed to explode in case the information proved helpful to terrorists in future. We expect, however, that the recommendations that we have made in chapter six on the disclosure of sensitive matters by the prosecution will be able to deal with such problems as and when they arise.

## The defence

49. It is in the nature of the investigative process that the police or other investigating agency will be the first on the scene of the crime, will have the best opportunity of surveying it in order to decide what if any exhibits should be taken for forensic scientific analysis, and will be the first to be informed of the results of any scientific work done on those exhibits. The defendant's representatives, on the other hand, will be at a significant disadvantage in these respects. In most cases the defence are in the position of having to respond to whatever scientific evidence the prosecution is able to collect. Even here they may be in some difficulty since, as some witnesses informed us, it can be difficult for the defence to know where to go for advice on forensic science matters and there may be long delays over obtaining legal aid to cover the cost, not to mention lack of clear guidance over what matters any grant of legal aid covers.

50. In the specific field of DNA evidence, a study was carried out for the Commission by Beverley Steventon<sup>15</sup> in which she examined problems

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<sup>13</sup> See chapter one, paragraph 3, note 1.

<sup>14</sup> See chapter six, paragraph 44, note 21.

<sup>15</sup> *The Ability to Challenge DNA Evidence*, Royal Commission on Criminal Justice Research Study No. 9, London HMSO, 1992.

experienced by a small sample of solicitors who had acted for the defence in cases involving DNA evidence. Although all 34 defence solicitors who had sought an independent expert had been able to find one, in three cases the defence lawyers had experienced difficulty in locating a suitable expert, and in one case an application for legal aid to cover the cost of DNA profiling work was refused. Similar problems in other fields were reported in the research by Roberts and Willmore<sup>16</sup>, who found that defence solicitors generally had little experience of contesting scientific evidence and that arrangements for locating defence experts were haphazard and *ad hoc*. Problems in securing authorisation from the Legal Aid Board acted as a further discouragement.

51. Many of these problems would be alleviated by implementation of our recommendation on defence access to public sector laboratories (paragraph 24 above), and by development of the present arrangements for public sector laboratories to do work for the defence (paragraph 24) or, if unable to do so, to give advice on where it might best be done (paragraph 26) and for prosecution disclosure (paragraphs 46 and 47). We doubt, however, whether it is feasible to provide for the attendance of potential defence experts in serious crimes in general. In many cases the defendant will not have been identified at the time that the investigation of the scientific evidence begins and the appointment of a scientist to represent the defence at that stage would tend to pre-empt the defendant's own choice. In any case we doubt whether sufficient scientists could be made available.

52. We recommend that, when exhibits are taken for analysis, regard should be had to the potential need for the defence in due course to do tests on the same material. This means that, where this is practicable, sufficient material should be collected for the purpose. Similarly the scene of the crime should be kept undisturbed as far as practicable until such time as it can be examined by the defendant's legal and scientific representatives should they so wish. We accept that this will often be impracticable, in which cases photographs and video recordings of the scene of the crime should be routinely taken and given to the defence. We further recommend, where scientific material is in the hands of the prosecution and where a suspect has been charged and is legally represented, that the defence should have an enforceable right to observe any further scientific tests conducted on it or, unless the material exists only in minute quantities, the right to remove some of the material, subject to proper safeguards, so that tests can be carried out by defence scientific experts.

53. The ability of the defence to consider and challenge expert scientific evidence depends crucially on the availability of legal aid. From what we have been told, the present arrangements are far from satisfactory. The main issue is one of promptness of payment. It is unacceptable that, where scientific work is commissioned by the defence in a case, either the solicitor or the scientist is left unpaid for long periods (sometimes for a year or more). We have been told even by public sector laboratories that legal aid delays are a deterrent from taking on work for defendants. We therefore believe that similar criticisms made by other witnesses are well directed.

54. We recommend that, where legal aid claims are made in advance of scientific work being commissioned, they are processed and paid promptly and at least interim payments are made. We do not, however, see why scientific work on behalf of the defence should, if legal aid has been granted for the case as a whole, necessarily have to wait for additional specific approval. It should be possible to lay down clear rules as to what defence solicitors can commission, once legal aid has been granted for the case as a whole, without waiting for such approval. Solicitors should be free to proceed within such rules in the knowledge that, provided the costs do not exceed a stated figure, they will be paid. Where approval is required, it must be dealt with promptly.

55. Nothing in what we have said is intended to imply that there should not be a thriving private sector of forensic science firms to which the defence should have

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<sup>16</sup> See paragraph 41, note 11.

access if they so wish. We recognise that in the eyes of many defendants the public sector laboratories will continue to be identified with the prosecution. Even where this is not so, there may be a feeling that a scientist from a public sector laboratory may be less experienced at looking for evidence or an interpretation of it that will favour the defendant. The defence in our view should have complete freedom to choose between the private and the public sector and, where available, university departments, in this respect. We recommend that the new Council keep under review the extent to which the interests of the defendant are being properly looked after by all these sectors, singly and in combination.

## The pre-trial phase

56. It is our belief that, in cases involving scientific evidence, the pre-trial phase should be used to sort out and define as many scientific issues as possible and to consider where appropriate the best means of resolving (for example by further scientific tests) any matters that may be disputed. There will remain matters of disputed interpretation that can only be resolved by the jury. But the objective should be to ensure that, before the issues are presented to the jury, everything possible has been done to clarify the scientific evidence and to identify the extent of agreement between the expert witnesses on matters of scientific fact and interpretation, or at least to narrow the differences between them.

57. Of the contested cases covered by the Crown Court Study, a sizeable minority involved scientific evidence. Although participants differed in their assessments of the proportion of cases which involved such evidence<sup>17</sup>, most estimates ranged between 30% and 40%: if these figures are broadly representative, this would mean that there may be some 10,000 or so cases a year in the Crown Court involving some form of scientific evidence. Participants agreed that where there was such evidence it was “very important” in almost one half of the cases and “fairly important” in over a third. In about three-quarters of the total cases, it was not contested because there was no basis for any challenge. According to defence barristers, the evidence went unchallenged in two-thirds even of the “very important” cases. But there was a defence challenge to the scientific evidence in about a quarter of the cases in which there was scientific evidence. On the basis that this would represent about a quarter of a third of all contested cases it would mean around 2,500 cases a year in the Crown Court. In two-thirds of the cases where there was a challenge, it took the form only of cross-examination of the prosecution expert. In the remainder, which would represent about 800 cases a year, there was both cross-examination and a defence expert was called or that expert’s evidence was read to the court. But although a defence expert is called as a witness only relatively rarely, the defence may nevertheless have an expert to assist them both before the trial and during it. In the study by Steventon<sup>18</sup>, the author reported that although approximately two-thirds of the 34 defence lawyers in her sample had contested DNA evidence in court, expert witnesses had been called by the defence in only three cases.

58. The Crown Court Study found that, even where the defence led scientific expert evidence of their own, it was rare for any attempt to be made to bring both sides together in order to see what scope there was for reaching agreement on scientific issues before the trial. The Study also showed that there was an appreciable degree of late submission of evidence by the defence in contravention of the Crown Court (Advance Notice of Expert Evidence) Rules 1987 (according to the prosecution barristers in at least two-thirds of the cases which involved a defence expert giving evidence to the court). In most cases where the defence disclosed its scientific evidence late it seemed to cause no difficulties for the prosecution. But there was a small number of cases in which the prosecution barrister said there was insufficient time to do tests that were needed. These cases were 1% of those in which the prosecution barrister said that there was scientific evidence, or 0.4% of all contested cases—this might amount to some 120 cases a year.

<sup>17</sup> Part of the explanation for these differences of view is that the question to the various categories of respondent was phrased slightly differently.

<sup>18</sup> See paragraph 50, note 15.

59. It seems to us therefore that, in a minority of cases where the scientific evidence is contested, not enough is done to ensure that the case is properly prepared in a way that will ensure its clearest possible presentation before the jury. It is true that in the cases covered by the Crown Court Study, jurors themselves claimed to have understood the scientific evidence without much difficulty<sup>19</sup>. But if scientific evidence is inaccurate, insufficiently understood, not disclosed, or misinterpreted, a major miscarriage of justice case may ensue with extremely serious consequences for the defendant. We believe therefore that it is very important that measures should be taken to improve the preparation of the minority of cases, however small in percentage terms, in which there is a risk of a miscarriage of justice if the judge, jury and counsel are not able fully to grasp the implications of the scientific evidence and the grounds on which it is disputed.

60. It is our view that the procedures that we have outlined in chapter seven for better preparation for the trial have a particular application to cases in which scientific evidence is in question. Those procedures, which we emphasise do not call for formal hearings in more than a very small minority of cases, should always be applied to cases in which scientific evidence is being led, whether by the prosecution or by the defence. As we explain below, we recommend that, if the defence intend to dispute the prosecution's scientific or other expert evidence, they should give advance notice of the grounds on which they dispute that evidence, whether or not they intend to call expert evidence of their own. At present advance notice has to be given only of expert evidence that the defence intend to call. We believe that extension of the rule would be desirable and appropriate given the special status of expert evidence and of expert witnesses.

61. Advance disclosure by the defence of scientific evidence is already required by the Crown Court (Advance Notice of Expert Evidence) Rules 1987, to the extent that the defendant must disclose, as soon as practicable after committal, a statement in writing of any finding or opinion of an expert upon which he or she proposes to rely. This requirement also applies to the prosecution. If, however, a defendant decides not to call expert evidence but to rely simply on discrediting the expert evidence adduced by the prosecution, he or she may do so without revealing the details of any tests that the defence may have commissioned from scientific experts but which have tended to confirm the prosecution case. It may also happen that, where the defence does lead scientific evidence, it does so after consulting a number of experts not all of whom agree with the expert who gives evidence. The jury, however, does not have to be told of these dissenting views: it hears only the expert whom the defence calls.

62. In the course of their judgment in the case of Judith Ward<sup>20</sup>, the Court of Appeal summarised the principles of law and practice which at the present time govern the disclosure of evidence by the prosecution before trial. The Court said that defence experts are under the same obligation as prosecution experts when it comes to disclosure of the results of experiments or tests which tend to cast doubt upon their evidence. This applies where the defendant is calling his or her own expert evidence. Where the defence are not calling such evidence we make no recommendation that they should have to disclose evidence which they are

<sup>19</sup> 94% of judges who expressed an opinion in the Crown Court Study said that the scientific evidence was readily understandable by the jury. In cases involving scientific evidence 56% of jurors said that the scientific evidence was not at all difficult to understand and 34% said that it was "not very difficult". 9% thought that it was "fairly difficult" and 1% that it was "very difficult".

<sup>20</sup> The following extract is taken from pages 135 and 136 of the judgment:

"In relation to the evidence of expert witnesses, both for the prosecution and the defence, the Crown Court (Advance Notice of Expert Evidence) Rules 1987 now require that any party to the proceedings in the Crown Court who proposes to adduce expert evidence must, as soon after committal as possible, furnish the other party with a written statement of any finding or opinion of which he proposes to give evidence . . . What the rules do not say in terms is that if an expert witness has carried out experiments or tests which tend to disprove or cast doubt upon the opinion he is expressing, or if such experiments or tests have been carried out in his laboratory and are known to him, the party calling him must also disclose the record of such experiments or tests. In our view the rules do not state this in terms because they can only be read as requiring the record of *all* relevant experiments and tests to be disclosed. It follows that an expert witness who has carried out or knows of experiments or tests which tend to cast doubt on the opinion he is expressing is in our view under a clear obligation to bring the records of such experiments or tests to the attention of the solicitor who is instructing him so that it may be disclosed to the other party."

not intending to call, believing that it must be for the defendant to decide what evidence to give on his or her behalf<sup>21</sup>.

63. Where the defence are calling their own expert evidence, we recommend that the expert witnesses on both sides be required to meet, on their own or in the presence of counsel or solicitors, in order to draw up a report of the scientific facts and their interpretation by both sides. After this report has been inspected by counsel, and subject to any further discussion between them, the document will be available to be put to the court as a written account of what has been agreed or remains in dispute. If as a result of the discussions between the experts and between counsel, substantial disagreement on the scientific evidence is recorded in the report, a preparatory hearing should normally be arranged so that both parties can discuss, in front of the judge, how best to clarify and if possible narrow down the areas of dispute, possibly by agreeing to further scientific tests.

64. Where the defence do not dispute the prosecution scientific evidence, we recommend that they should indicate this when counsel for both sides certify that they have discussed the case between them and notify the agreement, or lack of it, that they have reached on the issues. Where the defence do intend to dispute the evidence but not to call expert evidence on behalf of the defendant they should, after disclosure of the prosecution's expert evidence, indicate which matters in that evidence are admitted, which are not admitted and, when they are not admitted, in which respects. For example, they may suggest that there are weaknesses in the scientific facts, theory, methodology or interpretation relied upon, or that certain alternative tests, theories or procedures are worthy of consideration. Whatever response they make to the prosecution expert evidence must be sufficient to enable the prosecution to see which areas of their expert evidence are in dispute and to put the Crown in a position where they can adequately identify the issues and, if they so wish, seek a preparatory hearing before a judge at which the issues can if possible be further clarified.

65. Five of us would go further and require defence experts to participate in the pre-trial discussions as outlined in paragraph 63, whether or not they are to be called as witnesses. The reason for this is that, although it is rare for defence experts to be called, they are used extensively by the defence in preparing its case. So to allow the defence to deny participation of such experts in the pre-trial procedure, on the grounds that they are not to be called, would largely nullify the effect of the reforms that we propose in this chapter and which derive from our wish, as we said in chapter one, to move the system in an inquisitorial direction in the case of forensic scientific evidence.

66. There will be the occasional case where the prosecution are not proposing to lead any expert evidence but the defence wish to call such evidence themselves in order to exonerate the defendant or to cast doubt on the prosecution case. In such a case the prosecution should be under the same obligations as the defence would be in the reverse situation. That is to say, if not calling any expert evidence of their own, they should be required to disclose their response to the defence's expert evidence in the same way as the defence would be under the proposals that we make in paragraph 64 above.

67. We have considered whether judges should be given the power at this stage to order further scientific tests to be done or whether they should direct that the opinion of an independent third party should be sought. We have, however, come to the conclusion that such a procedure might well add greater complexity to the pre-trial and trial phases, because it would be necessary for the third expert to be subjected to examination and cross-examination by both sides, without necessarily bringing about any decisive answer to the questions in issue. We recommend therefore that it be left to the parties to sort out by whatever means seem best to them, including further tests or consultation if appropriate, any

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<sup>21</sup> See, however, paragraph 65 for the view of a minority of us on the participation of defence experts in pre-trial discussions whether or not they are to be called to give evidence.

conflicts in the scientific evidence. The judge should, however, be free to direct them to discuss and resolve any outstanding questions in whatever way they think fit. This may mean no more than a definition of the issues that will have to be subject to examination and cross-examination before the jury at the trial. Even so, much may have been gained if the process keeps the issues in dispute to a minimum and ensures that they are put before the jury in as comprehensible a way as practicable.

68. As we have said, we do not envisage that it will be necessary to have a preparatory hearing in all cases where scientific evidence is being called or even where it is in dispute. We do, however, believe that there should be an expectation that such a hearing should take place unless both parties are in a position to certify that it is unnecessary, usually because they have agreed on what the scientific evidence is and on the inferences to be drawn from it. There may be cases in which, after such an agreement has been certified, fresh evidence comes to light which the prosecution or the defence wish to lead at the trial. We see no objection to this provided that the evidence is disclosed in accordance with the time limits and the party concerned gives an adequate explanation at the trial to the judge. Failure to do so should attract adverse comment from counsel and the judge.

69. We recommend that the present time limits for disclosure of expert evidence before trial should be more rigorously applied, with costs being awarded against solicitors and counsel if they are to blame for late service of the necessary statements. The recommendations that we have made above to enhance access by the defence to forensic scientific expertise where required and the timely grant of legal aid for this purpose should enable defendants to meet their disclosure obligations more readily in the future. Where the defendant rather than his or her representatives is to blame, for example because he or she was slow to provide samples for analysis, then adverse comment on the late production of the evidence should be permitted more readily at trial. If, as we recommend, committal proceedings are abolished, the necessary time limits will have to be redefined as either a given period of time after service of the prosecution case statements or perhaps a given period of time before the date of the trial. We much prefer the former.

## The trial

70. We were told by forensic scientists and other expert witnesses that in their view the trial process was ill-suited to the objective presentation of expert evidence. The process of examination and cross-examination is, according to this view, sometimes exploited by skilful counsel in such a way as to give to the evidence a slant that is neither objective nor scientific. Some of the Forensic Science Service (FSS) respondents who participated in the study by Roberts and Willmore<sup>22</sup> were critical of the fact that counsel for the prosecution were sometimes ill-prepared and did not assist them in bringing out the salient aspects of their evidence. Some also expressed the view that defence lawyers frequently appeared to lack sufficient understanding of scientific evidence to enable them to subject it to adequate scrutiny or to highlight its limitations. We have already stated our firm belief that, where there is a dispute over the scientific evidence, expert witnesses must expect to have their evidence tested in examination and cross-examination in the same way as other witnesses. It cannot be said that, simply because it has been given by an expert, the evidence is necessarily correct or, indeed, credible. Serious miscarriages of justice may occur if juries are too ready to believe expert evidence or because it is insufficiently tested in court. We believe that the overall aim in this area should be the objective presentation of expert evidence in a way which jurors who are not themselves experts can reasonably be expected to follow.

71. As part of this aim, we recommend that far more use is made of written summaries of such expert evidence as is not contested. All too often, expert

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<sup>22</sup> See paragraph 41, note 11.

evidence is given orally by witnesses in order, it would seem, to enhance the value of the evidence in the eyes of the jury. But where the defence have agreed the evidence, there should be no question of cross-examination and the attendance of the witness and his or her appearance in the box is unnecessary. We have been told that nevertheless some judges insist on the appearance of expert witnesses in such circumstances because they believe that this makes the trial more comprehensible to the jury. We do not, however, agree that such a course is necessary or justified. We therefore recommend that, where the expert evidence is agreed, it should be presented to the jury as clearly as possible, normally by written statement. It would be for counsel to speak to such a statement in their opening and closing speeches.

72. Where the evidence is in dispute and the expert witness goes into the witness box, his or her evidence can often be greatly assisted by the use of visual and other technical aids and we recommend that these are used wherever possible. Such aids should also be used in support of better training for both counsel and experts.

73. As we have said, many experts feel that they are not always given a proper opportunity to explain what the scientific evidence really means. This may be because counsel stop short of asking vital questions from lack of scientific knowledge or inadequate briefing or because they make inadequate use of the opportunity to re-examine after cross-examination or because they do not want the answer to be heard. We recommend that trial judges, where the evidence is disputed, ask expert witnesses before they leave the witness box whether there is anything else that they wish to say. To avoid inadmissible evidence being heard, the judge should put this question in the absence of the jury and, if the expert witness does indicate a wish to clarify the evidence, it should be heard before the jury returns. If the judge is satisfied that there can be no objection to the evidence, it should be put before the jury. Expert witnesses should on the same basis be readier to ask the judge to be allowed to add to what they have said in examination or cross-examination in order to make themselves clear. They might best do this by telling their solicitor on leaving the witness box that they wish to clarify the evidence just given. The solicitor would be under an obligation to inform counsel and counsel to tell the judge. The judge would then explore the admissibility of the evidence in the absence of the jury as we propose above and, if appropriate, the witness would be recalled to clarify the earlier evidence.

74. Some of our witnesses would go further than the recommendations we have made above. In their view expert evidence should be given by a court expert, either instead of or in addition to the experts who appear for the prosecution and the defence. Alternatively, some would recommend that judges should sit in the relevant cases with an expert assessor or assessors. We have considered these suggestions but are not in favour of them. A court expert, even if subject to examination and cross-examination, would by implication carry more weight than an expert for the prosecution or the defence. There would, however, be no guarantee that he or she was any nearer to the truth of the matter than the expert witnesses for the parties. A court expert should not in our view be the only expert, since that would deprive the parties of the opportunity of leading their own expert evidence. But to have a court expert in addition to the experts for the parties would greatly extend the amount of time spent in examination and cross-examination of all three experts without making discovery of the truth any more certain. The worst solution of all, in our view, would be to have the expert sitting with the judge as an assessor, since his or her evidence would not be susceptible to examination or cross-examination by either side.

75. Expert witnesses need to be identified as such by reference to their experience and qualifications. At present, this is a matter for the courts to assess and we think that it should continue to be so. The courts should be guided, where there is any doubt, by whether the witness possesses a professional qualification guaranteed by membership of the appropriate professional body or the possession of a relevant professional or vocational degree, diploma or certificate. We see no need for a system of statutory certification or accreditation

of expert witnesses nor for the maintenance of a register of experts by a Government Department. We do, however, recommend that the professional bodies assist the courts in their task of assessment by maintaining a special register of their members who are suitably qualified to act as expert witness in particular areas of expertise. We do not see professional bodies as guaranteeing the competence of individuals. But they might be asked to give advice to legal representatives on the qualifications that witnesses should hold if they are to be considered expert in a particular field.

76. If a statutory code of practice is in due course introduced, it might include or be combined with a system of accreditation overseen by the new Council, and would be a further factor that the courts could take into account when called upon to make a decision as to whether a particular witness was to be regarded as an expert witness or not. We would not, however, go so far as to say that the courts should necessarily exclude a witness who was not accredited under such a system.

77. We have already noted<sup>23</sup> the increased readiness of the courts following the Court of Appeal judgment in *Silcott, Braithwaite and Raghip* to admit expert evidence from psychologists and psychiatrists on whether the defendant suffers from a degree of mental impairment or other mental disorder severe enough to affect the reliability of confession evidence. This is an important development, which we welcome.

78. It has been brought to our attention that, because of the rules on hearsay evidence, an expert witness may not strictly speaking be permitted to give an opinion in court based on scientific tests run by assistants unless all those assistants are called upon to give supporting evidence in court. It seems to us that this rule is badly in need of change and we recommend that it be considered by the Law Commission as part of the review of the rules of evidence that we recommend in chapter eight. Meanwhile, although the defence must have the right to examine the assistants of expert witnesses if it so chooses, we look to the courts and to the parties to make maximum use of the facility to present the evidence of assistants in written form until such time as the law is changed. Any unreasonable exploitation of the system should be met by sanctions against the counsel concerned if he or she is found to be responsible.

79. We have already commented in chapter eight on the need for lawyers who practise at the Criminal Bar to be familiar with forensic scientific and other expert issues. This familiarity should be promoted by interdisciplinary exchanges involving barristers, solicitors and experts. Vocational training and continuing education of criminal lawyers might also include, among other things, two or three days in a forensic science laboratory.

80. This chapter has mainly been addressed to the forensic science system and to the way in which forensic scientists give evidence. It is, however, also relevant to expert witnesses in other fields, for example psychiatry, psychology, fingerprints and handwriting. What we have recommended on the clarification of issues before trial and on the presentation of the evidence at trial applies just as much to other fields of expertise as to forensic science.

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<sup>23</sup> See paragraph 39, note 10.

# Chapter Ten: Court of Appeal

## General

1. We are asked in our terms of reference to consider whether changes are needed in the role of the Court of Appeal in considering new evidence on appeal, including directing the investigation of allegations. We have not, however, confined our examination to these issues since they cannot readily be separated from the role of the Court of Appeal in hearing appeals against conviction in general. The performance of the Court of Appeal is crucial to the early correction of miscarriages of justice, whether these have resulted from the jury not having some relevant evidence before it, or having some false evidence called before it, or coming to what has to be accepted as the wrong verdict on the evidence it did hear. Appeals against sentence fall outside our terms of reference. Our recommendations are therefore confined to appeals against conviction.

2. The Court of Appeal was set up by statute in 1907 after decades of debate over whether it was right to provide any means (other than the Royal Prerogative of Mercy in extreme cases) of overturning the verdict of the jury. The present possible grounds of appeal are contained in section 2(1) of the Criminal Appeal Act 1968. We have found this subsection confusing if only because the grounds of appeal that it contains overlap with each other. In our view it needs redrafting. Some of us think that a redrafted subsection should provide for appeals to be determined on the basis of a single general test, such as whether the conviction “is or may be unsafe”. Others of us believe that the grounds need specifically to reflect the different categories of appeals. We have not, however, thought it appropriate to redraft section 2 ourselves.

3. In its approach to the consideration of appeals against conviction, the Court of Appeal seems to us to have been too heavily influenced by the role of the jury in Crown Court trials. Ever since 1907, commentators have detected a reluctance on the part of the Court of Appeal to consider whether a jury has reached a wrong decision. This impression is underlined by research conducted on our behalf. This shows that most appeals are allowed on the basis of errors at the trial, usually in the judge’s summing up. We are all of the opinion that the Court of Appeal should be readier to overturn jury verdicts than it has shown itself to be in the past. We accept that it has no means of putting itself in the place of the jury as far as seeing and hearing the witnesses is concerned. Nevertheless, we argue in this chapter that the court should be more willing to consider arguments that indicate that a jury might have made a mistake. We also believe that the court should be more prepared, where appropriate, to admit evidence that might favour the defendant’s case even if it was, or could have been, available at the trial.

4. Most appeals against conviction are, as we have said, allowed because of errors at trial. While we accept that a conviction ought not to stand in cases where the error is such that it might well have affected the jury’s verdict, that does not in our view mean that the appellant should automatically walk free. The Criminal Appeal Act 1968 as amended in 1988 now gives the court a very wide power to order retrials. We think that this should encourage the court in cases where a material error has occurred to overturn verdicts more readily and to order a retrial.

5. We have considered certain procedural matters including, as our terms of reference require, whether the court should have any role in directing post-trial investigations, and we make certain recommendations on the composition of the court and on the limited matters on which there can be an appeal to the House of Lords. We have also considered whether there should be a right of appeal against an acquittal.

### Applications for leave to appeal against conviction

6. A convicted person must apply for leave to appeal to the Court of Appeal, except where the appeal is on a point of law alone or the trial judge has granted a certificate of leave to appeal, both of which are rare occurrences. The application for leave to appeal is usually considered in the first instance by one judge who is known as the single judge<sup>1</sup>. This consideration takes place on the basis of a written application for leave and any supporting material sent with it. There is usually no hearing before the single judge<sup>2</sup>. If the single judge refuses the application, it may be renewed. If it is renewed, the application will usually be considered by the full court, consisting of three other judges, again generally on the papers, but this time their decision will be given in open court. If, however, the applicant is legally represented, the renewed application will be considered by the full court and there may be oral argument. If leave is then granted, the appeal itself is heard by the full court.

7. This sifting process excludes large numbers of potential appellants. In 1992, according to figures supplied to us by the Criminal Appeal Office, there were 14,661 persons convicted at the Crown Court after a not guilty plea, and 1,552 who had applications for leave to appeal against conviction considered by the single judge<sup>3</sup>. Of these, 514 (33%) had their applications granted, 1,022 (66%) had their applications rejected, and 16 (1%) had their applications referred to the full court. Of those rejected by the single judge, 406 (or 40%) renewed their application to the full court, and of these 50 (12%) were granted leave by the full court. This means that, of those applying for leave, 36% were granted it and 64% were refused it. Of the 669<sup>4</sup> appeals against conviction heard by the full court, 299 (45%) succeeded. The overall picture, therefore, is that few defendants seek to appeal against conviction and of those who do, few are granted leave to appeal. But the success rate of those whose appeal reaches the full court is relatively high.

8. The facts regarding appeals are not adequately set out in the annual *Judicial Statistics* or *Criminal Statistics*. In addition to the data now presented, we believe that one or other of these publications should show the annual breakdown of how many applicants:

- (a) apply for leave to appeal against conviction to the single judge;
- (b) succeed or fail in such applications;
- (c) renew their applications to the full court;
- (d) succeed or fail in such renewals;
- (e) have their cases heard by the full court; and
- (f) the result—conviction quashed, retrial ordered, conviction upheld, or other disposition. The figures should present separately the data on appeals against sentence.

9. A research study<sup>5</sup> undertaken on our behalf by Kate Malleson showed, as might have been expected, that both applications for leave to appeal to the single

<sup>1</sup> In exceptional cases the application for leave will not go to the single judge but will be considered by three judges.

<sup>2</sup> Unless the applicant has applied for bail and is represented by counsel or solicitors privately paid or acting without a fee. Legal aid is not granted for a hearing before a single judge.

<sup>3</sup> Many of these appeals will have related to persons convicted in earlier years.

<sup>4</sup> This figure includes some applications in which leave to appeal was granted in previous years.

<sup>5</sup> *A Review of the Appeal Process*, Royal Commission on Criminal Justice Research Study No. 17, London, HMSO 1993.

judge and renewals to the full court are distinctly less likely to succeed where the appellant is unrepresented. Malleson examined 84 cases in which applications for leave to appeal refused by the single judge were renewed for consideration by the full court. Where the applicant was not represented by counsel, leave was granted in 9 cases out of 47 (19%), as compared with 21 cases out of the 38 (55%) where the applicant was represented by counsel. A small internal survey carried out by the Criminal Appeal Office in the last three months of 1990 reached a similar conclusion: it found that 48% of applications succeeded where the applicant was represented but only 15% when he or she was not. It should be remembered that most who are legally represented on an application will have been advised that it has at least some chance of success.

10. By contrast, many of those who try to appeal without legal representation have already had legal advice that they have no grounds of appeal. Any defendant who has legal aid for a trial in the Crown Court (which 99%<sup>6</sup> do) is entitled to advice as to whether he or she has grounds of appeal. If barristers advise that there are grounds, they are required also to draft them. If the barrister has advised that there are no grounds, he or she will normally decline to assist further and the applicants, unless assisted by their solicitor, will have to draft their own grounds. It would, however, be unwise to assume that in every case where counsel advise would-be appellants that they do not have good grounds for appeal, the case is therefore bound to be without merit.

11. In a study carried out on our behalf, Joyce Plotnikoff and Richard Woolfson<sup>7</sup> looked at the arrangements for providing legal advice and information about the appeals process in the 28 days following conviction or sentence at the Crown Court. Their study revealed a pattern of uneven provision of advice, variable quality of service, and misunderstanding of the powers of the Court of Appeal. There were found to be defects both in the practice of the profession and in the three relevant guidance documents, one produced by the Court of Appeal<sup>8</sup>, the other two by the Bar Council and the Law Society under the auspices of the Efficiency Commission<sup>9</sup>. All three guidance documents make it clear that at the end of the case it is the duty of the lawyers to see the client and to offer him or her at least provisional advice. The Criminal Appeal Office's Guide also includes a statement<sup>10</sup> that solicitors should include with the brief a separate form of instruction to counsel to give the defendant advice and assistance on appeal against any conviction or sentence. A model text for such separate instructions is set out in Appendix 1 to the Criminal Appeal Office's Guide. This requires counsel to give written advice on appeal not more than fourteen days after the hearing.

12. The Law Society's Guide, however, makes no mention of Appendix 1 or of the need to instruct counsel to advise the client regarding the possibility of an appeal at the end of the case. Solicitors therefore only rarely include Appendix 1 or any equivalent in their instructions to counsel.

13. The researchers found that, according to the prisoners in their sample, 9% had not been visited by the lawyers in the cells at the end of the case and a further 23% said that they had been visited at the end of the case but an appeal had not been discussed. The researchers also found that nearly 90% of the solicitors and barristers who responded said that they never handed anything in writing about an appeal to their client during a cell visit.

14. We regard these as serious matters. We recommend that both branches of the profession take all necessary steps to ensure that practitioners not only

<sup>6</sup> *Judicial Statistics*, London HMSO, 1992, Cm 1990, table 10.5, page 94.

<sup>7</sup> *Information and Advice for Prisoners about Grounds for Appeal and the Appeals Process*, Royal Commission on Criminal Justice Research Study No. 18, London, HMSO 1993. The study was based on questionnaires distributed to 2,242 prisoners who had recently completed 28 days following sentence or conviction and also to 500 solicitors, 110 barristers and 48 legal aid officers (prison officers specially designated to provide advice on legal aid to prison inmates).

<sup>8</sup> *A Guide to Proceedings in the Court of Appeal Criminal Division*.

<sup>9</sup> Both are entitled "*The Crown Court—A Guide to Good Practice*".

<sup>10</sup> At paragraph 1.2 of the Guide.

perform their duty to see the client at the end of the case, as most do, but also give preliminary advice both orally and in writing. It would seem helpful in this regard if solicitors as a matter of course included in their instructions to counsel Appendix 1 or its equivalent of the Guide issued by the Criminal Appeal Office. This we suggest should become a standard part of every brief in a criminal case.

15. The various Guides should make it plain that the duty to see the client for the purposes of preliminary advice on appeals falls on both counsel and his or her instructing solicitor (or clerk). It is for counsel to give the preliminary advice on the prospects of an appeal. The lawyers' duty to see the client should be supported by giving the defendant the right to a cell visit at the end of the case. The Prison Service should ensure that prisoners are not taken away from the court precincts before such a cell visit takes place.

16. It is essential at this first stage that the prisoner be seen and told whether counsel provisionally thinks that there are or are not grounds of appeal or needs further time to consider the matter. Since defendants at the end of the case will often be in a distressed and confused state, and therefore not in a good position to receive advice, it is important that they should always be given this advice in writing following the format of Appendix 1 of the Guide. Defendants should be asked to sign a copy of the advice to signify that they have been seen by their lawyers. If, as will often be the case, the conviction and sentence do not occur on the same day, the obligation to see and advise the client applies at both stages.

17. Subsequently solicitors are under a continuing duty to advise their clients so that, if the client does wish to lodge an appeal, this is done within the statutory 28 days. The Law Society's Guide to Good Practice states that a written opinion from counsel should be available within 14 days of conviction but the Bar Council's Guide sets 21 days as the limit. This discrepancy should be resolved and the solicitor should correspond with and if necessary visit the client in prison in order to complete the paperwork in time. The researchers found that there was some confusion over whether this work by solicitors qualified for legal aid. We recommend that it be made clear that it does.

18. There are other matters on which the Guides to Good Practice are unclear and on which it seemed to the researchers that solicitors themselves were not always properly informed. For example, some prisoners seemed to be under the impression that the Court of Appeal had power, if it thought that the appeal was frivolous, to increase the sentence imposed by the Crown Court. No less than 52% of the solicitors in the sample also shared this misapprehension. Since the Court of Appeal's power to increase sentence was abolished in 1966, it is regrettable that so many solicitors dealing with criminal cases seem not to be aware of the fact. An explanation may, however, lie in the fact that the court does have the power, exercisable by the full court or by the single judge, to order that all or part of the time spent in custody pending the outcome of the appeal should not be counted as part of the appellant's sentence. In practical terms this may appear to the prisoner to be no different in effect from a power to increase sentence, as both result in a longer time being spent in custody. The existence of this power is potentially a substantial deterrent against lodging an appeal and 21% of the prisoners in the sample said that they had been deterred from appealing by the prospect of spending a longer period in custody.

19. In our view, as in that of the researchers, it is important that, if the time loss rules are to remain (a matter which we discuss below), the existing guidance should be as clear as possible. Many prisoners seem to believe that all the time spent in custody is likely to be lost if the court makes a time loss order. The fact is, however, that the power to order loss of time is seldom exercised<sup>11</sup> and, when it is, the maximum period ordered to be lost is in practice 28 days. We think it wrong that appellants who spend several months awaiting appeal should be left with the impression that if they fail, those months will be added to their

<sup>11</sup> In written evidence the Lord Chancellor's Department told us that in the period October 1990 to July 1991 5 time loss orders were made, each for 28 days.

sentences. Nor should they have reason to fear that the Court of Appeal will increase their sentence. None of the Guides is clear on this point and it is not mentioned in the Bar Council Guide at all. We recommend that the Court of Appeal issue a new practice direction on this matter. We recognise that one consequence of such a practice direction might be an increase in the number of applications for leave to appeal. If this were to be the case, we would regard it as an unavoidable result of correcting an important piece of misinformation common among prisoners.

20. Plotnikoff and Woolfson comment that no account is taken in the Guides of the need for interpreters to be employed where the convicted defendant does not understand English. They also note the need for the forms that the appellant may have to complete to be available in his or her language. The lack of such aids was mentioned by a sizeable proportion of the solicitors who replied to the researchers' questionnaires. While the case is before the court it is the court's responsibility to ensure that the defendant has an interpreter if he or she needs one. Once, however, the defendant has been convicted and is in prison he or she becomes the responsibility of the Prison Service. We recommend that prison governors be given adequate resources to enable them to provide interpreters for prisoners who do not speak English in order to facilitate their communication with their lawyers. Arrangements also need to be made by prisons to ensure that such interpreters are competent.

21. Plotnikoff and Woolfson gave particular attention in their study to the arrangements for enabling appellants serving prison sentences to pursue their appeals. They found that those arrangements were not working satisfactorily in all cases. In particular, a leaflet on appeals aimed specifically at inmates was not widely available, was not written in suitably plain English and was in some respects out of date. We endorse the researchers' recommendation that a policy document be produced by the Prison Service in consultation with the Criminal Appeal Office on the provision of assistance on appeals, including a commitment to interview every new inmate to ensure that his or her right of appeal is fully understood and that an inmate who wants information on how to appeal is given it, as well as advice on how to get in touch with his or her lawyer in confidence.

22. Plotnikoff and Woolfson found that 56% of solicitors had problems communicating with prisoners. The most common reason for this was the difficulty in locating the prisoner. Families of prisoners face similar difficulties. We deplore this and recommend that the Prison Service set up a reliable system for locating prisoners for this and other purposes. We further support the recommendation that improved arrangements be made for visits from lawyers and accordingly welcome the review of the arrangements for legal visits which, we have been told, is about to be undertaken by the Prison Service. We also endorse the researchers' recommendation that special assistance should be available for illiterate inmates. If these and other necessary improvements in the facilities for advice on appeals to prisoners are to be achieved, better support will need to be given to the prison officers who, in each prison department establishment, act as legal aid officers. We believe that better management, control, monitoring and training of these officers are urgently needed. We have been told that the Prison Service, with the assistance of the Criminal Appeal Office, has developed a new standardised training course for them which it hopes to launch in June 1993. We welcome this.

23. We have concluded that it would be unwise to abolish the present requirement to obtain leave to appeal. The full court would clearly be faced with an unmanageable task, including many applications without merit, if it were to be required to give a full hearing to any convicted person who decided to appeal. We have, however, been concerned by the disadvantages under which defendants labour in their applications for leave to appeal where they do not have legal advice. We therefore have some sympathy with the suggestion that appellants should have a right to legal assistance in presenting an application for leave to appeal to the single judge and in renewing a refused application to the

full court. Unfortunately, there are practical difficulties. On conviction a person who is legally aided has the right to legal advice about his or her prospects on appeal. If counsel advises that there are insufficient grounds for an appeal, he or she will not be in a position to draft grounds. If the defendant's solicitor agrees with counsel, he or she will also be unable to draft grounds of appeal. To change lawyers at that stage of the proceedings, however, could create a major extra burden for the newly appointed lawyers if they had to pick up the threads of a long or complex case. Furthermore, in cases where counsel has advised on the initial application but that has been turned down by the single judge, it is likely to be a misuse of public funds to provide legal aid for the renewal of that application to the full court, since in many cases the application will have no merit. Even if the court applied penalties in costs, a great deal of time could be wasted and meritorious cases delayed.

24. We are concerned about the position of the defendant whose barrister and solicitor for one reason or another have advised that there are no grounds of appeal. We understand that in limited instances the Criminal Appeal Office is prepared to grant legal aid to defendants who wish to change their barristers and we assume that that office will continue to take a sympathetic approach to individual cases that may have special features. We recommend that in addition convicted defendants should have the right to legal aid to enable their grounds of appeal to be drafted at the stage of the initial application by their solicitor in the very rare case where the solicitor does not agree with counsel that there are insufficient grounds of appeal.

25. Would-be appellants have an absolute right to renew an application for leave to appeal. In order to make this right effective they need legal advice. We recommend that the original entitlement to advice on appeal for those on legal aid should cover advice on whether to renew the application if it is rejected by the single judge. The legal aid system should make the necessary provision for this and the legal profession and the Criminal Appeal Office should ensure that the advice is given. But we see no need for change in the present arrangements for legal representation on renewal of the application to the full court except where counsel has advised in writing in favour of that renewal. In such cases we recommend that legal aid should always be granted for counsel to settle the grounds and then argue the application before the full court. We understand that this may not always be done at present.

26. The power of the Court of Appeal to order loss of time seems to us to be necessary as a means of discouraging appeals that have no merit. It is a weaker sanction than the Crown Court's power to increase sentence in appeals from the magistrates' courts. We recommend, as stated above, that clearer information should be provided about the operation of the time loss provisions. We further recommend that the length of the sentence and the relative lack of merits in any grounds of appeal should be factors in determining the numbers of days lost. The maximum should be 90 days. Provided they are operated openly and fairly in this way, we can see no objection to the retention of the time loss provisions as a means of deterring appeals that are without merit.

## Consideration of appeals

27. Subsection 2(1) of the Criminal Appeal Act 1968 requires the Court of Appeal to allow an appeal against conviction if it thinks

- “(a) that the verdict of the jury should be set aside on the ground that under all the circumstances of the case it is unsafe or unsatisfactory; or
- (b) that the judgment of the court of trial should be set aside on the ground of a wrong decision of any question of law; or
- (c) that there was a material irregularity in the course of the trial.”

In any other case the court must dismiss the appeal. There is a proviso to the effect that the court may, notwithstanding that it is of the opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the

appeal if it considers that no miscarriage of justice has actually occurred. We refer to this power below as “the proviso”.

28. It is not possible to tell from the published statistics how often each paragraph of subsection 2(1) is being used by the court nor the numbers of appeals which are dismissed after the proviso is applied. In almost half the cases studied by Malleson the court made no reference to which of the three grounds set out in subsection 2(1) it was applying. The presence of “a wrong decision of any question of law” or of “a material irregularity” was referred to in only some 10% of cases. The use of the term “unsafe and unsatisfactory” was applied to a wide variety of cases involving both law and fact, fresh evidence and technicalities. It appears from Malleson’s research that in practice the court often uses paragraph 2(1)(a) even when paragraph 2(1)(b) or (c) might seem more in point.

29. Much of the difficulty in deciding which ground the Court of Appeal is applying under section 2(1) seems to us to be due to the confusing way in which the section is drafted. The court seems seldom to distinguish between “unsafe” and “unsatisfactory”. For our part, we doubt whether there is any real difference between the two. It also seems to be the case that either of the grounds set out in paragraphs (b) and (c) of subsection 2(1), namely an error of law or a material irregularity in the course of the trial, may cause the court to think that the original conviction was unsafe or unsatisfactory. There is thus overlap between the three grounds of appeal set out in subsection 2(1). This is illustrated by the fact that, as Malleson found, almost all judgments of the Court of Appeal where the appeal is allowed end with a statement that for the reasons given the original conviction must be regarded as “unsafe and unsatisfactory”. In most of the remainder, the court said that it was quashing the conviction on the grounds that it was “unsafe or unsatisfactory”.

30. There is also potential confusion as to the scope of the proviso. Its use may be appropriate where there has been a material irregularity in the course of the trial (paragraph (c)). But the wording of the proviso seems difficult to reconcile with paragraph (a) or (b). If the court thinks that a conviction “should be set aside on the grounds that it is unsafe or unsatisfactory” (paragraph a) or “should be set aside on the grounds of a wrong decision of any question of law” (paragraph b), it is difficult to see how it can at the same time consider the proviso to be applicable. It seems from the decided cases, however, that the court does indeed consider whether the unsatisfactory nature of a conviction under either of those paragraphs is nevertheless outweighed by the consideration that no miscarriage of justice appears to have occurred.

31. It has also been argued that the proviso is redundant. It can hardly be applied if a conviction is unsafe. But if no miscarriage of justice has occurred, the proviso is unnecessary, since the conviction need not then be regarded as unsafe. When an error of law has occurred, the court can decide whether or not it is so serious that the conviction “should be set aside” without the existence of the proviso. Similarly, in paragraph (c), it has been argued that the words “material irregularity” make the proviso equally unnecessary, since if the irregularity is not material to the jury’s verdict the court should dismiss the appeal while, if it is material, that should be sufficient grounds for allowing it<sup>12</sup>.

32. We are therefore agreed that the section should be redrafted and so recommend. In the view of the majority of us, the present grounds of appeal should be replaced by a single broad ground which would give the court sufficient flexibility to consider all categories of appeal as is the case in Scotland. The majority therefore suggest that the correct approach is for the court to decide whether a conviction “is or may be unsafe”. If the court is satisfied, on whatever grounds, that the conviction *is* unsafe, it should allow the appeal outright. If the court believes that the conviction *may* be unsafe, it should quash the conviction

<sup>12</sup> For a fuller account of the defects in the drafting of section 2, see R. Buxton, “Miscarriages of Justice and the Court of Appeal”, *Law Quarterly Review*, January 1993.

but order a retrial unless there are reasons which make a retrial impracticable or undesirable. If the court considers neither that the conviction is unsafe nor that it may be unsafe, it should dismiss the appeal. The majority of us see no need in this approach for the proviso because if the court is not convinced that the conviction is or may be unsafe, it simply dismisses the appeal.

33. There are obvious attractions in the option of a retrial where the Court of Appeal thinks it possible but not certain that the jury would have acquitted the appellant had it known of the new considerations advanced in the course of the appeal. But retrials are not a panacea. Quite apart from the expense involved, there are bound to be cases where a retrial will be impracticable and even unjust. The conviction may, for example, be too long ago or the witnesses no longer available, or it would be unfair to a victim to be required to give his or her evidence again, or the appellant may already have been released from prison or, following the discharge of a first jury, already have been tried for a second time. We have, therefore, given careful consideration to what course the Court of Appeal should follow where a retrial is desirable in theory but not in practice. Where the ground of appeal is fresh evidence, then, as will become apparent below from our discussion of the House of Lords decision in *Stafford*, we think that the court should take on the jury's function itself. But where the ground of appeal is technical rather than evidential, there is a stronger argument for saying that if a retrial is impracticable or otherwise undesirable, the appellant should go free. On this, we have not been able to reach agreement; our differences are set out in paragraph 66 below.

34. Three of us, in any event, take the view that it is confusing to wrap all possible grounds of appeal in the one word "unsafe". This expression implies that there is something wrong with the jury's verdict, whether because it was unsupported by the evidence or affected by some irregularity or error. There might, however, be some irregularities or errors of law or procedure which did not necessarily affect the jury's verdict but were so serious that the conviction should not stand. Furthermore, the minority do not consider that an umbrella formula would give the Court of Appeal sufficient guidance towards adopting the less restrictive approach of which all of us are in favour. The minority consider that the grounds of appeal should be redrafted to take into account two separate categories of appeal, those claiming that the verdict has been arrived at through an erroneous view of the evidence by the jury (whether because it misinterpreted the evidence or because it had not heard all of it) and those alleging material irregularities or errors of law or procedure in or before the trial.

### Error at trial

35. Malleson's research on appeals heard in 1989, 1990 and 1992 shows that by far the most common ground of appeal is some error at the trial. The error most commonly advanced both in appeals heard and in those which were allowed was alleged misdirection by the trial judge or some defect in the summing up, or a wrong decision to allow or to exclude evidence. In the 1990 sample errors of this and similar kinds were involved in 85 out of 102 successful appeal grounds (83%); in the 1992 sample they were involved in 84 out of 102 (82%). Appeals allowed on the ground of fresh evidence, by comparison, were 6 (6%) in the 1990 sample and 4 (4%) in the 1991 sample. Judicial and other error at the trial is therefore by far the most common ground of successful appeals.

36. Error at the trial can at present be dealt with in one of three ways. The first is to apply the proviso and dismiss the appeal if it is held that no miscarriage of justice has occurred. Malleson's research showed that the proviso was applied in 13 cases out of 118 dismissed appeals in the 1990 sample. The second way is to quash the conviction. As Malleson's research shows, this is what the court generally does. The great majority of successful appeals in both 1990 and 1991 were allowed as a result of errors at trial of one sort or another which led to the conviction being quashed. The third option is for the court to quash the conviction and then order a retrial.

37. We take slightly differing views on the approach which the court should take when considering appeals based on error at the trial. The minority of three

referred to in paragraph 34 consider that, where there was error at the trial which was sufficiently serious materially to affect the trial, but which did not render the conviction unsafe, the court should generally order a retrial rather than simply quash the conviction. It should only quash the conviction and not order a retrial where a retrial would not be practicable or appropriate.

38. The majority of us do not believe that a person who is clearly guilty should be accorded a retrial merely because there has been some error at the trial. They believe, as already stated in paragraph 32, that the court should consider what happened at the trial and then

- (a) if it believes that the conviction is safe despite the error, it should dismiss the appeal;
- (b) if it believes that the error has rendered the conviction unsafe, it should allow the appeal; or
- (c) if it believes that the conviction may be unsafe as a result of the error it should quash the conviction and if possible order a retrial.

Under this scheme the proviso is redundant.

39. Whatever our differences about the circumstances in which a retrial should be ordered, we agree that appellants should not be able to exploit purely technical irregularities in the conduct of the trial. In particular, we should like to see the Court of Appeal make every effort to support judges who, in accordance with the recommendations made in our last chapter, intervene in the trial to protect witnesses, prevent procrastination, and assist the understanding of the jury. Unless the court believes that such interventions have of themselves caused the jury to come to a wrong verdict, it should dismiss the appeal, using the proviso if it is to be retained.

## Reconsideration of the jury's verdict where there is no fresh evidence

40. When the Court of Criminal Appeal was established in 1907 it was given the power to quash a jury's verdict which was "unreasonable or cannot be supported having regard to the evidence". The Court of Appeal has thus from its inception had the power to reject a jury's verdict. But in practice, it was only prepared to quash a jury's verdict when there was no evidence on which a reasonable jury properly directed could have convicted the defendant. The fact that the judges themselves were doubtful about the verdict was not of itself thought sufficient to justify quashing it.

41. In 1965 the Donovan Committee<sup>13</sup> criticised this approach as too narrow. It said that a large body of informed opinion considered that there was a need for a broader approach. It thought the solution to the problem was to change the statutory formula so that the court should quash a verdict which it found to be "unsafe or unsatisfactory". The Committee said: "The advantage to be gained from the provision we suggest is that the safeguards for an innocent person, wrongly identified and wrongly convicted, are sensibly increased". The formula "unsafe or unsatisfactory" was included in section 2(1)(a) of the Criminal Appeal Act 1968.

42. In 1968 the Court of Appeal in *Cooper*<sup>14</sup> held that the new formula meant that the court might quash a verdict where it only had a "lurking doubt". The relevant extract from the judgment is as follows:

"This is a case in which every issue was before the jury and in which the jury was properly instructed, and, accordingly, a case in which this court will be very reluctant indeed to intervene. It has been said over and over again throughout the years that this court must recognise the advantage which a jury has in seeing and hearing the witnesses, and if all the

<sup>13</sup> *The Interdepartmental Committee on the Court of Criminal Appeal*, London, HMSO Cmd 2755.

<sup>14</sup> [1969] 1 Q.B.267.

material was before the jury and the summing up was impeccable, this court should not lightly interfere. Indeed, until the passing of the Criminal Appeal Act 1966.... it was almost unheard of for this court to interfere in such a case. However, now our powers are somewhat different, and we are indeed charged to allow an appeal against conviction if we think that the verdict of the jury should be set aside on the ground that under all the circumstances of the case it is unsafe or unsatisfactory. That means that in cases of this kind the court must in the end ask itself a subjective question, whether we are content to let the matter stand as it is, or whether there is not some lurking doubt in our minds which makes us wonder whether an injustice has been done. This is a reaction which may not be based strictly on the evidence as such: it is a reaction which can be produced by the general feel of the case as the court experiences it."

43. We have received conflicting evidence about the extent to which the "lurking doubt" test has been applied. Some contend that it has been applied infrequently. Research done by Kate Malleson for JUSTICE found only six cases in the period between 1968 and 1989 in which the test had been applied. In Malleson's 1989 sample of 114 appeals there was only one such case. More recently the test has been applied more often. In Malleson's 1990 sample of the first 102 successful appeals heard in the year, there were six successful appeals in which the court held that there was a lurking doubt. In her 1992 sample of the first 102 successful appeals in the year there were 14 cases in which the conviction was quashed because the court considered that the jury had reached the wrong conclusion although there was no fresh evidence and no criticism of the trial process. In nine of these the court said that the evidence was too weak or flawed to justify a conviction; in the other five cases the court referred to having a "lurking doubt".

44. In their evidence to us JUSTICE said that practitioners took the view that the court was reluctant to apply the "lurking doubt" test:

"Time and again JUSTICE has read counsel's advice on appeal to the effect that where the summing up has been impeccable and there are no mistakes of law, the Court of Appeal will not substitute its own opinion for that of the jury, however much it may disagree with it."

45. However, it has also been suggested to us that the Court of Appeal has not infrequently allowed appeals on what has in truth been the "lurking doubt" principle, although no specific mention of this phrase has been made. We have been told that there have been appeals in which no specific error at trial or in law has been demonstrated, but nevertheless the combined experience of the three members of the court leads them to conclude that there may have been an injustice in the trial and in the jury's verdict. They consequently allow the appeal on the ground that at the least the verdict was unsatisfactory. There is no real difference between this approach and an application of the "lurking doubt" principle.

46. We fully appreciate the reluctance felt by judges sitting in the Court of Appeal about quashing a jury's verdict. The jury has seen the witnesses and heard their evidence; the Court of Appeal has not. Where, however, on reading the transcript and hearing argument the Court of Appeal has a serious doubt about the verdict, it should exercise its power to quash. We do not think that quashing the jury's verdict where the court believes it to be unsafe undermines the system of jury trial. We therefore recommend that, as part of the redrafting of section 2, it be made clear that the Court of Appeal should quash a conviction, notwithstanding that the jury reached their verdict having heard all the relevant evidence and without any error of law or material irregularity having occurred,

if, after reviewing the case, the court concludes that the verdict is or may be unsafe.

### Appeals based on pre-trial malpractice or procedural irregularity

47. Where the appeal is based on some pre-trial matter—ranging from the alleged fabrication or improper suppression of evidence to some form of irregularity in procedure, for example under PACE—much the same considerations apply as where the appeal is based on an alleged error at trial. If the procedural defect is such that the Court of Appeal believes that the jury's verdict is unsafe, the conviction should be quashed. If the court believes that in consequence of the defect the conviction may be unsafe, it should in the view of the majority order a retrial where possible and practicable. Dismissing the appeal is the right course where the court despite the procedural defect considers the conviction safe.

48. We are not unanimous on what should happen in cases of malpractice, ranging from serious breaches of PACE to fabricating a confession, where there is nevertheless other strong evidence of the defendant's guilt. Two of us think that if the pre-trial irregularity or defect is sufficiently serious materially to affect the trial but not to render the conviction unsafe, the Court of Appeal should retain the power to order a retrial or to quash the conviction depending on its view of the gravity of the defect<sup>15</sup>. The rest of us believe that the Court of Appeal should not quash convictions on the grounds of pre-trial malpractice unless the court thinks that the conviction is or may be unsafe.

49. In the view of the majority, even if they believed that quashing the convictions of criminals was an appropriate way of punishing police malpractice, it would be naive to suppose that this would have any practical effect on police behaviour. In any case it cannot in their view be morally right that a person who has been convicted on abundant other evidence and may be a danger to the public should walk free because of what may be a criminal offence by someone else. Such an offence should be separately prosecuted within the system. It is also essential, if confidence in the criminal justice system is to be maintained, that police officers involved in malpractice should be disciplined, and in this connection we attach great importance to the recommendations in chapter three, which should lead to more effective police disciplinary procedures. The Court of Appeal must report any cases of malpractice by police officers which come to their attention to chief officers of police. We also envisage that the more serious the malpractice the less likely it is that the court would conclude that the verdict could be safe.

50. In the view of the majority, the minority view is illogical. It would only be effective if the judge at first instance had allowed the tainted evidence to be heard by the jury. If the judge had properly excluded the evidence then the verdict would be unassailable. The minority view must logically involve the trial judge in stopping a case on the basis of tainted evidence which he or she nevertheless proposed to exclude. The majority believe this to be unacceptable precluding as it must the jury from returning a verdict on the basis of evidence which was safe, admissible, and probative. It is only the tainted evidence which is excluded by section 78 of PACE. That section does not allow the court to stop the case if there remains admissible probative evidence to support it.

### Appeals based on fresh evidence

51. Successful appeals based on fresh evidence are relatively rare. In Kate Malleson's 1990 sample of 102 successful appeals 6 were allowed on the grounds of fresh evidence. In her 1992 sample there were 4 out of 102.

52. The two issues arising in connection with fresh evidence appeals are, first, how the Court of Appeal defines "fresh evidence" in deciding whether to receive

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<sup>15</sup> See paragraph 65 ff of Professor Zander's note of dissent.

it and secondly, how it approaches its powers when it allows such fresh evidence to be adduced.

53. So far as concerns the former, it is clear that the Court of Appeal must take a view as to whether evidence that is said to be “fresh” does warrant its attention. If the rule were otherwise it would mean that an appellant could put forward anything that he or she claimed was fresh evidence and the system would be required to hear and possibly allow an appeal or at least order a retrial. That would clearly be unacceptable.

54. Section 23 of the Criminal Appeal Act sets out the basis on which fresh evidence can be received. Under subsection (1) the evidence of any witness may be received in the discretion of the court if they “think it necessary or expedient in the interests of justice”. Under subsection (2) the court must receive fresh evidence, unless they think it would not afford any ground for allowing the appeal, if it appears to them to be “likely to be credible” and admissible and it was not adduced at the trial “but there is a reasonable explanation for the failure to adduce it.” The discretion under subsection (1)(c) and the requirement under subsection (2) overlap and we recommend that the drafting of the subsections should be looked at. Section 23(1) to (3) are set out in full below:—

“23-(1) For purposes of this Part of this Act the Court of Appeal may, if they think it necessary or expedient in the interests of justice:—

- a. order the production of any document, exhibit or other thing connected with the proceedings, the production of which appears to them necessary for the determination of the case;
- b. order any witness who would have been a compellable witness in the proceedings from which the appeal lies to attend for examination and be examined before the court, whether or not he was called in those proceedings; and
- c. subject to subsection (3) below, receive the evidence, if tendered, of any witness.

(2) Without prejudice to subsection (1) above, where evidence is tendered to the Court of Appeal thereunder the court shall, unless they are satisfied that the evidence, if received, would not afford any ground for allowing the appeal, exercise their power of receiving it if:—

- a. it appears to them that the evidence is likely to be credible and would have been admissible in the proceedings from which the appeal lies on an issue which is the subject of the appeal; and
- b. they are satisfied that it was not adduced in those proceedings but there is a reasonable explanation for the failure to adduce it.

(3) Subsection (1) (c) above applies to any witness (including the appellant who is competent but not compellable, and applies also to the appellant’s husband or wife where the appellant makes an application for that purpose and the evidence of the husband or wife could not have been given in the proceedings from which the appeal lies except on such an application”.

55. Subject to one point, to which we refer in paragraph 60 below, these powers seem to us to be adequate. What is in question, however, is whether the court has construed them too narrowly. It is understandable that the court should view fresh evidence with some suspicion. Obviously there is a fear that fresh evidence can, and often will, be manufactured. Moreover, the court is right not to wish to encourage defendants and their lawyers to think of Crown Court trials as nothing more than a practice run which, in the event of a conviction, will leave them free to put an alternative defence to the Court of Appeal in whatever manner they please. On the other hand, the court must be alive to the possibility that the fresh evidence, if true, may exonerate the appellant or at least throw serious doubt on the conviction.

56. It follows that the Court of Appeal must be prepared to consider, as the statute requires, whether the fresh evidence now adduced was available at the time of the trial and, if it was, whether there is a reasonable explanation for the failure to adduce it then. It has been suggested to us that the attitude of the court to these questions has on occasion been excessively restrictive. We would urge that in general the court should take a broad, rather than a narrow, approach to them.

57. A particularly difficult category of cases in which the question of the admission of fresh evidence arises is where a witness wishes to change the evidence that he or she gave at the trial. We think that the Court of Appeal is right to look at such cases very carefully. The altered evidence of a witness who has already given different evidence on oath at a trial must of necessity attract substantial suspicion. Which is the evidence more worthy of credence? That given on the first occasion at the trial, or the second thoughts on which it is argued that the Court of Appeal should be persuaded to allow the appeal? Nevertheless, if there is some reasonable explanation why the witness gave the previous evidence from which he or she now wishes to depart, the court should receive it.

58. We would apply the same approach to the difficult question as to the circumstances in which the court should be prepared to consider an appeal based on some error by the trial lawyers. (We discuss this under the heading of fresh evidence because it is claimed that a lawyer's mistakes typically arise in relation to decisions on which evidence to call or not to call. But our recommendation applies to any cases in which it is alleged that the lawyer's mistake forms part of the grounds for an appeal.) In *Ensor*<sup>16</sup> the Court of Appeal confirmed an earlier ruling to the effect that a mistaken or unwise decision by counsel could not normally be regarded as a proper ground of appeal. However, the court said that if it had any lurking doubt that an appellant might have suffered an injustice as a result of "flagrantly incompetent advocacy" then it would quash the conviction<sup>17</sup>.

59. We do not think that this very narrow test goes far enough. We believe that some wrong jury verdicts of guilty may be the result of errors by the lawyers—whether of judgement or of performance—which do not amount to "flagrantly incompetent advocacy". It cannot possibly be right that there should be defendants serving prison sentences for no other reason than that their lawyers made a decision which later turns out to have been mistaken. What matters is not the degree to which the lawyers were at fault but whether the particular decision, whether reasonable or unreasonable, caused a miscarriage of justice. There would, accordingly, always have to be reasoned argument based on the facts of the case to indicate precisely why the appellant believes that a mistake has been made and what effect this has had on the case. But incompetent advocacy does not, in our view, need to be "flagrant" for an unsafe conviction to be the direct result of it.

60. Under subsection 23(2) the court must be persuaded that fresh evidence is "likely to be credible". It has been suggested to us that this is too high a test. We agree. We recommend that the test be changed to "capable of belief". This would in our view be a slightly wider formula giving the court greater scope for doing justice. It would also have the advantage of reducing the occasions when the court has to exclude evidence that is relevant on the ground that the court is not persuaded of its credibility, while at the same time leaving the court fully able to refuse to receive fresh evidence if it is incapable of belief.

61. When fresh evidence is received, the court has three possible courses of action. It can rule that the evidence gives no reason for changing the verdict,

<sup>16</sup> [1989] 1 W.L.R. 497.

<sup>17</sup> Malleson in her first study found that errors of lawyers were cited as grounds of appeal in 9 of the cases which she reviewed. These were all refused leave to appeal. Such appeals are rare since they are commonly made only by unrepresented appellants (as was the position with the 9 cases found by Malleson) or appellants who have changed their legal advisers. There is no way of knowing whether the appeals concerned had any merit.

which it therefore upholds. Alternatively, it can hold that the fresh evidence is so significant that it renders the verdict unsafe or unsatisfactory, and it therefore quashes the conviction. Or, having quashed the conviction, it can order a retrial so that a new jury can hear the fresh evidence for itself.

62. In *Stafford v DPP*<sup>18</sup> the House of Lords held that on the proper construction of the statute it was the task of the Court of Appeal when deciding the impact of fresh evidence to decide whether it thinks the verdict is unsafe or unsatisfactory. It should consider the weight of the evidence and not concern itself so much with the question as to what effect it might have had on a jury. This ruling has been criticised, notably by Lord Devlin, who argued that it usurped the function of the jury. In our view, the criticism made by Lord Devlin<sup>19</sup> and others has force insofar as it concerns a decision by the court to hear and evaluate itself the fresh evidence and despite it to reject the appeal. In our view, once the court has decided to receive evidence that is relevant and capable of belief, and which could have affected the outcome of the case, it should quash the conviction and order a retrial unless that is not practicable or desirable. The Court of Appeal, which has not seen the other witnesses in the case nor heard their evidence, is not in our view the appropriate tribunal to assess the ultimate credibility and effect on a jury of the fresh evidence. It should normally not decide the question of the weight of the evidence itself unless it is satisfied that the fresh evidence causes the verdict to be unsafe, in which case it should quash the conviction.

63. Where a retrial is impracticable or otherwise undesirable, there is an argument for saying that the Court of Appeal should not usurp the function of the jury but should simply allow the appeal. We do not agree. It seems to us unacceptable, particularly after we have recommended that the court should apply a less strict approach to the kind of evidence it will receive, that fresh evidence which the court accepts as being capable of belief should not be tested as far as practicable. We are therefore unanimous in concluding that there is no sensible alternative in these circumstances but to leave the Court of Appeal with the function that the House of Lords in *Stafford* suggested it had under the present statute—of deciding the matter for itself.

## Retrials

64. Until 1988 the Court of Appeal only had power to order a retrial where an appeal was allowed by reason of fresh evidence. But under section 43 of the Criminal Justice Act 1988 a retrial can now be ordered whenever the court thinks it in the interests of justice. The number of retrials in the years since 1988 has been small but growing—1988–1; 1989–0; 1990–3; 1991–13; 1992–23. In Malleson's 1990 sample there were 2 cases of retrials, both of which involved fresh evidence. In her 1992 sample there were 6 retrials ordered, all of which were based on errors at trial.

65. We welcome and wish to encourage the increasing exercise of this power. Although, as we have already pointed out in paragraph 33 above, retrials will not be practicable or desirable in a significant number of cases, they offer the Court of Appeal an attractive solution for its understandable reservations about speculative prediction of a hypothetical jury's decision. Where the court is not in doubt, there is no difficulty in allowing or dismissing the appeal as appropriate. Where, on the other hand, the court is in doubt and would like to see the evidence or arguments more fully tested, then, other things being equal, retrials seem to all of us the better way to proceed, even if some of us would not like them to be as frequently ordered as would others.

66. We have already said (paragraph 63) what should in our view happen in cases where fresh evidence makes a retrial desirable but it is impracticable. We differ, however, over the approach which the court should take in cases where the option of a retrial is, for whatever reason, not available and fresh evidence is

<sup>18</sup> [1974] A.C. 878.

<sup>19</sup> See *The Judge*, Oxford University Press, 1979, pp. 148–76.

not involved. Six of us take the view that the court has no choice but to allow the appeal. They argue that if the court has decided that the conviction may be unsafe and wishes for that reason to remit it to a new jury, it is no longer able to say that the appellant is guilty beyond reasonable doubt; and if, therefore, it cannot in practice exercise its preferred alternative of a retrial, the appellant must go free. Five of us, on the other hand, believe that in those circumstances the court should still be required to consider further whether it should quash the conviction or uphold it. They argue that the impossibility of a retrial is not a sufficient reason for the court automatically to allow the appeal. It is true that its reason for wishing to order a retrial was its view that without the error of law or defect of procedure in question the jury might have returned an acquittal. But before concluding, in effect, that if a retrial were possible that is what a fresh jury would do, the court should have tried as best it can to resolve its doubts in one direction or another. In other words, the minority of us take the same view of these cases as we all do of cases involving fresh evidence—namely, that if a retrial though desirable is not practicable, the Court of Appeal must decide the matter for itself.

### Appeals based on inadmissible evidence

67. If the fresh evidence sought to be admitted is inadmissible under the rules of evidence, in our view the court should not receive it. If the rules of evidence need reform, as we think they do (see chapter eight, paragraph 26), then that should be done. It is undesirable that the Court of Appeal should in effect be precluded by the current rules of evidence from considering an alleged wrongful conviction. We therefore attach great importance to the review of the rules of evidence by the Law Commission that we have recommended. The highly exceptional case where there may still be convincing but inadmissible evidence showing that a miscarriage of justice has occurred should we think be dealt with through the mechanism of the Royal Prerogative of Mercy.

### Procedural matters

68. We are asked in our terms of reference to consider the role of the Court of Appeal in directing the investigation of allegations. It is relevant here to note that, under section 9(d) and (e) of the Criminal Appeal Act 1907, the Court of Appeal used to have the power to appoint a special commissioner to conduct an inquiry into documents and to appoint as assessors any persons with special expert knowledge where such knowledge was likely to be required for the determination of a case. These powers were little if ever used and they were not re-enacted in the 1968 Act.

69. We do not think that the Court of Appeal is well constituted to supervise and direct police or other investigations. Nor do we think that the same body should exercise investigative as well as judicial functions. We believe therefore that any supervision of investigations would be better done by a different body, such as the one that we recommend in our next chapter for the investigation of alleged miscarriages of justice which have not been corrected on appeal.

70. It may, however, be that in the course of considering an appeal, the Court of Appeal identifies matters that could best be dealt with by further investigation. We recommend that the court should be free to refer such matters, which we would expect to arise only rarely, for further investigation to the new body. It would be the duty of the new body to report the results of the investigation to the Court of Appeal.

71. Although the 1968 Act does not specifically state this, it appears to be a matter of settled law<sup>20</sup> that there can be only one direct appeal against a conviction. We consider that with the need for finality and the existence of the alternative route to reopening a case via a reference to the Home Secretary, the present position is correct and should be retained. In future, if our recommendations are accepted, the unsuccessful appellant will be able to take

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<sup>20</sup> *R.v. Pinfold* [1988] Q.B. 462.

his or her case to the new body. We are firmly of the view that once the normal appeal route is exhausted, further applications should be made to that body. Most of these applications will require investigation, but we accept that a small minority may point clearly to the innocence of the applicant or raise a technical or legal ground which was overlooked at the appeal. Even for those cases we believe that the correct route is via the new body, which will be able to refer them expeditiously to the Court of Appeal.

## Appeals against acquittal

72. At present it is not possible to appeal against an acquittal in such a way as to secure a reversal of the jury's verdict or a retrial. It has been possible since the passage of the Criminal Justice Act 1972 for the Attorney General to refer a case to the Court of Appeal on a point of law. That procedure, however, can only correct an error of law for the future: the acquittal cannot be reversed and the defendant in the trial which gives rise to the reference is not named in the proceedings.

73. We have considered whether there may be a case for permitting appeals against acquittals in one or more of three possible sets of circumstance:

- a. where the jury can be shown to have been bribed or intimidated;
- b. where the acquittal is perverse in the sense that it flies in the face of the facts or of the law; and
- c. where a person is acquitted, or convicted on a less serious charge, as a result of error by a prosecution witness, particularly a forensic scientist or other expert who gives evidence on the basis of a mistaken view of the facts of the case.

74. We are persuaded that, where a person is convicted of conspiracy to pervert the course of justice, the facts of the offence being that he or she interfered with one or more members of the jury in a case which led to the acquittal of the defendant or defendants, the trial at which that jury returned that verdict of acquittal should be regarded as a nullity. If practicable, it should be possible to prosecute the acquitted defendant or defendants again for the same offence. One of our members believes that a clear connection must be proved between the offender and an acquitted defendant. When trials have included several defendants, this member further questions the fairness of nullifying all verdicts if such a connection cannot be established with each defendant. The majority are of the view that the mere fact that the jury has been proved to have been interfered with should be sufficient to justify a retrial. The cases we have in mind will normally occur as a result of the efforts of organised, professional criminals for whom it will, in the view of the majority, be all too easy to conceal a connection with the defendant or defendants.

75. We are not in favour of any further right of appeal against acquittals. Although juries are under a solemn duty to return a verdict in accordance with the evidence, they do from time to time perversely return a verdict contrary to the evidence. Until there is research on jury deliberations it is impossible to say confidently why this happens. But it is plausible to suppose that it is because the jury has taken an unfavourable view of the prosecution or of the law under which it is brought or of the likely penalty. We do not, however, think that these cases justify the introduction of a right of appeal against acquittal.

76. It is also our view that there should be no appeal against an acquittal where a defendant is acquitted, or convicted on a less serious charge, as a result of an error by a prosecution witness. We have every sympathy for the victims and families of victims in such cases, especially where they have suffered bereavement or injury. We believe, however, that the right answer is for the investigating and prosecuting authorities to prepare their cases thoroughly. It would not in our view be possible to define satisfactorily cases in which it would be right for a defendant who is acquitted as a result of a mistake on the part of the prosecution to stand trial a second time for the same offence.

## Appeals to the House of Lords

77. Under section 33 of the Criminal Appeal Act 1968, there can be a further appeal to the House of Lords but only with the leave of the Court of Appeal or the House of Lords. Such leave will not be granted unless it is certified by the Court of Appeal that a point of law of general public importance is involved in the decision and it appears to the Court of Appeal or to the House of Lords that the point is one which ought to be considered by that House.

78. Several witnesses have suggested that there are two practical obstacles to exercising this right of appeal. The first is that it is only available to appellants who have their appeals heard by the full court. It is not possible for an applicant who is refused leave to appeal to the Court of Appeal to go on to appeal to the House of Lords. This may be unfair where a hearing by the full court of an application for leave to appeal is indistinguishable in effect from a full appeal hearing. This arises where the court, after hearing counsel for the applicant, feels that it should hear the arguments for the crown, whose counsel it then calls upon to respond. We therefore recommend that, wherever the Court of Appeal hears in full court an application for leave to appeal, it should, if it calls upon the crown to respond to the applicant's case, thus in effect converting the hearing to that of a full appeal, grant leave at that point. This would preserve the possibility of a further appeal to the House of Lords. (The court has in the past been advised to grant leave to appeal to the applicant at this point but we understand that this procedure may not always be followed.)

79. The second obstacle is the requirement that the Court of Appeal must grant a certificate that a point of law of general public importance is involved in the decision. We agree that it is unduly restrictive to require such a certificate to be issued in addition to the necessity of obtaining leave from the Court of Appeal or the House of Lords itself. We think therefore that the requirement that the Court of Appeal certify that the case involves a matter of law of general public importance should be dropped. The need to obtain the leave of either the Court of Appeal or the House of Lords before proceeding further is by itself a sufficient filter.

## Composition and organisation of the Court of Appeal Criminal Division

80. The single judge who initially considers applications for leave to appeal is normally a High Court judge. The full court in appeals against conviction is normally composed of one Lord Justice of Appeal and two High Court judges.

81. Several witnesses suggested that the court would benefit from the addition of lay members, particularly in cases where its task is to review verdicts of fact returned by lay juries. We are not persuaded of the benefits of such a course. The bulk of the work of the Court of Appeal is concerned with sentencing and with questions of mixed law and fact of some complexity. We do not think that the importation of a lay element would add greatly to its ability to reconsider cases. If there is need to bring a fresh point of view to focus on possible miscarriages of justice, that need is better met by the proposals that we make in the next chapter for the setting up of a new body.

82. We do, however, think that membership of the Court of Appeal should include more judges with current and wide experience of trying criminal cases. It has been suggested to us that this need would be best met by appointing suitably qualified circuit judges to sit as members of the Court of Appeal. We agree. Circuit judges have great knowledge and experience of trying criminal cases and of sentencing and we believe that there would be benefits in bringing this experience to bear in the Court of Appeal. High Court judges deal with only a small proportion of Crown Court cases. In 1991 5% of the work of the Crown Court was done by High Court judges, as compared with 67% by circuit judges<sup>21</sup>. We therefore recommend that senior circuit judges nominated by the Lord Chief

<sup>21</sup> Judicial Statistics, see note 6.

Justice should be able to sit as members of the full court. No more than one circuit judge should sit as part of any full court, nor should circuit judges be able to sit on appeals in cases of a class which they would not have been able to try themselves. (There are arrangements whereby circuit judges, depending on their experience, are only allowed to try particular categories of cases). When a circuit judge sits as a member of the full court, he or she should be able to hear appeals or applications for leave to appeal from both conviction and sentence. We do not, however, believe that circuit judges should act as single judges. Nor should a circuit judge be a member of a court that reviews a case tried by a High Court judge. Circuit judges would not, therefore, be members of the Court of Appeal in the full sense.

83. It has also been put to us that the Court of Appeal should sit in regional centres. This would prevent appellants, their legal representatives and witnesses having to travel long distances for hearings and would show some consideration for local interests. It should be possible for the necessary administration to continue to be done by the Criminal Appeal Office in London. We believe that the idea has attractions and should be given serious consideration provided that the resource consequences are not too great. We do not see why they should be. We understand that the court has sat at regional centres on occasion in the past.

84. We are aware that, if the recommendations that we make in this chapter are implemented, they could lead to more applications for leave to appeal and more appeals. We do not believe that it is acceptable that possibly genuine appeals should be screened out by lack of resources to consider them properly. If extra resources are required, they should be found.

# Chapter Eleven: Correction of Miscarriages of Justice

## General

1. The last part of our terms of reference requires us to consider whether changes are needed in the arrangements for considering and investigating allegations of miscarriages of justice when appeal rights have been exhausted. Almost all of those who gave us evidence argued that the arrangements should be changed, with the responsibility for reopening cases being removed from the Home Secretary and transferred to a body independent of the Government. We agree that there is a strong case for change. We therefore argue in this chapter for the establishment of a new independent body to consider allegations of miscarriage of justice, to arrange for their investigation where appropriate, and, where that investigation reveals matters that ought to be considered further by the courts, to refer the cases concerned to the Court of Appeal. We discuss in some detail the role of such a body, its relationship to the courts and to the Government, its composition and how it should be held accountable, the powers it may need to investigate cases, and how those cases should be selected.

## Case for new body

2. In *R. v. Pinfold*<sup>1</sup> the Court of Appeal held that it had no jurisdiction to entertain a second application for leave to appeal in the same case even where fresh evidence had emerged since the dismissal of the earlier appeal. The Court of Appeal can only consider such a case again if the Home Secretary uses his powers under section 17 of the Criminal Appeal Act 1968 to refer it to the Court of Appeal, when the case is treated for all purposes as an appeal to the court by the convicted person. The power to refer cases in this way is limited to those tried on indictment; it does not include summary convictions by magistrates' courts<sup>2</sup>.

3. If, therefore, an unsuccessful appellant wishes to reopen his or her case in the courts, the Home Secretary must be persuaded to refer it to the Court of Appeal. The only alternative course is to persuade the Home Secretary to recommend to the sovereign that the Royal Prerogative of Mercy be exercised. This alternative, which is described more fully in the next paragraph, is most often used when the case involves a summary conviction in the magistrates' courts<sup>3</sup>. It is very seldom exercised when the option of a reference under section 17 is available, because successive Home Secretaries have been understandably reluctant to reverse a decision of the courts, preferring instead to ask the courts to reconsider the case as the statute envisages. The use of the Royal Prerogative to override convictions on indictment is limited to cases where there are convincing reasons for believing that a person is innocent but a reference to the

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<sup>1</sup> See chapter ten, paragraph 71, note 20.

<sup>2</sup> The full text of the section is as follows:

"17.— (1) Where a person has been convicted on indictment, or been tried on indictment and found not guilty by reason of insanity, or been found by a jury to be under disability and to have done the act or made the omission charged against him, the Secretary of State may, if he thinks fit, at any time either—

(a) refer the whole case to the Court of Appeal and the case shall then be treated for all purposes as an appeal to the court by that person; or

(b) if he desires the assistance of the court on any point arising in the case, refer that point to the court for their opinion thereon, and the court shall consider the point so referred and furnish the Secretary of State with their opinion thereon accordingly.

(2) A reference by the Secretary of State under this section may be made by him either on an application by the person referred to in subsection (1), or without any such application".

<sup>3</sup> Of the 19 free pardons granted in 1992, 17 related to convictions for motoring offences, and 2 to convictions for failing to purchase a television licence.

Court of Appeal is not practicable, for example because relevant material would not be admissible in evidence. The Home Office told us in written evidence that such cases are extremely rare.

4. If the Royal Prerogative of Mercy is exercised by the grant of a free pardon, the effect is that so far as possible the person is relieved of all penalties and other consequences of the conviction. Alternatively, a sentence can be varied so as to give special remission of all or part of the penalty imposed by the court. This may be done for compassionate purposes, for example to give early release to prisoners with terminal illnesses, or in order to reward prisoners who have given exceptional assistance to prison staff, the police, or the prosecuting authorities. The exercise of the Royal Prerogative in this way is not the same as the grant of a free pardon. Nor does the exercise of the Royal Prerogative amount to the quashing of the conviction, even if a free pardon is granted. The conviction stands and can only be quashed by a separate application to the Court of Appeal<sup>4</sup>.

5. The available figures for the number of cases referred by the Home Secretary to the Court of Appeal under section 17 of the Criminal Appeal Act 1968 show that the power is not often exercised. From 1981 to the end of 1988, 36 cases involving 48 appellants were referred to the Court of Appeal as a result of the doubts raised about the safety of the convictions concerned. This represents an average of between 4 and 5 cases a year. In the years 1989-1992, 28 cases involving 49 appellants have been referred, including a number of cases stemming from the terrorist incidents of the early 1970s and inquiries into the activities of the West Midlands serious crimes squad<sup>5</sup>. We were told by the Home Office that it receives between 700 and 800 cases a year which are no longer before the courts and where it is claimed that there has been a wrongful conviction. (The figure for 1992 was 790 of which 634 involved a custodial sentence). Plainly, therefore, a rigorous sifting process is applied, and only a small percentage of cases end in a reference to the Court of Appeal under section 17.

6. There is in theory no restriction on the numbers or categories of cases which the Home Secretary may refer to the Court of Appeal under section 17 since the section gives him discretion to refer cases "if he thinks fit". In practice, however, as Sir John May observed in his second report on the Maguire case<sup>6</sup>, the Home Secretary and the civil servants advising him operate within strict self-imposed limits. These rest both upon constitutional considerations and upon the approach of the Court of Appeal itself to its own powers. The Home Secretary does not refer cases to the Court of Appeal merely to enable that court to reconsider matters that it has already considered. He will normally only refer a conviction if there is new evidence or some other consideration of substance which was not before the trial court. Successive Home Secretaries have adopted this approach, and not only because they have thought that it would be wrong for Ministers to suggest to the Court of Appeal that a different decision should have been reached by the courts on the same facts. They have also taken the view that there is no purpose in their referring a case where there is no real possibility of the Court of Appeal taking a different view than it did on the original appeal

<sup>4</sup> See *R. v. Foster* [1984] 3 W.L.R. 401.

<sup>5</sup>

<i>Year</i>	<i>No. of cases referred</i>	<i>No of appellants</i>	<i>Results</i>
1989	3	6	6 convictions quashed
1990	7	20	19 convictions quashed 1 retrial
1991	10	12	10 convictions quashed 1 retrial
1992	8	11	1 appeal pending 10 appeals pending 1 appeal dismissed

Both the retrials resulted in the defendant's acquittal.

<sup>6</sup> See chapter one, paragraph 3, note 1.

because of the lack of fresh evidence or some other new consideration of substance.

7. The effect of this second criterion was examined in depth by Sir John May as part of his inquiry into the case of the Maguires. We cannot do better than quote his conclusion:

“... there is no doubt that the criterion so defined was and is a limiting one and has resulted in the responsible officials within the Home Office taking a substantially restricted view of cases to which their attention has been drawn ... The very nature and terms of the self-imposed limits on the Home Secretary's power to refer cases have led the Home Office only to respond to the representations which have been made to it in relation to particular convictions rather than to carry out its own investigations into the circumstances of a particular case or the evidence given at trial. .... the approach of the Home Office was throughout reactive, it was never thought proper for the Department to become proactive”.

8. Sir John May refers later in his second report on the Maguires to the evidence that he heard from Home Office officials and from a former Home Secretary, Mr Hurd, expressing views on alternative machinery for considering alleged miscarriages of justice. This evidence led him to the conclusion that some alternative machinery was indeed required in place of the existing power of the Home Secretary to refer such cases to the Court of Appeal under section 17 of the Criminal Appeal Act 1968. We set out below our view of what the alternative machinery should be. First, however, we give our reasons for recommending (as we do in paragraph 11 below) the creation of a new body independent of both the Government and the courts to be responsible for dealing with allegations that a miscarriage of justice has occurred.

9. Our recommendation is based on the proposition, adequately established in our view by Sir John May's Inquiry, that the role assigned to the Home Secretary and his Department under the existing legislation is incompatible with the constitutional separation of powers as between the courts and the executive. The scrupulous observance of constitutional principles has meant a reluctance on the part of the Home Office to enquire deeply enough into the cases put to it and, given the constitutional background, we do not think that this is likely to change significantly in the future.

10. We have concluded that it is neither necessary nor desirable that the Home Secretary should be directly responsible for the consideration and investigation of alleged miscarriages of justice as well as being responsible for law and order and for the police. The view that these two heavy responsibilities should be divided was expressed to Sir John May's Inquiry by a former Home Secretary and confirmed in oral evidence to us by the then Home Secretary and two of his predecessors.

11. We recommend therefore that the Home Secretary's power to refer cases to the Court of Appeal under section 17 of the Criminal Appeal Act 1968 should be removed and that a new body should be set up to consider alleged miscarriages of justice, to supervise their investigation if further inquiries are needed, and to refer appropriate cases to the Court of Appeal. We suggest that this body might be known as the Criminal Cases Review Authority. We refer to it in what follows as “the Authority”.

### Role of the Authority

12. We recommend that the role of the Authority should be to consider allegations put to it that a miscarriage of justice may have occurred. The applicant's approach to the Authority would normally be made either after his or her conviction had been upheld by the Court of Appeal or after he or she had failed to obtain leave to appeal. In cases which seemed to the Authority to call for further investigation, it would ensure that that investigation was launched.

Where the Authority instructed the police to conduct investigations, it would be responsible for supervising the investigation and would have the power to require the police to follow up those lines of inquiry that seemed to it necessary for the thorough reexamination of the case. Where the result of the investigation indicated that there were reasons for supposing that a miscarriage of justice might have occurred, the Authority would refer the case to the Court of Appeal, which would consider it as though it were an appeal referred to it by the Home Secretary under section 17 now. Where, in the Authority's view, the investigation revealed no grounds for such a reference, for example, because it revealed fresh material confirming the correctness of the conviction, an explanation with reasons would be given to the applicant.

## Relationship of the Authority with Government and with Court of Appeal

13. We have already explained why we believe that the Authority should be independent of the Government. It will, however, be necessary for the Government to provide the resources to enable it to operate and a Government Minister will have to be responsible for appointing its members and accounting to Parliament for its activities. We recommend that the legislation which establishes it gives it operational independence but requires it to submit an annual report to the Minister concerned, who would in turn be required to lay the report before Parliament. The Minister would also be required to answer to Parliament for any suggestion that the Authority was inadequately resourced or not properly constituted for the task it was required to perform. We see these arrangements as necessary in order to ensure that the new system for correcting miscarriages of justice is working properly. We do not see them as compromising its independence.

14. We recommend that the Chairman of the Authority be appointed by the Queen on the advice of the Prime Minister as is done in the case of Lords Justice of Appeal. Other members might be appointed by the Lord Chancellor. The Home Secretary, as the Minister responsible for criminal justice policy and for law and order, should be responsible for reporting to Parliament for the way in which the new arrangements are implemented.

15. We believe that there are cogent arguments for the Authority to be independent of the Court of Appeal. Their roles are different and, as we have said in the last chapter, we do not think that the Court of Appeal is either the most suitable or the best qualified body to supervise investigations of this kind. We have recommended in chapter ten that the Court of Appeal should be empowered if it thinks fit to refer cases to the Authority for investigation, and that the Authority should be required to report the outcome of any such investigation to the Court of Appeal. But we do not see the Authority as coming within the court structure. Nor, equally importantly, would it be empowered to take judicial decisions that are properly matters for the Court of Appeal.

16. When, therefore, an investigation is completed whose results the Authority believes should be considered by the Court of Appeal, we recommend that it should refer the case to that court, together with a statement of its reasons for so referring it. It should at the same time provide the court with such supporting material as it believes to be appropriate and desirable in the light of its investigations, and which in its view may be admissible, though without any recommendation or conclusion as to whether or not a miscarriage of justice has occurred. It would be for the Court of Appeal, on receiving a case referred in this way, to treat it as an appeal from the Crown Court. That is to say, it would ensure that the defence and the prosecution received a copy of the statement of reasons and supporting material sent to it, together with any additional material (see paragraph 31) that the Authority thought fit. It would then be for the appellant to present his or her case in whatever manner seemed best. As happens with references by the Home Secretary under section 17 now, it should continue to be open to the appellant to raise before the Court of Appeal any matter of law or fact, or mixed law and fact, as he or she wishes, regardless of whether or not it

was included in the papers sent to the court by the Authority. The appellant should also be free to appear before the court if he or she so wishes.

17. As we have explained, we do not see the Home Secretary as continuing to have in general any function in relation to individual cases of miscarriage of justice. We do, however, assume that he or she will retain Ministerial responsibility for the exercise of the Royal Prerogative of Mercy. For the reasons that the Home Office gave in oral evidence, and to which we refer above (paragraph 6), it will seldom if ever be necessary or desirable to exercise the Royal Prerogative in cases where it is concluded that a miscarriage of justice may have taken place. To do so would be to override the decisions of the courts, whose function it properly is to determine such cases. Nevertheless, we do not entirely rule out the need in the very exceptional case for the Authority to refer the results of its consideration and investigation to the Home Secretary to consider the exercise of the Royal Prerogative. This should only be where the Court of Appeal is unlikely to be able to consider the case under the existing rules.

18. The one category of case that has been drawn to our attention where this might happen is if the Court of Appeal were to regard as inadmissible evidence which seemed to the Authority to show that a miscarriage of justice might have occurred. We have been told by the Home Office in written evidence that these cases are rare and we hope that, following the outcome of the review of the rules of evidence that we have recommended in chapter eight, they will become rarer still in the future. We cannot envisage any other circumstances in which the courts would be so far unable to provide a remedy that it ought to be suggested to the Home Secretary that he should recommend the exercise of the Royal Prerogative. There may, however, be unforeseeable circumstances where the need might arise. We therefore recommend that the possible use of the Royal Prerogative be kept open for the exceptional case. We emphasise, however, that it is undesirable for the courts to be deprived of powers to quash a conviction where the evidence, whatever its status, seems clearly to show that the appellant is innocent. We therefore, as we have already said<sup>7</sup>, attach great importance to the Law Commission's review of the rules of evidence which we have recommended.

19. The primary function of the Authority will be to consider and if necessary investigate cases which have already passed through the criminal justice system and in which the right of appeal has been exercised. An applicant who is told by the Authority that it will not intervene in his or her case should always be free to try again, although he or she is likely to need to present fresh evidence or argument to stand any better chance of success. We therefore do not believe that there should be any right of appeal from the Authority's decisions to investigate or not to investigate the cases put to it and to refer or not to refer them to the Court of Appeal. In our view, the Authority's decisions should also not be subject to judicial review. We therefore recommend that there should be neither a right of appeal nor a right to judicial review in relation to decisions by the Authority, but that it should be free to consider a case more than once if that seems in the circumstances to be an appropriate course.

### Composition and accountability of the Authority

20. The Authority should consist of several members, the precise numbers depending on its workload at any particular time. Not all need be full-time. We do not favour a single person, however well qualified and eminent, filling the role on the model of the ombudsman, since we believe that the consideration of possible miscarriages of justice will benefit from bringing to bear several different points of view. Both lawyers and lay persons should be represented. We recommend that the Chairman should be chosen for his or her personal qualities rather than for any particular qualifications or background that he or she may have. We recommend, however, given the importance of the Authority being seen to be independent of the courts in the performance of its functions, that the Chairman should not be a serving member of the judiciary.

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<sup>7</sup> Chapter ten, paragraph 67.

21. The Authority should be supported by a staff of lawyers and administrators and have access to specialist advisers, such as forensic scientists, as necessary. The precise numbers and mix must depend on its workload. If it takes on a backlog of cases from the existing system (and it is to be expected that those whose petitions the Home Office previously turned down might well reapply), there will be a transitional period during which it will have significantly more cases to consider than it will have later. It may be advisable for it to have on its staff one or two people who are expert in investigations since this should assist it in its role (which we describe in more detail at paragraph 28 below) of supervising investigations undertaken by the police.

22. We have already mentioned that in our view the Authority should produce an annual report, which the Home Secretary should be required to place before Parliament and which Parliament might debate if it thought fit. This would describe the work done on cases during the year, analyse the representations received and give a breakdown of the number of cases completed and still outstanding, with the length of time that they had taken to consider. We think it important that the Authority should also be able to draw attention in its report to general features of the criminal justice system which it had found unsatisfactory in the course of its work, and to make any recommendations for change it thinks fit.

### Selection of cases for further investigation

23. In the early years of the Authority it seems reasonable to suppose that the number of cases put to it by persons claiming to be the victims of miscarriage of justice will be at least of the order of the number of cases put to the Home Office now (700–800 each year—see paragraph 5 above) and may at first be substantially more. However generously staffed it may be, the Authority will be faced with the same problem as the Home Office in deciding which of those many cases call for further investigation<sup>8</sup>.

24. We have described above the criterion of fresh evidence or new consideration of substance whereby, under the present arrangements, the Home Office limits the unrestricted discretion conferred on the Home Secretary by section 17 of the Criminal Appeal Act 1968. We have explained in paragraph 7 why we find the operation of that criterion unsatisfactory. We are reluctant to set specific criteria by which the Authority should select cases for further investigation. In practice, it will need no further justification for investigating a case than a conclusion on the part of its members that there is, or may be on investigation, something to justify referring it to the Court of Appeal. The Authority will need to devise its own rules and procedures for selecting cases for investigation subject to this overriding justification.

25. In our view the Authority should be able to discuss cases direct with applicants if it thinks that this would help it to decide whether a case called for further investigation. It has struck us forcibly that many people who believe that they are the victims of miscarriage of justice feel that they have a right to be heard and are frustrated by the fact that they have been unable to put their case in person to the Home Office officials who are considering it. We understand the resource constraints that have prevented the Home Office from interviewing applicants, and we accept that this could not be done in every case. We nevertheless recommend that the Authority be adequately resourced to conduct interviews with prisoners where it believes that this might help. It is not always possible for people who have suffered a miscarriage of justice and then been sentenced to a long term of imprisonment to set out their case clearly and cogently in writing and an interview may sometimes be the best way of convincing the Authority that the case is one that is worth investigation.

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<sup>8</sup> The representations received at present include a number from or about defendants who have not been tried or appellants whose first appeals to the court have not yet been considered. Some representations do not include a description of the grounds for contesting the conviction. Such cases are excluded from consideration.

26. Certain categories of case, as now, will exclude themselves in the sifting process. We think that the Authority, like the Home Office, should decline to look at cases that are still going through the courts and would normally require rights of appeal to have been exhausted. On the other hand, our recommendations in chapter ten would enable the Court of Appeal, where it thinks fit, either of its own motion or at the request of the appellant, to refer cases to the Authority before an appeal is decided. The Authority would be required to accept such cases and to investigate them.

27. Where cases are referred from the Court of Appeal, care will be needed before approaching the appellant personally for information about the case. Since the case will still be before the courts, the appellant will be entitled to the normal protection against self-incrimination. He or she should therefore only be interviewed, if that is necessary for the purposes of the investigation, by agreement and with his or her legal adviser present. The appellant should also have the right to abandon the appeal if he or she does not wish the investigation to proceed and, if he or she does abandon it, the investigation should lapse in consequence.

### Investigatory methods and powers

28. The Authority should be empowered not only to direct the investigation in the sense that it would decide which lines of inquiry needed to be pursued but also, if it felt that the case warranted it, to order that the investigation be carried out by a police force different from the one that investigated the original offence. Her Majesty's Chief Inspector of Constabulary would be able to advise on the appropriate alternative force. These powers are analogous to the ones currently enjoyed in major cases by the Police Complaints Authority and, as far as ensuring that the investigation is thorough and far reaching, we believe that they should be sufficient. Given the size and scope of the inquiries that sometimes have to be made in these cases and the resources required, there is in our view no practicable alternative to the police carrying out the investigation. It may, however, be, as we have already remarked, that the direction of inquiries and their evaluation once completed would benefit from the employment on the staff of the Authority of people with relevant investigative experience. The Authority should also be in a position to commission expert advice on particular aspects, for example scientific evidence, if it wished to do so outside the main police investigation.

29. We have considered whether any additional powers are necessary either for the Authority or for the police officers undertaking investigations at its direction. We are not convinced, however, on the information available to us, that additional powers are needed. The police have the necessary powers and investigative skills necessary to take the inquiries forward as directed and we have not been given examples of cases where the absence of particular powers has proved an obstacle to the successful outcome of an investigation. Nevertheless, it is possible to envisage cases where an investigation may be unable to make progress without the power to require answers or information. There may also be cases which call for the power to offer immunity from prosecution to individuals such as witnesses who might be at risk of prosecution for perjury if they retract the evidence that they gave at trial. We recommend therefore that this aspect be kept under review. If in any case it is thought appropriate to offer immunity from prosecution to a person who assists the Authority in its investigations, this should be a matter for the Attorney General to decide in the context of the particular investigation.

### Disclosure

30. The Authority should be responsible for ensuring that both the applicant and the prosecution are kept properly informed during the course of the investigation, whether or not issues of disclosure arise. Before the drafting of the terms of reference of a case to the Court of Appeal, the parties might be asked whether they wish to make any representations.

31. When a case is referred to the Court of Appeal, we would expect the information provided to the court (see paragraph 16 above) to be supplied,

through the court, to the parties, who should also be given such further material as they and the Authority think appropriate and desirable in the circumstances of the particular case. The police report, since it contains evaluation and interpretation of the material and is not evidence, and may also contain sensitive information on individuals, would not be sent either to the parties or to the court. It is well established in any case that such reports attract public interest immunity and are never disclosed. It is important that this continues. The Authority should nevertheless in general be responsible for disclosing whatever evidence has come to light in the course of its investigation that is relevant to the representations about the conviction or throws doubt on that or other convictions. Where, however, any questions of public interest immunity arise, it should ask the courts to decide how far such information should be disclosed. We recommend that the matter be determined by a single Lord Justice of the Court of Appeal *ex parte* in appropriate cases.

## Legal aid

32. There will need to be adequate arrangements for granting legal aid to convicted persons who have lost their appeals so that they may obtain advice and assistance in making representations to the Authority. We envisage that this aid would not normally continue once the Authority had initiated its own investigations. In some cases, however, it might ask the applicant's legal representatives to provide further information or assistance, perhaps involving the continuation of investigations already started by solicitors. Legal aid should be made available for this purpose and to enable a convicted person to interpret and respond to new information and, if the case is referred back to the Court of Appeal, to be represented at the appeal hearing. We envisage that the arrangements for granting legal aid for these purposes should not be made by the Authority itself but form part of the overall arrangements for legal aid on the basis of recommendations from the Authority.

# Chapter Twelve: Summary of Recommendations

We set out below a summary of the recommendations contained in the text of the preceding chapters.

<b>Recommendation Number</b>		<b>Chapter One Paragraph</b>
<b>INTRODUCTION</b>		
1.	Section 8 of the Contempt of Court Act 1981 should be amended to enable research to be conducted into juries' reasons for their verdicts.	8.
2.	There should be further research to establish the extent to which members of the ethnic minority communities suffer discrimination within the criminal justice system.	25.
3.	A system of ethnic monitoring should be introduced in order to establish how minorities are treated and thus to identify the measures which are needed to ensure that as far as possible the rules, procedures and practices of the criminal justice system are applied in the same way to all.	26.
<b>POLICE INVESTIGATIONS</b>		
		<b>Chapter Two Paragraph</b>
<i>Identification evidence</i>		
4.	The police should make a record of the description of the suspect as first given to them by a potential witness and this should be disclosed to the defence solicitor at the earliest possible opportunity.	10.
5.	Before an identification parade takes place, the police should provide the suspect's solicitor with details of the description given of the offender by the witness or witnesses who are due to attend the parade.	10.
6.	Colour photographs or video recordings should be taken of all identification parades.	10.
7.	The jury should be warned by the judge to take account of the evidence of those witnesses who do not identify the suspect as the offender, although they may have had the same opportunity of recognising him or her as witnesses who do make a positive identification.	11.
8.	Purpose-built suites for the conduct of identification parades should be extended to all major urban areas.	12.
<i>Interviewing of witnesses and suspects</i>		
9.	The present guidance on the treatment of victims in cases of rape and domestic violence should be extended to a wider range of witnesses and cases than at present.	16.

10. Police training should stress the special needs of distressed victims and witnesses and equip police officers with the necessary skills to handle such people with tact and sympathy. 16.
  11. The new national training in basic interviewing skills announced in Home Office Circular 22/1992, as supplemented by Home Office Circular 7/1993 should, so far as practicable, be given to all ranks of police officers. 23.
  12. Code C of PACE should be examined with a view to it in future specifying the minimum length of breaks between interviews. This aspect should subsequently be kept under review. 24.
- Power to require or request samples*
13. Power to take a sample of hair, other than pubic hair, without consent should extend to plucked as well as cut hair. 28.
  14. Saliva should be reclassified as a non-intimate sample for the purpose of section 65 of PACE so that mouth swabs may be taken without consent in accordance with section 63 of PACE. 29.
  15. The police and other investigators should have the power to remove substances retained in the mouth of a suspect. 30.
  16. Section 65 of PACE should be amended so that dental impressions are classified as intimate samples. 31.
  17. Where a suspect agrees to provide an intimate sample in a case which does not involve a serious arrestable offence, the police should be permitted to have it taken. 32.
  18. Where a suspect declines to supply an intimate or non-intimate sample in cases other than serious arrestable offences, the courts should be able to draw such inferences later from the refusal as they think fit and, if appropriate, treat the refusal as corroboration of any other evidence. 32.
  19. The power to take non-intimate samples without consent should be extended by a reclassification, for this purpose only, of certain offences as serious arrestable offences. 33.
  20. The police should have the power to take without consent non-intimate samples for the purpose of DNA analysis from all those arrested for serious criminal offences, whether or not DNA evidence is relevant to the particular offence. It should be permissible for the relevant DNA data or samples to be retained for subsequent use if the person concerned is convicted. Retention on a frequency data base should, however, be allowed. 35.
  21. There should be clear legislative provision for the more extensive storage of DNA samples or data both for the purpose of identifying offenders and for the purpose of keeping a frequency data base overseen by an independent body. 36-38.

*Police questioning after charge*

22. The questioning of suspects after charge should be

permissible provided that the usual caution is repeated, and that the person charged has the opportunity of consulting a solicitor free of charge before any interview and of having that solicitor present at the interview.

42.

*Scientific and technical aids*

23. The timetable for the introduction of a national computerised fingerprint recognition system should be accelerated.

46.

*Supervision of investigations*

24. Sufficient numbers of computer terminals should be provided to ensure that the Home Office Large Major Enquiries System (HOLMES) can be used in all investigations that call for its use.

52.

25. Reviews of certain selected major investigations should be conducted by members of Her Majesty's Inspectorate of Constabulary assisted by officers from another force.

53.

26. Policy files should be opened for all major inquiries. These should set out the format and direction of the inquiry, outline the decisions taken on its scope, give the reasons for discontinuing any particular lines of inquiry, and record any restrictions imposed on resource grounds.

54.

27. Following major investigations there should be a full debriefing involving all the parties so that future investigations can benefit from the experience gained.

54.

28. Job descriptions should be drawn up for the supervising ranks of the police service. Sergeants should work as supervisors as well as having their own caseloads, and detective sergeants should be held accountable within reason for the performance of the detective constables under their supervision.

59.

29. There should be an overhaul of detective training and of training in investigations, with particular emphasis being placed on the mistakes most commonly made during investigations and how they can be avoided.

60.

30. Police forces should put their methods of selecting officers for Criminal Investigation Departments onto a more formal basis linked to clear job descriptions.

61.

31. Police performance should not be assessed unduly on the basis of arrest or conviction rates. As far as possible performance measures should be based on the quality of the work performed.

62.

32. All forces should put in place a "helpline" scheme. In addition, it should be possible to report alleged misconduct, on a wholly confidential basis, direct to HM Inspectorate of Constabulary.

65.

33. All forces should issue police officers with notebooks containing fixed pages numbered sequentially.

66.

*The investigation of serious and complex fraud*

34. The Director of the SFO should be able to authorise the use of powers under section 2 of the Criminal Justice Act 1987

- by police officers in cases investigated by his office. The prohibition in subsection (11) of section 2 should be removed. 69.
35. It should be possible for section 2 powers to be exercised in assisting other countries' agencies in the investigation of offences of fraud committed overseas. 70.
36. A study of the feasibility of merging the SFO and the CPS's Fraud Investigation Group should be initiated as a matter of urgency. 73.
- Other investigative agencies*
37. Our recommendations on the investigation of crime and on safeguards for suspects should apply as far as may be appropriate to all bodies or agencies which have a responsibility for the investigation of crime. 75.

### SAFEGUARDS FOR SUSPECTS

#### *Safeguards for interviewing outside the police station*

38. The definition of an interview in Code C Note For Guidance 11A should be clarified to remove the apparent confusion as to what constitutes an interview for the purposes of the code. 10.
39. If the experimental project in Essex demonstrates the feasibility of tape-recording exchanges between suspects and police officers outside the police station, extensions to the PACE codes should be considered to cover what should and should not be permissible between arrest outside the police station and arrival at it. 12.
40. Whenever a confession has allegedly been made outside the police station, whether tape-recorded or not, it should be put to the suspect at the beginning of any tape-recorded interview that subsequently takes place at the station, after the suspect has had an opportunity of consulting a solicitor in private. 14.

#### **Safeguards inside the police station**

##### *(i) Establishing proper grounds for detention*

41. Code C should be amended to clarify whether the custody officer has the discretion to invite the suspect to comment on arresting officer's account of the arrest or on whether there should be further detention, and if so whether such exchanges are deemed to be an interview under PACE. 16.

##### *(ii) Detention time limits*

42. Section 50 of PACE should be amended so as to ensure that information is made available on the numbers of persons arrested and, of these, the numbers who are subsequently charged, and on the periods for which those charged and not charged are detained. 21.

##### *(iii) The role of the custody officer*

43. The custody officer should continue to be a police officer of at least the rank of sergeant. The use of acting sergeants should be kept to an absolute minimum. 26.

44. The possibility of some duties of a clerical and administrative nature being delegated to civilians under the control of the custody officer should be explored further as opportunity offers. 27.
45. In addition to the present training in custody officer duties provided to all newly promoted sergeants as part of their general training, further dedicated training should be given if there is a significant gap between general training and the taking up of custody officer duties. 28.
46. Station commanders should be fully equipped by training for the management and supervision of both custody officers and arresting and investigating officers to ensure that there is a separation of these roles. This task should be clearly noted on the station commanders' job descriptions. 29.
47. There should be centralisation of custody functions wherever practicable and their provision as a separate specialist service. 30.
48. Code C should be redrafted so as to include specific recognition of the difficulties that sometimes make it impracticable to apply its provisions immediately. 34.
49. All forces should introduce computerisation of the custody record process to a national standard. This process should be overseen and monitored by Her Majesty's Inspectorate of Constabulary. 34.
50. Continuous video recording (including sound-track) of all the activities in the custody office, the passages and stairways leading from the custody office to the cells, and if feasible, the cell passage and the doors of individual cells of all police stations designated under PACE as suitable for detaining suspects, should be introduced as soon as practicable. 37.
51. Suspects should be made aware that cameras in custody suites are switched on, but should not have the right to require them to be switched off. 38.
52. The simplified version of the notice to detained persons devised by the authors of the Commission's Research Study No. 17 should be tested under real conditions. 40.
- (iv) Interpreters*
53. A fully qualified interpreter, preferably independently employed by or on behalf of the suspect, should be used wherever practicable when the suspect is giving instructions to a solicitor. 43.
54. Only fully qualified interpreters should be used for interviews with the deaf. More funds should be made available to train interpreters and to pay interpreters in the criminal justice system on similar scales to those that apply elsewhere. 44.
55. Deaf suspects suffering from other handicaps or difficulties should always receive the full protection of the "appropriate adult" arrangements. 44.

(v) *The provision of legal advice*

56. Custody record forms should be amended so that the waiver of the right to consult a solicitor privately is achieved by way of alternative boxes which must be ticked in addition to the space for a signature. 48.
57. When a suspect waives his or her right to legal advice this should be recorded on tape at the custody desk if video recording is introduced. 48.
58. In addition to reminding the suspect at the beginning of the tape-recorded interview of his or her right to free and independent legal advice, the interviewing officer should, if the suspect has declined such advice, ask him or her to give the reasons for waiving the right. 48.
59. All suspects who decline legal advice should be given the opportunity of speaking to a duty solicitor on the telephone. If they decline to do this, or speak to the solicitor but maintain their decision, this should be recorded on the custody record and repeated on tape at the beginning of any subsequent tape-recorded interview. 49.
60. Paragraph 6.6(d) of Code C should be amended so as to require an officer of the rank of Inspector or above, before agreeing to the interview beginning or continuing, to inquire into the reasons for the suspect's change of mind and enter these into the custody record form. Alternatively, the officer should ensure that the suspect is asked by the interviewing officer what his or her reasons are for the change of mind at the beginning or recommencement of the tape-recorded interview. 50.
61. Solicitors should automatically see and if possible be given a copy of the custody record as it then stands on their arrival at the police station and, if possible, be given an updated copy when they leave. Unrepresented suspects should be given a copy on request. 51.
62. Solicitors should be able to hear the tapes of any interviews which may have taken place with their clients before the solicitor's arrival at the police station and should also be given a copy of the tape as soon as practicable after charge. 52.
63. Code C should be amended so as to encourage the police to inform the suspect's solicitor of at least the general nature of the case and the *prima facie* evidence against the suspect. 53.
64. Police training should include formal instruction in the role that solicitors are properly expected to play in the criminal justice system. A suitable reference to the role of the solicitor, which should be more positive than the current reference in paragraph 6D should be included in Code C. 54.
65. The Law Society should take appropriate action to ensure that the advice in "Advising the Client at the Police Station" becomes more widely known, better understood, and more consistently acted upon. It should experiment with producing a video film to support training in this area. 60.
66. Steps should be taken to make "own" solicitors and their representatives subject to the same standards as apply to duty solicitors and their representatives. They should have

- to satisfy the Legal Aid Board that they are fit and proper persons to offer legal advice at police stations before being permitted to receive legal aid fees. 61.
67. The Law Society should consider what can be done to monitor the performance of own solicitors engaged outside the legal aid arrangements. 62.
68. In the longer term, the training, education, supervision and monitoring of all legal advisers who operate at police stations should be thoroughly reviewed. 63.
69. The Legal Aid Board should commission occasional empirical research as a means of checking on the quality of performance of legal advisers at police stations. 63.
- (vi) Recording of interviews*
70. In the view of the majority of us further research should be carried out to inform future consideration of whether video recording of interviews should be introduced on a more widespread basis. 72.
- (vii) Summaries of police interviews ("interview records")*
71. The Home Office in consultation with the other interested parties should explore further, by experiment where appropriate, the options set out in paragraph 79 of chapter three in order to establish the best practicable method of producing interview records for the future. 80.
- (viii) Appropriate adults*
72. There should be a comprehensive review of the role, functions, qualifications, training and availability of appropriate adults. The review should examine whether the categories of people who need an appropriate adult are appropriately described in Code C, and whether the police need clearer guidelines about the criteria to be employed when considering the need for an appropriate adult. 84 & 86.
73. The working party conducting this review should formulate a rule governing the status of information passed by a suspect to an appropriate adult. 87.
- (ix) Police surgeons*
74. A working party on police surgeons should be set up by the Home Office to consider the need for a central coordinating body, the need for centres of excellence at universities, the appropriate training and standards for police surgeons, the role of psychiatry, the fees payable, the availability and use of psychiatric nurses and other relevant matters. 90.
75. There should be experiments to determine whether duty psychiatrist schemes would be appropriate at busy police stations in city centres. In any event, every police station should have arrangements for calling upon psychiatric help in any case where this is needed. 92.
- (x) Police discipline*
76. Acquittal of a police officer in a criminal court should no longer be a bar to disciplinary proceedings on the same facts. Such proceedings should be capable of resulting in dismissal where the officer's conduct shows that he or she is unsuitable to remain in the police force. 103. i.

77. Disciplinary hearings should be less formal and less closely aligned to criminal proceedings. The standard of proof should not be the criminal standard. 103. ii.
78. If the facts justify it, a police officer should be subject to disciplinary proceedings notwithstanding any pending civil proceedings. 103. iii.
79. A police officer dismissed following an internal disciplinary hearing should have the right to seek damages for wrongful dismissal in lieu of the present appeal to the Home Secretary. 103. iv.
80. Systematic arrangements should be made to ensure that criticisms of police conduct by a court are passed on to the force concerned. 103. v.
81. Reliable national statistics about disciplinary matters, including breaches of PACE, should be collected and recorded on a uniform basis by all police forces. 103. vi.

#### THE “RIGHT OF SILENCE” AND CONFESSION EVIDENCE

##### *Silence in the face of police questioning*

82. The majority of us believe that adverse inferences should not be drawn from silence at the police station and recommend retaining the present caution and trial direction. 22.
83. In the majority’s view, it is when but only when the prosecution case has been fully disclosed that defendants should be required to offer an answer to the charges made against them at the risk of adverse comment at trial on any new defence they then disclose or any departure from the defence which they previously disclosed. 24.

##### *Silence in investigations of serious and complex fraud*

84. Investigators in serious fraud cases should retain their existing powers to require answers to questions. 30.

##### *Existing safeguards against unreliable confessions*

85. When PACE is next revised attention should be given to the fact that section 77 is limited to the “mentally handicapped” and does not include the “mentally ill” or other categories of the “mentally disordered” and is thus inconsistent with other provisions in the Act and in the codes. 40.
86. The Court of Appeal’s decision in *Galbraith* should be reversed so that a judge may stop any case if the prosecution evidence is demonstrably unsafe or unsatisfactory or too weak to be allowed to go to the jury. 42.

##### *Admissibility of confession evidence*

87. Whenever a confession has allegedly been made to the police outside the police station, whether tape-recorded or not, it should be put to the suspect at the beginning of the first tape-recorded interview at the station. Failure to do this may render the alleged confession inadmissible, but if

the suspect does not confirm the confession on tape, it should not automatically be inadmissible. 50.

88. An alleged confession to a person other than an investigating official should be allowed to go before the jury even if not tape-recorded, provided it meets the tests contained in PACE and the judge, after *Galbraith* has been reversed, believes that the jury could safely consider it. 51.

*Corroboration of confessions*

89. There should be a judicial warning in cases where confession evidence is involved. The precise terms of the warning should depend on the circumstances of the case. If it remains possible for a confession to be admitted without supporting evidence, the jury should be warned that great care is needed before convicting on the basis of the confession alone. 77 & 85.

90. The majority of us believe that, where a confession is credible, and has passed the tests laid down in PACE, the jury should be able to consider it even in the absence of other evidence. The judge should in all such cases give a strong warning to the jury. The other evidence which the jury should be advised to look for should be supporting evidence in the *Turnbull* sense. 87.

THE PROSECUTION

*Present performance of the CPS*

91. The CPS's systems for the internal review of performance and quality assessment of case handling should be extended to include the communication to CPS lawyers of the comments of senior prosecuting counsel, and of judges faced with examples of poor CPS performance. 9.
92. Steps should be taken to reorganise the allocation of CPS staff to uncontested cases to ensure that lawyers are only used on those tasks for which their skills are required. 13.

*Relationship with police at investigative stage*

93. The police should seek the advice of the CPS at the investigation stage in appropriate cases in accordance with guidelines to be agreed between the two services. 18.

*The institution of criminal proceedings*

94. The police should be given the additional power of releasing suspects on bail subject to conditions. 22.

*Power to require the police to make further inquiries*

95. Where a chief officer of police is reluctant to comply with a request from the CPS to investigate further before a decision on discontinuance is taken, HM Chief Inspector of Constabulary in conjunction with the Director of Public Prosecutions should bring about a resolution of the dispute. 26.

*Discontinuance of criminal proceedings*

96. Where a case is to be discontinued the CPS should take this decision in time wherever practicable to save the

- defendant, the victim and the other witnesses from the need to attend court. 35.
97. The CPS should be given the power to discontinue proceedings up to the beginning of the trial in both the magistrates' courts and the Crown Court. 37.
98. When counsel is briefed in a case, he or she should be asked to read the papers in good time and to inform the CPS in writing that in his or her view the case meets the criteria of the Code for Crown Prosecutors in that there is a realistic prospect of conviction, or that further evidence is required, or that it should be discontinued or no evidence offered. 39.
99. The Bar should ensure that suitable procedures are put in place to ensure that machinery exists at barristers' chambers for allocating cases to appropriately experienced counsel and for ensuring that counsel provides advice in good time. Failing that, steps should be taken through legal aid legislation to impose suitable procedures. 39.
- Relationships with counsel*
100. Lord Justice Farquharson should be invited to reconvene his committee to see if there is need for refinement of the 1986 guidelines on CPS relationships with prosecution counsel. 43.
- Victims and other witnesses*
101. Victims should so far as practicable be kept informed of the progress and outcome of cases, including decisions not to prosecute and, in some cases, the results of bail applications or successful appeals. 45.
102. Where the views of victims are not apparent from the case papers, the CPS should in appropriate cases take steps to ascertain them before decisions are taken, particularly in bail cases. 46.
103. The CPS and the police should agree the categories of case in which the police should as a matter of routine provide information to the CPS on whether and why the victim would object in case there is a bail application. 46.
104. Where appropriate, the CPS should pass on information to the victims or witnesses direct rather than through the police. 47.
105. We recommend particular care and the continuing involvement of the police in cases where the victim fears for his or her personal safety because a defendant is about to be released on bail or after a successful appeal. 48.
106. The CPS lawyers handling the case should meet victims and key witnesses before the trial whenever there is a particular reason for checking any part of the evidence that they are likely to give. It is particularly important that prosecution advocates should confer at some point with expert witnesses. 49.
107. The majority of us consider that the prohibition on barristers interviewing witnesses before the trial other than their own client or an expert should be abolished. 52.

*Time limits*

108. The effectiveness of the time limits on preparation of cases by the police and the CPS proposed by the Working Group on Pre-Trial Issues should be closely monitored. 55.

*Diversion*

109. Police cautioning should be governed by statute, under which national guidelines should be laid down in regulations. 57.
110. The CPS should be able to require the police in lieu of prosecution to administer a caution, provided that the defendant admits the offence. 58.
111. There should be an examination of the possibility of combining the caution with a requirement on the offender to cooperate with social work agencies or the probation service or to agree to consult a doctor or attend a clinic, perhaps under the overall responsibility of the probation service. 60.
112. Subject to the planned evaluation of existing Public Interest Case Assessment schemes, these should be put on a formal and systematic basis and extended as far as practicable across the country. 61.
113. Prosecution fines on the Scottish model but with a range of fines instead of one level of fine should be introduced in England and Wales for use instead of prosecution in appropriate cases. 63.

**PRE-TRIAL PROCEDURES IN THE CROWN COURT  
(I)**

*Mode of trial*

114. In cases involving either way offences the defendant should no longer have the right to insist on a trial by a jury. Where the CPS and the defendant agree that the case is suitable for summary trial, it should proceed to trial in a magistrates' court. The case should go to the Crown Court for trial if both prosecution and defence agree that it should be tried on indictment. Where the defence do not agree with the CPS's proposal on which court should try the case, the matter should be referred to the magistrates for a decision. 13.
115. Legislation should refer to the various matters (including potential loss of reputation) which the magistrates should take into account in determining mode of trial. 18.

*Committal proceedings*

116. Committal hearings in their present form should be abolished. 26.
117. Where the defendant makes a submission of no case to answer, it should be considered on the papers, although the defence should be able to advance oral argument in support of the submission and the prosecution should be able to reply. Witnesses should not be called. 27.
118. In indictable only cases submissions of no case to answer should be decided by the Crown Court. In either way cases

- the responsibility should fall to the magistrates' courts, where stipendiary magistrates should preside over the hearings. 28.
119. There should be time limits, starting from the moment the defence receive the prosecution's case, for the making of submissions of no case to answer. 30.
120. When committal proceedings are abolished, bail applications should be made to the magistrates' courts until such time as the Crown Court becomes seized of the case. 31.
121. The CPS should be required to check before the trial that witnesses are likely to attend to give evidence, and should be alert to any indication that witnesses might have changed their minds about the nature of the evidence which they intend to give. The trial judge should ask prosecution counsel for an explanation of why the CPS had failed to alert the court at an earlier stage if a trial is abandoned because of the failure of a witness to appear, or because a witness has indicated a change of mind. 32.
- Prosecution disclosure*
122. As part of the procedures laid down by the Court of Appeal in *Johnson, Davis and Rowe* for the disclosure of sensitive information, the prosecution should be able to apply for a ruling of the court on the non-disclosure of sensitive material which may not be covered by public interest immunity. 47.
123. Cases where the disclosure of sensitive material is an issue should only be dealt with by High Court judges or nominated circuit judges. A number of such judges should be designated as duty judges to hear *ex parte* applications in cases of this nature. The judge who decides the *ex parte* application should wherever practicable conduct the trial. 48.
124. Where sensitivity is not in issue the prosecution's initial duty should be to supply to the defence copies of all material relevant to the offence or to the offender or to the surrounding circumstances of the case, whether or not the prosecution intend to rely upon that material. 51.
125. The prosecution should inform the defence at this stage of the existence of any other material obtained during the course of the inquiry into the offence in question. 51.
126. Requests for further disclosure by the defence should be on the basis of likely relevance to the line of defence disclosed. Where there is a dispute the matter can, if the defence insist, be referred to the court for a decision. 52.
127. The general framework for prosecution disclosure should be laid down in primary legislation, with detailed procedures to be governed by appropriate subordinate legislation or codes of practice. Such codes of practice or their equivalent should be published in draft, so as to give scope for the widest degree of consultation on their precise terms. 53 & 55.
128. Those involved in the various stages of prosecution disclosure should be required to sign a certificate to the effect that to the best of their knowledge and belief they

- have discharged their responsibilities in regard to disclosure. 53.
129. Provision in rules for exceptions to the disclosure requirements should include the the need to protect *bona fide* research. 54.
130. The prosecution should be obliged to disclose to the defence records of adverse findings in disciplinary proceedings against a police officer but only in so far as those records are relevant to an allegation by the defence about the officer's conduct in the current case. 56.
131. The prosecution should no longer be required to disclose cases in which there has been an acquittal following evidence given by a police officer who, apparently, has been disbelieved by the jury. 56.
- Defence disclosure*
132. All but one of us believe that there should be an extension of the arrangements for defence disclosure. 59.
133. Any defence disclosed to the prosecution in advance of the trial should not be disclosed to the jury until that defence, or an alternative, is advanced at trial. 62.
134. Those who intend to contest the charges against them should be obliged to disclose the substance of their defence in advance of the trial or to indicate that they will not be calling any evidence but will simply be arguing that the prosecution has failed to make out its case. 66.
135. If the prosecution considers the defence disclosure to be unsatisfactory, it should be able to apply to the court for a ruling on the matter. 67.
136. Where defendants put a defence at the trial without providing in advance an indication of the substance of their case, or where the explanation given at trial is different from the one given in advance of the trial, or where defendants disclose a number of mutually exclusive alternative defences, the prosecution should be able, with the leave of the judge, to invite the jury to draw adverse inferences. The circumstances should also be subject to comment by the judge in the summing up. 70.
137. If there are good reasons for a departure by the defence from the case advanced before the trial it should be open to the court to rule that no adverse comment should be permitted. 71.
138. A defendant who has not disclosed a defence should not be entitled to further disclosure from the prosecution, beyond what is the prosecution's initial duty to disclose, except in the rare cases where he or she is able to satisfy the court of its relevance. 72.

## PRE-TRIAL PROCEDURES IN THE CROWN COURT (II)

### *Pre-trial reviews/preparatory hearings*

139. All but one of us believe that there should be a number of

- procedures for the purposes of clarifying and defining the issues in advance of the jury's being empanelled. In the less complex cases an exchange of papers between the parties should be sufficient. In the more complex cases, but only in these, either party should be able to require a preparatory hearing in front of a judge in order to secure rulings on the main issues. In addition the court should be able to direct that such a hearing take place. 4.
140. The preparatory hearing should be part of the trial. 5.
141. Practice directions should be issued to the effect that in trials estimated to be of more than a certain length there should normally be a preparatory hearing. 17.
142. Pre-trial procedures should be set out in practice directions and rules of court. Breaches should be subject to comment by the court, to costs sanctions and, if necessary, to disciplinary action by the Bar Council or the Law Society. 21.
143. Guides to best practice in the Crown Court for each branch of the legal profession should, among other things, set out the times within which papers should be delivered to counsel and for counsel to deal with papers once they are received. 21.
144. Within prescribed time limits the parties should be required to certify that they have discussed the case and with what result. Where no preparatory hearing is needed, such "certificates of readiness" should record that fact, contain an estimate of the likely length of the case, indicate dates that should be avoided, and cover similar matters. Penalties in costs should be available and be employed for failure to comply with these requirements. 22.
145. The court should oversee the general progress of cases and intervene in order to speed up the process where necessary. 23.
146. Where a solicitor reports that he or she has been unable to comply with the requirements through inability to obtain instructions, the case should be listed for mention. If the defendant does not then attend at the court, a warrant for his or her arrest should be issued. 24.
147. A judge at a preparatory hearing should be empowered to make a ruling on any question as to the admissibility of evidence and any other question of law relating to the case. There should be no right of interlocutory appeal except on the limited ground that a ruling is wholly unreasonable. 28.
148. In the very small number of cases in which disclosure, severance or the admissibility of evidence is particularly sensitive and likely to be of critical significance, the trial judge should be nominated as soon as the CPS have alerted the court to the situation and should take over management of the case from that point right through to the conclusion of the trial. 30.
149. The trial judge should be bound by any orders or rulings made by the judge who presides over the preparatory hearing and counsel for the defence and the prosecution should be prohibited from seeking to reopen any matter that has been decided at that hearing. 31

150. The Bar and the Law Society should make and enforce appropriate rules to ensure that the solicitor delivers the brief to counsel's chambers in good time, and that the barrister who is allocated the case advises promptly on the preparatory steps that need to be taken before the trial. 32.
  151. Solicitors should put the name of counsel on the brief whenever possible. Where they do not do so, the barristers' clerk should allocate it after consultation with the instructing solicitors as soon as the brief arrives. 33.
  152. The Bar Council should make rules of conduct requiring the introduction of effective internal management systems in chambers in order to ensure that briefs are read within a specified time of receipt and that, if a barrister becomes aware that he or she will be unable to present the case, it is reassigned promptly. Failure to observe such arrangements should lead to judges imposing sanctions in costs or reporting the barrister to the Bar Council and to the Professional Conduct Committee of the Bar. 33.
  153. Fee scales for counsel should be revised in order to provide proper remuneration to counsel at the pre-trial stage and to provide sufficient incentive for counsel to achieve the proper balance between preparatory work and advocacy at the trial itself. 34.
  154. Counsel for both prosecution and defence should be required, on being given a brief, to certify that they have read it within a specified time of receipt. 35.
  155. There must be effective sanctions against poor performance or limited cooperation by defence lawyers. Heads of chambers and the Bar must take further measures to prevent individual counsel being allocated more cases than they can handle at any one time. 36. & 39.
- Sentence discounts, "cracked" trials, sentence "canvass" and "plea bargaining"*
156. The present system of sentence discounts should be more clearly articulated, with earlier pleas attracting higher discounts. 47.
  157. At the request of defence counsel on instructions from the defendant, judges should be able to indicate the highest sentence that they would impose at that point on the basis of the facts as put to them. 50.
  158. The sentence canvass should normally take place in the judge's chambers with both sides being represented by counsel. A shorthand writer should also be present, but, if not available, a member of the court staff should take a note to be agreed immediately by the judge and both counsel. 51.
  159. If the case cannot immediately be concluded but later comes back before the same judge, he or she should have a note of the sentence indication. If new information has come to light justifying a heavier sentence than first indicated the judge should warn counsel so that the defendant can reconsider his or her contemplated plea. 53.

160. If the case comes back before a different judge, he or she should be made aware of the earlier indication. It would be undesirable for the second judge to impose a heavier sentence unless new facts justified such a course. Again, the defendant should be advised of any such risk. 54.
  161. Discussions on the level of charge (charge bargaining) should take place as early as possible in order to minimise the need for cases to be listed as contested trials. 56.
  162. The additional privileges enjoyed by unconvicted prisoners should be extended to convicted prisoners awaiting sentence. 57.
  163. The policy of offering sentence discounts should be kept under review in order to monitor its impact on members of the ethnic minority communities. 58.
- Application to cases of serious fraud*
164. Unless there are special features which make it sensible to retain sections 4-6 of the Criminal Justice Act 1987, the special arrangements for transfer proceedings in certain fraud cases should be replaced by the procedures which we recommend for the generality of cases. 60.
  165. If sections 4-6 of the 1987 Act are retained, they should be amended so that cases that are serious *or* complex become amenable to the transfer procedures. 60.
  166. The legislation should be changed to require more detailed advance disclosure from the defence in serious fraud cases. 61.
  167. Arrangements to allow for the imposition of regulatory rather than criminal penalties in appropriate cases should be introduced when the details have been fully worked out by those concerned. 64.
  168. The trial judge should have power to grant a legal aid certificate at the stage of the preparatory hearing in a serious fraud case. 65.
  169. It should be made possible for the defence to obtain an extension to a legal aid certificate in advance of the defendant's first appearance before the trial judge. 65.
  170. Reporting restrictions on interlocutory rulings should be relaxed, enabling any matter of general relevance to be reported while continuing to restrict the publication of material that might have a prejudicial effect on proceedings in the case in question or related cases. 66.
  171. Preliminary meetings in advance of the preparatory hearing should be considered wherever appropriate. 67.
- Legal aid*
172. The scheme recommended by the Lord Chancellor's Department's Legal Aid Efficiency Scrutiny in 1986 for the collection of the defendant's contribution to legal aid should be further explored. 71.
  173. The Lord Chancellor's Department's Taxing Division should be set a target of paying 75% of each legal aid claim immediately, with any overpayment being recovered if necessary from future claims. 72.

174. Legal aid fees should be kept under review to ensure their adequacy in attracting sufficient numbers of competent solicitors, properly trained to present cases in the magistrates' courts. Standards of performance should be kept under review. 73.
175. Subject to clear rules (see recommendation 285) to be laid down as to what the defence can and cannot do, the defence should be free to instruct their own experts in the knowledge that reimbursement will be made promptly and in full. 74.

## THE TRIAL

### *Conduct of the trial*

#### *(i) Indictments*

176. The judiciary and legal practitioners should be consulted about the Law Commission's proposals for particularised indictments in order to explore the issues further. 6.

#### *(ii) Opening the trial*

177. Prosecution counsel's opening speech should be no longer than fifteen minutes unless the judge gives leave. 8.
178. Opening speeches should be restricted to an explanation of the issues involved in the trial. There should be a rule of best practice that they only refer to the evidence that the prosecution are going to call or to matters of law if this is essential to the jury's understanding of what is to follow. 9.
179. The defence should be permitted to make their opening speech immediately following the prosecution opening speech whenever this is considered to be desirable. 10.

#### *(iii) Examination and cross-examination of witnesses*

180. Where it seems to the judge that, as a result of time wasting tactics by counsel, the trial has unreasonably exceeded its estimated length, there should be a power to order a reduction in counsel's fees, subject to a right of appeal, or to suggest to the taxing officer that counsel's legal aid claim be critically examined in the light of the time wasted in court. 11.
181. A rule similar in effect to Rule 403 of the United States Federal Rules of Evidence should be introduced to enable judges to exclude evidence that, although relevant, may confuse the issues, mislead the jury, cause undue delay, waste time, or lead to needless presentation of cumulative evidence. 13.
182. Judges should act firmly to control bullying and intimidatory tactics on the part of counsel (see also recommendation 201). 14.
183. Where a defendant representing himself or herself has been excluded from the courtroom because of unreasonably obstructive behaviour an *amicus curiae* should be appointed if the judge thinks it appropriate. 16.

*(iv) Formal admissions*

184. As provided for by section 10 of the Criminal Justice Act 1967, matters which are not in dispute should, wherever possible, be reduced to writing before the trial and read out by counsel as an agreed statement. Where this is not done judges should in suitable cases impose penalties in costs or recommend a reduction in legal aid claims. 17.

*(v) Power of judge to call witnesses etc.*

185. Judges should be prepared, in suitable cases, to ask counsel why a witness has not been called and, if they think it appropriate, urge counsel to rectify the situation. In the last resort judges must be prepared to exercise their power to call the witness themselves. 18.

*(vi) Close of case*

186. Closing speeches should not in normal circumstances exceed thirty minutes. 19.
187. Judges should not have to give a summary of the evidence for and against the prosecution case in every case. 22.
188. The Bar's Code of Conduct should be amended to make it clear that defence counsel has a duty to intervene where the judge has plainly overlooked or misinterpreted a legal matter. 24.

*Hearsay evidence*

189. Hearsay evidence should be admitted to a greater extent than at present. But before the present rules are relaxed, the issues should be examined by the Law Commission. 26.

*Evidence of co-defendants*

190. Where more than one defendant is accused of the same offence the presumption should be in favour of a single trial, with the existing safeguards being rigorously applied by the judge. 28.

*Previous convictions*

191. The admissibility of evidence relating to the defendant's previous convictions should not be restricted to cases where there is a "striking similarity" in the evidence; the rule should be considered by the Law Commission as part of our recommended review of the law of evidence. 30.
192. When a defendant admits the basic facts alleged by the prosecution and the question is only one of knowledge or intent, the fact that he or she has previous similar convictions should be made known to the jury. 31.
193. If the defendant attacks the reputation or character of a prosecution witness, he or she should be open to similar attack from the prosecution unless the judge is satisfied that the imputations made by the defendant against the prosecution evidence are central to the defence. 33.
194. If a defendant without going into the witness box attacks the credibility of a prosecution witness, it should be possible for the prosecution, after the conclusion of the defence case, to lead, with the leave of the court, evidence of the defendant's previous convictions. 34.

*Corroboration*

195. The corroboration rules should be abolished as recommended by the Law Commission. Where a warning from the judge is required, this should be tailored to the particular circumstances of the case. 35.

*Victims and other witnesses*

196. Everything possible should be done to ensure that waiting and other facilities for victims and witnesses are adequate, that they are protected from intimidation and that in all other ways they are given the support and encouragement that many will need. 36.
197. Priority should be given to establishing witness support schemes in all Crown Court centres. 38.
198. It should be possible for a friend or supporter of a witness to be admitted to the body of the court though not to the witness box. 39.
199. The majority of us consider that defence barristers should be allowed to meet witnesses before the trial, particularly where the witnesses may be distressed or vulnerable. 41.
200. Where the case is known to be a sensitive one and the victim may be in a distressed or vulnerable state, the case should wherever possible be given a fixed date for hearing. 42.
201. Judges should be particularly vigilant to check unfair and intimidatory cross-examination of witnesses who are likely to be distressed or vulnerable. 43.
202. Where this is not already being done, judges should explain to the jury the reasons for using screens or video links in cases involving child witnesses. 43.
203. Witnesses who do not wish to have their addresses read out in court should be allowed to hand them into court or be able to use accommodation addresses, with the leave of the judge. 44.
204. Greater use should be made of section 23 of the Criminal Justice Act 1988 to enable statements of witnesses other than the defendant to be read out where the witness is afraid to give oral evidence. 44.
205. There should be guidelines for judges to follow when deciding whether or not to exercise their discretion to allow a witness to remain anonymous. Where this is an issue, it should be resolved in the course of the pre-trial procedures. 45.
206. At the conclusion of cases that involve sexual offences, victims' statements should be returned to the instructing solicitor. 46.
207. A power should be vested in the judge to prohibit, in the last resort, the reporting of unsupported allegations made during a speech in mitigation. 47.

*Interpreters*

208. The court should be responsible for providing the interpreter at the request of the defence out of central funds. 49.

- 209. There should be central coordination to ensure that national and local registers exist from which interpreters of the required standard may be drawn for the courts as needed. The arrangements should be overseen by the Lord Chancellor's Department. 50.
- 210. A glossary of legal terms should be prepared in all the main languages to help interpreters understand the system. 50.
- 211. Wherever possible the interpreter at the court should not be the interpreter used at the police station. 51.

*Juries*

*(i) Selection of jurors*

- 212. Electoral registration officers should take every possible step to ensure that the electoral rolls are comprehensive and include everybody who ought to be included. 53.
- 213. Unless there is a statutory bar on a person serving on a jury, every effort should be made to offer alternative dates to people who cannot sit on the dates first suggested. 54.
- 214. Jury summoning officers should take whatever steps are practicable to keep to a minimum the risk that individual jurors sitting on the same jury will be known to each other or to the defendant. 55.
- 215. The rates of financial loss allowance should be reviewed as a matter of urgency. 56.
- 216. Clergymen and members of religious orders should be removed from the list of those who are ineligible for jury service. 57.
- 217. Practising members of a religious sect or order who find jury service to be incompatible with their tenets or beliefs should be entitled to be excused jury service. 57.
- 218. Suitable research should be conducted, once section 8 of the Contempt of Court Act 1981 has been amended, into the influence that jurors with criminal records may have on jury verdicts. 59.
- 219. Persons who are on bail should be disqualified from serving on a jury. 59.
- 220. Once the new national criminal record system is running as an independent agency, the routine screening of jurors for criminal convictions should be arranged direct with the agency by the courts. 60.
- 221. The form sent to potential jurors should require the juror to affirm that he or she does not have a disqualifying conviction and that he or she understands that this may be checked and that a prosecution may follow if false information is given. 60.
- 222. In exceptional cases where compelling reasons can be advanced for such a course, it should be possible for either the prosecution or the defence to apply to the judge before the trial for the selection of a jury containing up to three people from ethnic minority communities. 63.
- 223. It should be open to the defence or prosecution to argue the

- need for one or more of the three jurors to come from the same ethnic minority as the defendant or the victim. The judge should be able to order this in appropriate cases. 64.
- (ii) Guidance and assistance to jurors*
224. In cases that may last weeks or months the judge should consider whether it might not be possible to stagger the courts' normal hours so that jurors have some time off during normal working hours. 65.
225. The Lord Chancellor's Department's explanatory video film for jurors should be remade in due course to include some explanation to jurors of the pre-trial discussions that may have taken place and of the fact that the judge may intervene in order to prevent irrelevant questioning or argument by counsel, to protect witnesses, to clarify the issues, and to keep the case broadly within any timetable that may have been agreed. 66.
226. The judge, in his or her opening remarks, should cover the extent to which jurors may ask questions during the trial, and explain that they may take notes. 67.
227. The provision of writing materials should be standard procedure. 67.
228. In complex cases, and in all cases where there has been a preparatory hearing, the judge should consider whether documents might with advantage be given to the jury. 68.
229. Technological aids should always be provided where this would assist in the presentation of complicated facts to the jury (see also recommendation 297). 68.
230. Before the jury retires, the judge should consider what materials are likely to be of most help to them in coming to the correct verdict. 69.
231. Where the need for legal argument has not been identified earlier, it should, wherever possible, be taken before the jury is empanelled, with counsel supplying beforehand written skeleton outlines of the arguments that they propose to adduce. 70.
- (iii) Other matters*
232. Every effort should be made to protect jurors from intimidation and the guidance given to them should set out the steps which they should take if they feel intimidated in any way. Sensitive cases should if possible be assigned to courtrooms whose public gallery is not so sited as to facilitate intimidation of the jury by members of the public. 73.
- Fraud trials*
233. Judges for long and complex fraud trials should be well trained, carefully selected, and provided with effective administrative support. 77.
234. As part of the preparatory hearing process, targets should be set for the amount of time to be occupied by each stage of the fraud trial. 80.
235. Where points of law in fraud trials have to be argued in the absence of the jury, written skeleton arguments should be

- submitted in advance and time limits should be imposed on oral argument. 80.
236. Judges should use more often their power under section 24 of the Criminal Justice Act 1988 to admit written documents as evidence without supporting oral evidence. 80.
237. Section 10 (3) of the Criminal Justice Act 1987, should be amended to permit judges to put the issues before the jury at the outset of a long fraud trial. 81.
- Training and sanctions*
238. There should be some restrictions on the work which the new barrister should be able to undertake during the second six months of pupillage; he or she should not appear in a jury trial or in the Court of Appeal unless led by a senior barrister. 86.
239. The Bar should ensure that the arrangements for the monitoring of pupils are improved so that they provide a solid basis for assessment of whether the new barrister has sufficient experience to practise unsupervised. 87.
240. The Bar's plans for further compulsory education in the first three years of independent practice and after should be implemented with the minimum of delay. 88.
241. Training in the main issues raised by scientific and statistical methods, forensic pathology, forensic science, psychiatry and psychology should be part of continuing compulsory training of criminal barristers and solicitors. 89.
242. A code of practice should be drawn up to govern the conduct of advocates in court. 90.
243. The Law Society should conduct research into such questions as consumer satisfaction, efficiency and operational problems in the system. 91.
244. The Legal Aid Board should periodically commission further research into the quality of work done by members of the profession. 91.
245. The Lord Chancellor's Department should examine urgently whether the level of fees available for those practising at the criminal bar acts as a serious disincentive to the maintenance of high standards there. 94.
246. Judges should be readier than at present to recommend the imposition of penalties in costs, reduction in fees and formal disciplinary measures by the relevant Inn of Court. 94.
247. There should be an increased effort to improve and extend the existing training of judges in awareness of race issues and consideration should be given to extending this training to awareness of gender issues. 95.
248. Substantially more resources need to be allocated to judicial training than at present. 96.
249. The performance of judges should be monitored during training by other members of the judiciary. 97.
250. Judges should be required to attend refresher training

- every three years and assistant recorders should receive their first refresher training course two years after their initial training. 97.
251. The judiciary should have in place an effective formal system of performance appraisal. Presiding and resident judges should have the leading roles in this; members of the Bar should also be able to comment on the performance of judges. These aspects should be looked at by the Lord Chancellor in consultation with the judiciary. 98 & 99.
252. Training courses involving a mix of persons from different agencies and disciplines in the criminal justice system should be held wherever possible. 100.
253. Training courses should be developed to address the need for practitioners to use plain English. 100.
- Management of courts and of cases*
254. Wherever practicable in complex cases judges should take on responsibility for managing the progress of a case, securing its passage through the various stages of pre-trial discussion to preparatory hearing and trial and making sure that the parties have fulfilled their obligations both to each other and to the court. 102.
255. There should be a more systematic approach to the role of stipendiary magistrates in the system to make best use of their special skills and qualifications. 103.
256. The administration of stipendiary magistrates should be overhauled, possibly by arranging them in two departments, one covering London and the other the rest of the country. 103.
257. Magistrates should be represented on all local court user committees. 104.
258. There should be a complete overhaul of all forms and leaflets in use in the courts which have to be filled in or read by members of the public. The assistance of the Plain English Campaign should be sought in this exercise. 105.
- Court design*
259. New courts should continue to incorporate suitable facilities for jurors and witnesses, especially those who are disabled. There should also be a programme, tailored to available resources, designed to improve the facilities for jurors and witnesses at existing courts. 107.
260. Jury boxes should wherever possible not be sited opposite the public gallery. So far as practicable, jurors should not have to wait or eat in areas to which ordinary members of the public have access. 108.
261. As new courts are built and old ones refurbished, the dock should be made to appear as far as practicable similar to the other compartments of the court. It should be positioned as close as possible to the defendant's solicitors and barristers and should not be unnecessarily large. 109.

**FORENSIC SCIENCE AND OTHER EXPERT EVIDENCE**

*Organisation of forensic science facilities*

262. A new Forensic Science Advisory Council should be set up to report to the Home Secretary on the performance, achievements and efficiency of the forensic science laboratories. Its remit should include the performance and standards of police in-house laboratories as well as of the larger public sector laboratories and the firms and experts in the private sector. 33.
263. There should be a continuing review of the effectiveness of the organisation of the public sector forensic science laboratories by the new Council. 16.
264. The new Council should endeavour to ensure that undue competitiveness does not lead to a diminution in standards. 22.
265. Subject to the rule that the same laboratory should not take on work for both prosecution and defence in the same case, the public sector laboratories should look upon themselves as equally available to the defence and the prosecution. 24.
266. The new Council should be charged with keeping the Metropolitan Police Forensic Science Laboratory's (MPFSL) arrangements for offering services to the defence under continuing review. 25.
267. Where it is not possible for a public sector laboratory to assist the defence, it should advise on where it might go for the scientific analysis or advice that it requires. 26.
268. As part of the work of the new Council, arrangements should be devised for the external inspection and assessment of the work of both the public and the private sector laboratories. 29.
269. The new Council should oversee the development of NAMAS accreditation for all laboratories engaged in forensic science work. 31.
270. Continuing efforts should be made to develop qualifications related to the competence of forensic scientists. 33.
271. The new Council should encourage the development of expertise and centres of excellence, embracing applied research, in the universities as well as in public sector and commercial laboratories. 34.
272. The new Council should oversee progress in the development of a code of practice for forensic scientists covering professional ethics and duties of disclosure. 35.
273. The new Council should keep under review the arrangements for the training of forensic scientists and their assistants and the means by which they are kept up to date with the latest scientific discoveries. 36.
274. The new Council should oversee any new arrangements for accrediting forensic scientists. 36.

*Forensic psychiatry and psychology*

275. The proposals of the Home Office Policy Advisory Board for Forensic Pathology should be implemented. 38.
276. Expert witnesses in forensic psychiatry and psychology should continue to be provided by the relevant departments in hospitals and universities. Where the provision of these services is threatened by funding difficulties, the Government should address the problem in the same way that similar problems with forensic pathology services have been addressed. 39.

*Investigation*

277. The Forensic Science Service (FSS) and MPFSL should be responsible for setting standards, auditing performance and establishing a code of practice for Scenes of Crime Officers (SOCOs). 41.
278. Training for SOCOs should be kept under review and benefit from the greatest possible contribution from forensic scientists from the FSS, MPFSL and other public sector laboratories. 41.
279. The current initiatives of the Association of Chief Police Officers and the forensic science services to assist the police in distinguishing those cases which would benefit from analysis in a forensic science laboratory from those which do not call for scientific investigation should be vigorously pursued. 42.

*Prosecution*

280. Every opportunity should be taken of ensuring by means of case conferences (over the telephone if appropriate) that prosecution counsel are fully aware of the implications of any scientific evidence in the case. 44.
281. If the defence believe that there may be material at the laboratory which throws doubt on the tests on which the prosecution is relying, they should be entitled to have access to the original notes of the experiment in order to test that belief. 48.

*The defence*

282. When exhibits are taken for analysis, regard should be had to the potential need for the defence in due course to do tests on the same material. 52.
283. Where scientific material is in the hands of the prosecution and a suspect has been charged and is legally represented, the defence should have an enforceable right to observe any further scientific tests conducted on it or, unless the material exists only in minute quantities, the right to remove some of the material, subject to proper safeguards, so that tests can be carried out by defence scientific experts. 52.
284. Where legal aid claims are made in advance of scientific work being commissioned, they should be processed and paid promptly and at least interim payments made. 54.
285. Clear rules should be laid down as to what scientific work defence solicitors can commission, once legal aid has been granted for the case as a whole, without waiting for further specific approval. 54.

286. The new Council should keep under review the extent to which the interests of the defendant are being properly looked after by the various providers of forensic science services singly and in combination. 55.
- The pre-trial phase*
287. There should be pre-trial discussion between the two sides, not necessarily by way of a hearing, in all cases in which scientific evidence is being led, whether by the prosecution or by the defence. 60.
288. If the defence intend to dispute the prosecution's scientific or other expert evidence, they should give advance notice of the grounds on which they dispute that evidence, whether or not they intend to call expert evidence of their own. 60.
289. Where the defence are calling their own expert evidence, the expert witnesses on both sides should be required to meet in order to draw up a report of the scientific facts and their interpretation by both sides. The document should be available to be put to the court as a written account of what has been agreed or remains in dispute. Where substantial disagreement on the scientific evidence is recorded in the report, a preparatory hearing should normally be arranged. 63.
290. Where the defence do not dispute the prosecution scientific evidence, they should indicate this when counsel for both sides certify that they have discussed the case between them and notify the agreement, or lack of it, that they have reached on the issues. 64.
291. Where the defence intend to dispute the evidence but not call expert evidence they should, after disclosure of the prosecution's expert evidence, indicate which matters in that evidence are admitted, which are not admitted and, when they are not admitted, in which respects. 64.
292. Where the prosecution are not proposing to lead any expert evidence but the defence wish to call such evidence, the prosecution should be under the same obligations as the defence would be in the reverse situation. 66.
293. It should be left to the parties to sort out by whatever means seem best to them any conflicts in the scientific evidence. It should, however, be open to the judge to direct them to discuss and resolve any outstanding questions. 67.
294. In cases involving scientific evidence, there should be an expectation that a preparatory hearing should take place unless both parties are in a position to certify that it is unnecessary. 68.
295. The present time limits for disclosure of expert evidence before trial should be more rigorously applied, with costs being awarded against solicitors and counsel if they are to blame for late service of the necessary statements. 69.
- The trial*
296. More use should be made of written summaries of expert evidence that is not contested. Such evidence should be

- presented to the jury as clearly as possible, normally by written statement. 71.
297. Visual and other technical aids should be used wherever possible by experts to assist them in giving evidence. 72.
298. Where expert evidence is disputed, the trial judge should ask expert witnesses before they leave the witness box whether there is anything else that they wish to say. The question should be put in the absence of the jury but, if the evidence is admissible, it should then be put before the jury. 73.
299. Expert witnesses should also be able, through their solicitor on leaving the witness box, to indicate that they wish to clarify the evidence they have just given. After the admissibility of such evidence has been explored in the absence of the jury, the witness should in appropriate cases be recalled to clarify the earlier evidence. 73.
300. It should continue to be for the courts to assess the competence of expert witnesses. The professional bodies should, however, assist the courts in this task by maintaining a special register of their members who are suitably qualified to act as expert witnesses in particular areas of expertise. 75.
301. The Law Commission should, as part of our recommended review of the rules of evidence, examine the apparent restriction on experts giving opinions in court based on tests run by assistants. Meanwhile maximum use should be made of the facility to present the evidence of assistants in written form. 78.

## COURT OF APPEAL

### *Applications for leave to appeal against conviction*

302. The Judicial Statistics or the Criminal Statistics should provide a clearer breakdown of the numbers applying to the single judge for leave to appeal, success rates, renewal rates, the number of cases heard by the full court and the eventual outcome. 8.
303. The Law Society and Bar should take all necessary steps to ensure that practitioners perform their duty to see the client at the end of the case and give preliminary advice both orally and in writing. 14.
304. The Prison Service should ensure that prisoners are not taken away from the court precincts before a cell visit by counsel and the instructing solicitor takes place. 15.
305. During the cell visit, clients should be advised in writing, as well as orally, whether counsel provisionally thinks that there are grounds of appeal or needs time to consider the matter. Written advice should follow the format of Appendix One of the guide issued by the Criminal Appeal Office and a copy should be signed by the defendant. 16.
306. The discrepancy between the Law Society's and the Bar's guidance on the time within which a written opinion should

- be available from counsel on lodging an appeal should be resolved. The solicitor should correspond with and if necessary visit the client in prison in order to complete the paperwork in time. It should be made clear that this work by solicitors qualifies for legal aid. 17.
307. The Court of Appeal should issue a practice direction giving clear guidance on the application of the time loss rules. 19.
308. Prison governors should be given adequate resources to enable them to provide interpreters for prisoners who do not speak English so that they can communicate with their lawyers. 20.
309. A policy document should be produced by the Prison Service on the provision of assistance with appeals, including a commitment to interview every new inmate to ensure that his or her right of appeal is fully understood and that an inmate who wants information on how to appeal is given it, as well as advice on how to get in touch with his or her lawyer in confidence. 21.
310. The Prison Service should set up a reliable system for locating prisoners for the purpose of enabling solicitors and members of families to get in touch with them. 22.
311. There should be improved arrangements for visits to prisoners from lawyers. 22.
312. Special assistance should be available for illiterate prisoners. 22.
313. Convicted defendants should have the right to legal aid to enable their grounds of appeal to be drafted at the stage of the initial application by their solicitor if the latter does not agree with counsel as to whether there are sufficient grounds of appeal. 24.
314. The entitlement to advice on appeal for those on legal aid should cover advice on whether to renew the application if it is rejected by the single judge. Where counsel advises in writing in favour of renewal, legal aid should be granted for counsel to settle the grounds and then argue the application before the full court. 25.
315. The length of the sentence and the relative lack of merits in any grounds of appeal should be factors in determining the numbers of days lost under the time loss provisions. The maximum should be 90 days. 26.
- Consideration of appeals*
316. Section 2(1) of the Criminal Appeal Act 1968 should be redrafted in view of the present overlap between the grounds of appeal and the confusion over the scope of the proviso. 32.
317. In the view of the majority of us the present grounds of appeal should be replaced by a single broad ground which would give the court flexibility to consider all categories of appeal. We suggest that the correct approach is for the court to decide whether the conviction "is or may be unsafe". 32.

*Error at trial*

318. The majority of us take the view that if the error would have made no difference to the safety of the conviction, the appeal should be dismissed. If the court believes that the error has rendered the conviction unsafe the appeal should be allowed. If the court believes that the conviction may be unsafe as a result of the error it should order a retrial. 38.

*Reconsideration of the jury's verdict where there is no fresh evidence*

319. As part of the redrafting of section 2 of the Criminal Appeal Act 1968 it should be made clear that the Court of Appeal should quash a conviction, notwithstanding that the jury reached their verdict having heard all the relevant evidence and without any error of law or material irregularity having occurred, if, after reviewing the case, the court concludes that the verdict is or may be unsafe. 46.

*Appeals based on fresh evidence*

320. In considering whether to receive fresh evidence the Court of Appeal should take a broad approach to the questions whether the fresh evidence was available at the time of the trial and, if it was, whether there is a reasonable explanation for the failure to adduce it then or for any subsequent departure by a witness from the evidence given at the original trial. 56 & 57.
321. Where an appeal is based on alleged error by trial lawyers, the test to be applied should not be confined to whether there was "flagrantly incompetent advocacy". What matters is whether the particular decision, whether reasonable or unreasonable, caused a miscarriage of justice. 59.
322. The test for receiving fresh evidence should be whether it is "capable of belief". 60.
323. Where the Court of Appeal would have ordered a retrial to test the fresh evidence but a retrial is impracticable or undesirable, it should decide the matter for itself. 63.

*Retrials*

324. In cases other than fresh evidence cases, where a retrial is desirable but not practicable a majority of us consider that the court should automatically allow the appeal. 66.

*Procedural matters*

325. The Court of Appeal should be free to refer matters that require further investigation to the new body which we recommend (see recommendation 331) should be responsible for the investigation of alleged miscarriages of justice. 70.

*Appeals against acquittal*

326. Where a person is convicted of conspiracy to pervert the course of justice on the grounds that he or she interfered with members of the jury in a case which led to the acquittal of the defendant or defendants, the trial at which that jury returned that verdict of acquittal should be regarded as a nullity. If practicable, the acquitted defendant or defendants should be prosecuted again for the same offence. 74.

*Appeals to the House of Lords*

327. Wherever the Court of Appeal hears in full court an application for leave to appeal, it should, if it calls upon the crown to respond to the applicant's case, grant leave to appeal at that point, thus preserving the possibility of a further appeal to the House of Lords. 78.
328. The requirement that before an appeal can be made to the House of Lords the Court of Appeal must certify that the case involves a matter of law of general public importance should be dropped. 79.

*Composition and organisation of the Court of Appeal Criminal Division*

329. Senior circuit judges nominated by the Lord Chief Justice should be able to sit as members of the full court. 82.
330. Serious consideration should be given to the possibility of the Court of Appeal sitting in regional centres. 83.

**CORRECTION OF MISCARRIAGES OF JUSTICE**

331. The Home Secretary's power to refer cases to the Court of Appeal under section 17 of the Criminal Appeal Act 1968 should be removed and a new body ("the Authority") should be set up. 11.

*Role of the Authority*

332. The role of the Authority should be to consider allegations put to it that a miscarriage of justice may have occurred, to ensure that any further investigation called for is launched, to supervise that investigation if conducted by the police, and, where there are reasons for supposing that a miscarriage of justice might have occurred, to refer the case to the Court of Appeal. 12.
333. The legislation which establishes the Authority should give it operational independence but require it to submit an annual report to the Minister concerned, who in turn should be required to lay the report before Parliament. The Minister should be answerable to Parliament about resources and whether the Authority was properly constituted for the task it was required to perform. 13.
334. The Chairman of the Authority should be appointed by the Queen on the advice of the Prime Minister. Other members might be appointed by the Lord Chancellor. 14.
335. The Home Secretary should be responsible for reporting to Parliament on the way in which the new arrangements are implemented. 14.
336. The Authority should be independent of the court structure. 15.
337. Where the Authority believes that a case should be considered by the Court of Appeal, it should refer the case to that court, together with a statement of its reasons for so referring it and, at the same time, provide the Court with such supporting material as it believes to be appropriate and desirable, and which it believes may be admissible,

- though without any recommendation or conclusion as to whether or not a miscarriage of justice has occurred. The Court of Appeal would then treat any case so referred in the same way as an appeal from the Crown Court. 16.
338. The Court of Appeal should ensure that the defence and prosecution receive copies of the statement and supporting material and any additional material that the Authority thinks fit. 16.
339. The possible use of the Royal Prerogative of Mercy should be kept open for the exceptional case. 18.
340. There should be neither a right of appeal nor a right to judicial review in relation to decisions reached by the Authority. 19.
- Composition and accountability of the Authority*
341. The Authority should consist of several members, with both lawyers and lay persons being represented. 20
342. The Chairman of the Authority should be chosen for his or her personal qualities rather than for any particular qualifications or background that he or she may have, but should not be a serving member of the judiciary. 20.
343. The Authority should be supported by a staff of lawyers and administrators and have access to specialist advisers. 21.
- Selection of cases for further investigation*
344. The Authority should devise its own rules and procedures for selecting cases for investigation, subject to its being able to conclude in each case so selected that there is, or may be on investigation, something to justify referring the case to the Court of Appeal. 24.
345. The Authority should be able to discuss cases direct with applicants and be adequately resourced to conduct interviews with prisoners where it believes that this might help. 25.
346. Where cases are referred from the Court of Appeal, the appellant should only be interviewed, by agreement and in the presence of his or her legal adviser. 27.
- Investigatory methods and powers*
347. The Authority should have powers to direct investigations, including deciding which lines of inquiry need to be pursued, and to order that an investigation be carried out by a police force different from the one that investigated the original offence. 28.
348. The possibility of the Authority, or police officers undertaking investigations under its direction, being given additional powers should be kept under review. 29.
- Disclosure*
349. The Authority should be responsible for ensuring that both the applicant and the prosecution are kept properly informed during the course of the investigation, whether or not issues of disclosure arise. 30.
350. The Authority should in general be responsible for disclosing any evidence found in the course of its investigations that is relevant to the representations about

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|      | the conviction or throws doubt on that or other convictions.  | 31. |
| 351. | Where a question of public interest immunity arises, the matter should be determined by a single Lord Justice of the Court of Appeal, <i>ex parte</i> in appropriate cases. | 31. |
| 352. | Where an applicant to the Authority requires legal representation, legal aid should be made available on the basis of recommendations by the Authority.                     | 32. |

# ALL OF WHICH WE HUMBLY SUBMIT FOR YOUR MAJESTY'S GRACIOUS CONSIDERATION

RUNCIMAN (*Chairman*)

ROBERT BUNYARD

JOHN CADOGAN

JOHN GUNN

J D MAY

YVE NEWBOLD\*

USHA PRASHAR

ANNE RAFFERTY

JOHN WICKERSON

PHILIP WOODFIELD

MICHAEL ZANDER†

M J ADDISON

*Secretary*

NIGEL OSNER

MARY-ANNE NEWMAN

B D LANE

}

*Assistant Secretaries*

2 June 1993

†Subject to the signed note of dissent set out in the following part of the report.

\*Subject to support for paragraphs 62-72 of the note of dissent set out in the following part of the report.

# Note of Dissent by Professor Michael Zander

(Paragraphs 62-72 are supported by Mrs Y. M. Newbold)

This Note of Dissent deals with three topics on which I am not able to agree with the proposals made by my fellow Commissioners: 1) Defence disclosure; 2) Pre-trial procedures; and 3) The powers of the Court of Appeal.

\* \* \* \* \*

## I Defence disclosure

My colleagues propose<sup>1</sup> that after the prosecution has disclosed its full case, the defendant should be required to disclose the substance of his defence, so as to give advance notice to the prosecution and thereby to reduce surprise at the trial.

1. The most important objection to defence disclosure is that it is contrary to principle for the defendant to be made to respond to the prosecution's case until it has been presented at the trial. The defendant should be required to respond to the case the prosecution makes, not to the case it says it is going to make. They are often significantly different.

2. The fundamental issue at stake is that the burden of proof lies throughout on the prosecution. Defence disclosure is designed to be helpful to the prosecution and, more generally, to the system. But it is not the job of the defendant to be helpful either to the prosecution or to the system. His task, if he chooses to put the prosecution to the proof, is simply to defend himself. Rules requiring advance disclosure of alibis and expert evidence are reasonable exceptions to this general principle. But, in my view, it is wrong to require the defendant to be helpful by giving advance notice of his defence and to penalise him by adverse comment if he fails to do so.

3. Moreover, the majority provides no evidence that there is a problem that requires action. The chief reason for wanting defence disclosure is to assist the prosecution's preparation and to avoid 'ambush defences', sprung without notice. But, as the majority itself admits<sup>2</sup>, ambush defences are rare, and when they occur they usually do not pose much of a problem. The recent (Seabrook) Report of the Criminal Bar Association rejected the call for obligatory pre-trial defence disclosure stating:

It is our experience that in the vast majority of cases the issues are apparent on the face of the witness statements or can easily be deduced where there is a not guilty plea<sup>3</sup>.

4. The majority concedes the validity of this statement when it says<sup>4</sup> 'even if there are no untoward practical disadvantages in the great majority of cases, the consequences in the minority of cases, often the most serious, are in our view unacceptable'. In my view, if there are no practical disadvantages in the great majority of cases, that is a powerful argument for not making fundamental

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<sup>1</sup> Report, chapter six, paragraphs 57-73.

<sup>2</sup> Report, chapter six, paragraph 64 and note 29.

<sup>3</sup> Report of a Working Party of the Bar Council, 'The Efficient Disposal of Business in the Crown Court', 1992, paragraph 630.

<sup>4</sup> Report, chapter six, paragraph 64.

changes in the system unless there is solid evidence regarding the minority of cases sufficient to justify the change and grounds for confidence that the consequences of the change would be positive.

5. In regard to the minority of cases, no evidence is produced to support the statement that they are often the most serious cases or that the consequences of non-disclosure in those cases are unacceptable. So far as I am aware, no such evidence exists.

6. Other reasons advanced by the majority<sup>5</sup> to justify introducing a requirement of defence disclosure are:

- That advance disclosure of the nature of the defence may lead to the prosecution dropping the case;
- That it may lead to an early guilty plea;
- That it may lead to fixing of an earlier trial date;
- That it would permit more accurate estimates of the length of the trial.

7. Each of these propositions seems unconvincing. All that is to be required of the defendant is that he disclose the broad nature of his defence (ie. that it will be self-defence, provocation, consent, etc.). It is difficult to visualise such limited disclosure having any of the above effects. Such limited disclosure would give little real help to the prosecution which wants to know what witnesses the defence intend to call and what they are likely to say. But it is not (yet) suggested that the defence would have to reveal such information. If therefore there is a problem about ambush defences, the majority's proposal would barely touch it. (One can foresee that if this limited form of defence disclosure proves largely useless to the prosecution, the next thing will be a call for much more defence disclosure.)

8. In serious fraud cases under the Criminal Justice Act 1987 the defence can be required by the judge to produce a case statement setting out the defence 'in general terms'. But a study done for the Royal Commission by Professor Michael Levi shows that this has proved largely ineffectual because it is not sufficiently specific<sup>6</sup>. If it does not work in the serious fraud area, it probably will not work in other areas.

9. Moreover, a general requirement of defence disclosure would involve significant extra delays, costs and inefficiencies. The lay client would have to be seen to take his instructions. Getting the lay client to come into the solicitor's office or going to see him in prison is often troublesome. Counsel would quite frequently be involved both to advise and often actually to settle the defence disclosure. It could hardly be expected that defence lawyers would go out of their way to be helpful to the prosecution. The prosecution would therefore often find it right to ask for 'further and better particulars', with resulting further delays and costs. These extra costs would apply not only to cases that ended as trials but also to those that ended as last-minute guilty pleas ('cracked trials').

10. The present much criticised lack of continuity in counsel's involvement in the case (on which see further below), would pose even greater problems than in relation to ordinary pre-trial matters. From the defendant's point of view, the last minute appearance of a barrister he has never seen before would be even more upsetting in a regime where pre-trial defence disclosure was a requirement. It is bad enough that the client should so often be faced on the day of trial with a new barrister. It would be worse if he knew that the new barrister's ability to represent him was restricted by decisions regarding defence disclosure made by another barrister at an earlier stage whether on paper or at a pre-trial hearing.

11. Moreover it is extremely unlikely that defence disclosure rules would be enforced. The rule requiring advance notice of an alibi defence is honoured more

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<sup>5</sup> Report, chapter six, paragraph 59.

<sup>6</sup> Michael Levi, *The Investigation, Prosecution and Trial of Serious Fraud*, Royal Commission on Criminal Justice Research Study No.14, 1993, pp.104,182.

in the breach than in the observance. Where there has been a breach of the rule the judge can refuse to allow the alibi defence to be put. But breaches are generally not penalised by the judges—because they are understandably reluctant to prevent a defendant from putting forward his defence. The judges would I believe be equally slow to penalise failure to make this new form of defence disclosure—whether by adverse comment or by sanctions imposed on the lawyers.

12. In summary, I am against defence disclosure because it is wrong in principle, and because it would cause extra delay, cost and general inefficiency in the system—to little, if any, purpose.

## II Pre-trial procedures including preparatory hearings

13. The second issue, concerning pre-trial procedures, is more one of process than of principle. But problems of process are important—and clearly my fellow Commissioners regard them as extremely important.

14. My colleagues envisage a new regime under which, in essence, the parties would be required to exchange forms designed to provide information to each other and to the court<sup>7</sup>. Counsel would have to communicate with each other. They would also be required to sign and lodge with the court certificates of readiness and of having done the pre-trial work. The court would monitor the system and would hold the parties to account for compliance with its successive stages within specified time-limits. Either party could demand to have a preparatory hearing (PTR) as of right and the court could order one of its own motion. At such a hearing rulings could be made that would bind the trial judge.

15. I am opposed to this proposal because I believe 1) that it would make the system less rather than more efficient and would increase delays and costs, and 2) that it is in any event unlikely to work as intended. I do not share the majority's belief that its proposed system could be made to work through application of sanctions. Nor do I believe in the efficacy of preparatory hearings as a means of shortening trials.

16. In my view, if there is any need for improvements in pre-trial procedures, they can be achieved more effectively and more efficiently by adaptation of the system proposed by the Pre-Trial Issues Working Group known as Recommendation 92<sup>8</sup>. Under this scheme all cases have an early Plea and Directions Hearing (PDH). A brief PDH would in my view suffice as pre-trial procedure for almost all cases. Issues that still required sorting out could normally be dealt with at a pre-hearing on the morning of the trial.

17. Recommendation 92 is presently being tested by an official pilot project in three courts—South Croydon, Plymouth and Sheffield. An interim report has been issued; in due course there will be a final report. The majority's proposed scheme should equally be tested empirically by a pilot scheme so that the relative advantages and disadvantages, including relative costs, of both approaches to the problems of pre-trial process could be fairly evaluated.

18. Since my fellow Commissioners have however set out their scheme in detail and since I believe its introduction would significantly worsen rather than improve the system, I have thought it right to set down my reasons.

19. My colleagues state<sup>9</sup> that their main objective in this area is to assist the jury:  
The best means of enabling the jury to reach its verdict on the clearest possible appreciation of the facts of the case is a pre-trial procedure in which the issues are clarified and defined in advance of the jury's being empanelled.

20. They do not, however, provide any evidence that the jury at present has any difficulty with the evidence in the case. It is simply assumed to be so. In the

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<sup>7</sup> Report, chapter seven, paragraph 1–36.

<sup>8</sup> Described in the Report, chapter seven, paragraph 12.

<sup>9</sup> Report, chapter seven, paragraph 4.

absence of empirical evidence this would be understandable. But the Crown Court Study<sup>10</sup> provides at least some evidence that the jury in fact manages quite well:

- 56% of jurors said all members of the jury understood the evidence and 41% said that most did. Foremen said the same<sup>11</sup>. The results for remembering the evidence were almost identical<sup>12</sup>.
- Also relevant is that about 90% of barristers thought the jury would have had no trouble in understanding the evidence in the case<sup>13</sup>. Where there was scientific evidence, 94% of judges thought all the evidence was understandable by the jury<sup>14</sup>.

21. One will have to wait for reform of the Contempt of Court Act and research as to what happens in the jury room to see whether the jury's self-evaluation and the barristers' and judges' assessments are well-founded. In the meanwhile, it is encouraging that jurors generally, foremen, barristers and judges broadly agree in their opinion of jurors' competence.

22. This evidence, while not conclusive, provides no support for the majority's position that there is a 'problem' in regard to jury understanding of the evidence sufficiently serious to justify not merely action but action of a quite radical character. If anything, it shows the opposite.

23. Belief in the jury's capacity to manage tolerably well seems plausible given that most cases are quite short. The average length of a contested case in the Crown Court is under 7 hours. Only 6% of cases are longer than 2½ days. The Crown Court Study showed that in a third of cases the jury is out to consider its verdict for under an hour; in nearly two-thirds of cases it is out for under 2 hours; in nearly 90% of cases it is out for under 4 hours<sup>15</sup>.

24. In the light of this empirical evidence it seems to me that my colleagues' concern that 'the jury needs more help' is not substantiated.

25. The majority's proposals in regard to pre-trial procedures and PTRs are also directed to 'streamlining the trial', not just for the sake of the jury but to save costs and improve efficiency. 'Streamlining the trial' is desirable—unless the means designed to achieve it are ineffectual or, worse, counterproductive.

26. My colleagues<sup>16</sup> propose a carefully graduated series of steps to be undertaken:

- (1) A form from the CPS to the defence certifying that they have made full disclosure.
- (2) A form from the defence to the CPS indicating whether the defence intend to defend and, if not, to what charges they would be prepared to plead guilty.
- (3) If the defence indicate an intention to plead guilty, the CPS replies whether it accepts the plea and if so, to what charges.
- (4) If the plea is to be not guilty, a further form from the defence making defence disclosure and dealing with other pre-trial matters.
- (5) All notices and counter-notices have to be served on the court, which is required to monitor compliance with the procedural requirements. The

<sup>10</sup> Michael Zander and Paul Henderson, *The Crown Court Study*, Royal Commission on Criminal Justice Research Study No.19, 1993. This report will be referred to here simply as the Crown Court Study.

<sup>11</sup> Sect.8.2.3. The results were based on returns from over 8,000 jurors in some 800 cases with an average of over ten jurors per case replying to a 14-page questionnaire.

<sup>12</sup> Sect.8.2.6.

<sup>13</sup> Sect.6.2.7.

<sup>14</sup> Sect.3.2.14.

<sup>15</sup> Sect.8.10.1.

<sup>16</sup> Report, chapter seven, paragraph 18.

court reminds parties by telephone of time-table lapses. The judge is informed if there is serious delay so that he can take action.

- (6) Both sides and the court would have the right to call for a preparatory hearing (PTR). If there is no PTR, a date would be fixed for trial.
- (7) Prior to the trial, counsel for both sides confer informally to sort out everything that can be sorted out.
- (8) Both counsel would also be under a duty to certify that they had discussed the case and with what result. If no PTR were sought, counsel's 'certificate of readiness' would record that fact, contain an estimate of the likely length of the case and indicate dates to avoid in regard to counsel's non-availability<sup>17</sup>.
- (9) There would also be a statement regarding the dates of non-availability of witnesses. Since, however, this would not be within the knowledge of the barristers, it would presumably have to be prepared by the solicitors (or CPS)—whether in the same or a separate certificate.
- (10) Briefs should be delivered by solicitors in good time with a barrister's name stated. They should then be read by the barrister within a specified time of receipt. If the brief has to be returned, it should be on the basis that preparatory work has been done and can be relied on and that there is time for the counsel to master the brief before trial. The Bar Council and the Law Society should make and enforce appropriate rules to ensure that these things are done<sup>18</sup>.

27. This new machinery is to be put in place to 'simplify and streamline' the system. In my view it would seriously complicate the pre-trial stage, and greatly increase costs and delays.

28. It is unquestionable that the proposed scheme would increase costs and delays. It involves a lengthy list of new steps to be taken by lawyers which will absorb a good deal of time spread over (often many) weeks, and for which they would have to be paid. Indeed, the majority states that they must not only be paid but be paid sufficiently well to ensure that the work is actually done. No attempt is made in the Report to estimate such costs, but I suggest they would be considerable.

29. They would include the cost of seeing the lay client for the purpose of taking instructions in order that the required new forms could be filled out. Sometimes this would mean visiting him in prison. If he was on bail, it might well involve repeated letters and phone calls to get him to come in to the office. The estimate of costs must also include the time of the court officials who are to monitor the system and chase non-compliance. It will also include the new work to be done in instructing barristers and by the barristers both in completing, or assisting in the completion, of the various new forms and in the formal and informal pre-trial communication<sup>19</sup> envisaged as being an important part of the majority's scheme.

30. Such extra costs and delays could only be justified if there were compensating advantages. I do not believe that such compensating advantages can be identified in terms either of assisting the jury or of simplifying and shortening trials.

31. The majority's proposals are plainly dependent on the new forms actually being completed in most cases.

32. It has been shown over many years and in many contexts, however, that legal practitioners cannot be relied on to complete and return forms. In the Crown Court Study, court clerks were asked whether the listing information

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<sup>17</sup> Stating counsel's availability or non-availability on paper would in practice give rise to considerable difficulties because of the complexity of most barristers' diaries. By comparison, discussing the matter in court in the presence of one's opponent would probably be more productive.

<sup>18</sup> Report, chapter seven, paragraph 22, 33 and 35. Nothing is said, however, as to how these objectives could in practice be achieved. I doubt whether such new rules are likely to have much impact.

<sup>19</sup> Thus just the simple requirement in (7) above of informal contact pre-trial between barristers could involve tens of thousands of telephone calls per year—see note 29 below.

forms (Form 5085 or 5085A, often called simply 'Form A') had been received. In almost half (47%) they had not been received. Those that were received often came in late<sup>20</sup>.

33. It is safe to predict that performance would in fact be patchy. Often, the forms would not be filled out at all—and would therefore need chasing. Often, whether intentionally or otherwise, they would be filled out incompletely and those to whom they are addressed would want to ask for 'further and better particulars'. Sometimes such requests would be made simply to the opponent; sometimes they would have to involve the court. The resulting paper chase would have considerable implications in terms of both cost and delay—not to speak of exasperation.

34. The majority's scheme equally clearly requires that the proposed new forms be exchanged according to time-limits which are adhered to, lest delays lengthen unacceptably. But not surprisingly, given the pressures they are under, legal practitioners are about as unreliable in regard to procedural time-limits as they are in regard to filling out and return of forms. Civil procedure has elaborate time-limits—but every practitioner knows they are largely ignored. Time-limits are beginning to be used in the criminal justice system but the signs so far are not encouraging.

35. The recent report by Plotnikoff and Woolfson for the Efficiency Commission<sup>21</sup>, for example, considered the impact of time-limits in existing regulations<sup>22</sup>. The study also compared LCD target time-limits for circuits with what happened in the three sample courts. The study found that almost without exception the time-limits were being exceeded, often by considerable margins<sup>23</sup>.

36. My fellow Commissioners acknowledge the problem of getting practitioners to complete forms and adhere to time-limits, but they believe that the problem can be solved by a mixture of 'sticks', in the form of wasted costs orders and the like<sup>24</sup>, and 'carrots' in the form of attractive remuneration. I regard this belief as unrealistic.

37. Sanctions can work if most people can be relied on to perform more or less according to the system so that the sanctions need to be applied only to the exceptional defaulter. If, as in the case of, say, speeding by motorists, a high proportion of people are potential defaulters, the sanctions can only secure compliance if they are draconian and there is a probability, or at least a realistic possibility, that they will be imposed. If that is not so, speeding will continue—as in fact it does.

38. In regard to the proposed new form-filling and adherence to time-limits there would, I believe, be very large numbers of potential 'defaulters'. In my view, nothing short of credible and severe sanctions could make the system work. But in the case of this proposed innovation it is not credible that severe sanctions would be imposed on sufficient numbers of practitioners to make the threat of such sanctions an effective deterrent. Given the procedural safeguards rightly in place to protect the practitioner, it would be remarkable if any significant number of, say, wasted costs orders (or other sanctions envisaged by the majority) were imposed either by the judges or by the professional bodies. Quite apart from any other reason, practitioners would normally be able to produce sufficient (and often entirely genuine) explanations as to why the forms had not been filled in or the time-limits exceeded. But even if there were no valid

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<sup>20</sup> Sect. 2.2.8.

<sup>21</sup> J. Plotnikoff and R. Woolfson, *From Committal to Trial: Delay at the Crown Court*, March 1993.

<sup>22</sup> These covered: (1) transfer of committal papers from the magistrates' court to the Crown Court; (2) time from committal to lodging the indictment with the Crown Court; (3) the time from committal to arraignment; and (4) the same in regard to custody cases.

<sup>23</sup> Thus in Court A the *average* period from committal to trial for custody cases was 163 days compared with the LCD's target of 70 days. For courts B and C, where the target was 56 days, the average period was 106 days and 148 days respectively (p.32).

<sup>24</sup> They refer (chapter 7, paragraph 36) to reports from the judge either to the taxing officer dealing with fees or to the barrister's head of chambers or to the leader of the circuit or a wasted costs order.

excuse, the courts and professional bodies would be unlikely to (and should not) impose significant penalties for minor procedural failings such as not filling in a form or not complying with a time-limit<sup>25</sup>. A procedural system that is dependent on heavy sanctions to make it work is almost bound to fail.

39. Nor could one realistically have faith in the Lord Chancellor's Department (LCD) paying so well for this work that the 'carrot' of sufficient remuneration would ensure compliance.

40. I am also not persuaded that the LCD would (or should) deploy the necessary manpower to provide the potentially very burdensome court monitoring role contemplated by the majority as an important part of its proposal.

41. A further crucial ingredient in my colleagues' scheme is efficient contact between clients and their lawyers. The problem of solicitors getting instructions from clients, whether they are on bail or in custody, has already been referred to. The more the system requires defendants on bail to go to the lawyers' office or their solicitors to go to prisons, the more it is likely to fail. Clients notoriously do not bother to come; lawyers have difficulty in finding time to go.

42. The majority's proposed scheme will at various points require both the CPS and defence solicitors to consult with counsel. This is another problem area. A requirement that counsel be instructed, whether to advise or to draft replies to forms or to undertake other paperwork, will generate delay and extra cost. Criminal work at present does not involve much pre-trial paperwork. The majority's scheme will involve a very great increase in the amount of paper to be processed by practitioners. Experience teaches one to be sceptical about the claim that more paper will bring increased efficiency.

43. One of the things that will predictably often go wrong is that counsel will change during the course of all this new pre-trial work. The lack of continuity of counsel in both civil and criminal cases is one of the well-known problems of the divided profession. It has often been said 'something should be done about it'. But in my view there is no cure for this problem that is not worse than the disease.

44. Returned briefs, like late preparation of cases, though in themselves undesirable, are an integral part of the system which is based on the priority given to avoidance of delay. To promote maximum through-put of cases the principle is that when a case finishes and a courtroom and judge thereby become available, there should, so far as practicable, be another case waiting to start at short notice<sup>26</sup>.

45. Changes in counsel during the progress of the case therefore are usually no-one's fault. They mainly result from the unavoidable fact that cases sometimes run shorter or longer than was anticipated. When a case runs short and a new case is brought on to fill the gap, counsel earmarked for the case cannot now manage it because he or she is 'part-heard' in another case. When a case runs long, it is the same problem in reverse. Counsel earmarked for the next case is unavailable because he is 'part-heard' in the current case. In that situation it is very rare for the courts to grant an adjournment to enable counsel of choice to do the case.

46. It might be thought that the solution would be for the courts to allow an adjournment if counsel of choice were unavailable because of being part-heard

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<sup>25</sup> The time-limits under discussion here, which relate to the successive internal procedural stages of a case, are themselves less significant than time-limits that regulate the overall period within which a case must be brought to trial, but accumulating lateness is likely to make achievement of such overall targets more difficult.

<sup>26</sup> The cases brought on at short notice, known as 'floaters' or 'backers', represent a significant proportion of the total. In the Crown Court Study court clerks said they were 14%, the barristers said they were closer to a fifth of all cases (sect.2.2.6).

One of the effects of returned briefs is that it makes it more likely that the defendant will meet his trial barrister for the first time on the morning of the trial. Defence solicitors in the Crown Court Study said the defendant saw his barrister for the first time on the morning of the trial in 55% of contested cases and 70% of cracked trial cases (sect.2.5.7).

in another case. From the defendant's point of view that might seem very desirable, especially if he had already seen the barrister. But the effect would be to cause a wholly unacceptable increase in delays, which would be greatly to the disadvantage of defendants who would have to wait much longer for their trials. Moreover, there would be little purpose as the problem of one or other counsel in the case being part-heard elsewhere could just as well re-occur on any adjourned hearing. That therefore is not a solution.

47. The fact is that the system will unquestionably continue to operate with a very large number of returned briefs and changes in counsel during the case<sup>27</sup>. Clearly this is not desirable. But because it seems to be inevitable, it should be seen less as a 'problem'<sup>28</sup>, than as a reflection of the very high premium our system rightly sets on keeping delay to a minimum. But under the majority's scheme, with its proliferation of new pre-trial processes, the incidence of returned briefs would be likely to get considerably worse.

48. The majority's proposed scheme also requires that counsel for each side be in an effective working relationship with each other at various pre-trial stages. This too presents problems. For one thing there is as yet no system for informing the other side of the identity of one's counsel, and for keeping the information up-to-date<sup>29</sup>.

49. Perhaps, eventually, computerisation of listing information will provide current information as to who is acting in the case. But at present the absence of such a system would, at least in ordinary routine cases, make pre-trial contact between the barristers difficult to achieve.

50. Even if each knew the other's identity, there would be no assurance that he was still doing the case, or if he was still doing it today, that he would necessarily be doing it tomorrow. The more that counsel's identity changes during the pre-trial stages, the more difficult in practice it would be for counsel to be in an effective working relationship with each other.

51. The majority's scheme also contemplates significant use of preparatory hearings (PTRs) to assist in the process of 'streamlining' and preparing cases for trial. My colleagues say they envisage PTRs for a small minority of cases, mainly for cases lasting five days or more. But the effect of this restriction is effectively cancelled by the fact that under the majority's scheme either side would have a right to demand a PTR—and the court too would have the right to require a PTR. The likely number of PTRs under the proposal therefore cannot be predicted. It might turn out to be a very large number<sup>30</sup>.

52. Worse, the existing empirical evidence about pre-trial hearings of whatever kind suggests that, contrary to what common sense would suggest, instead of simplifying trials or saving costs, such hearings tend to do the opposite. They increase costs and lengthen trials. The evidence for this proposition is now extensive:

- In the Crown Court Study, judges were asked whether they thought the pre-trial review had saved much time and money. As many as two-thirds (66%) said No. A quarter (24%) said that a little time and money had

<sup>27</sup> The Crown Court Study showed that currently close to half of all briefs are returned. Prosecution barristers in contested cases said their brief had previously been returned in 59% of cases. For defence barristers the proportion was 44% (sect.2.1.6).

<sup>28</sup> The Crown Court Study showed that, according at least to practitioners, most cases can in fact be adequately prepared by the barrister at very short notice. This was the view not only of the overwhelming majority of the barristers themselves (sect.2.1.4) but broadly also of those instructing them and of the judges (sect.2.4.8–10; 2.4.13; 2.5.4; 2.5.13).

<sup>29</sup> Defence barrister's clerks would have to ring the CPS—or ask counsel's instructing solicitors to ring the CPS—to get the name of the prosecution's present barrister. There would then be the reply phone call to convey the information to defence counsel's chambers. Then defence counsel would have to call his opposite number. This procedure alone could involve two or three phone calls in each of the 50,000 or so cases a year that go beyond an early guilty plea.

<sup>30</sup> The Crown Court Study showed that at present there is a pre-trial hearing of some kind in 40% of contested cases and 35% of cracked trials (sect.2.8.1).

been saved. In 8% a fair amount of time and money had been saved. A 'great deal' had been saved in only 1%<sup>31</sup>.

- Professor Michael Levi's study of serious fraud cases stated in regard to ordinary pre-trial reviews<sup>32</sup>: 'none of the defence lawyers I interviewed argued that pre-trial reviews had any significant effect on the development of the case. . . The problem is that the judge in the pre-trial reviews is seldom the trial judge, has seldom read the papers, and therefore understandably does not wish to become embroiled in complex matters.'<sup>33</sup>
- The fate of the more formal preparatory hearings under the Serious Fraud regime is equally discouraging. The Roskill Committee said that a full day should be set aside for preparatory hearings<sup>34</sup>. In fact, however, in many of the cases brought by the Serious Fraud Office, preparatory hearings have taken weeks or even months. (In Guinness I, the preparatory hearing took three months!)
- The only proper study of the impact of pre-trial conferences, using *matched* samples, conducted in 3,000 personal injury cases in New Jersey<sup>35</sup>, concluded that although they improved preparation<sup>36</sup>, they did not shorten trials. The researchers concluded that they therefore lowered rather than raised the efficiency of the system by absorbing a great deal of court and judge time without any compensating saving in the time required for trials.
- The recently published interim study of the effect of Recommendation 92 indicates that PDHs too lengthen trials. The average length of trials went from 6.03 hrs. before the pilot to an average of 8.29 hrs.<sup>37</sup>

53. Also, the majority's elaborate scheme of pre-trial process would apply to a large number of cases which, on any view, could not benefit from it at all—namely those that change at the door of the court from contested to uncontested cases (cracked trials). At present, cracked trials are about a quarter of all cases. Notwithstanding efforts to reduce them, cracked trials will continue to form a very significant part of the caseload of the Crown Court. Under the majority's proposals, they would all be subjected, to no purpose, to its new pre-trial processes.

54. In view of all the above, I do not believe that the majority has discharged the burden that lies on it of establishing that its scheme is likely to improve the system.

55. In my view, as stated above, the better way forward is likely to be through the scheme based on Recommendation 92 of the Report of the Pre-Trial Issues Working Group, a broadly-based official committee<sup>38</sup>. The main reason for Recommendation 92 was to reduce the problem of cracked trials. But the concept has a variety of other potential benefits. Having an automatic Plea and Directions Hearing (PDH)<sup>39</sup> for every case seems to me to have the following actual or potential advantages:

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<sup>31</sup> Sect.2.8.9.

<sup>32</sup> Pre-trial reviews are not the special preparatory hearings envisaged for serious fraud cases by the Roskill Committee which were established by the Criminal Justice Act 1987.

<sup>33</sup> Note 6 above, p.105.

<sup>34</sup> *Fraud Trials Committee Report*, 1986, HMSO, paragraph 6.52.

<sup>35</sup> M. Rosenberg, *The Pre-Trial Conference and Effective Justice*, 1964, Columbia University Press, p.68. Civil cases are of course not the same as criminal. But if pre-trial conferences do not achieve their intended results in civil cases, it is arguable that they are even less likely to work in criminal cases where the adversarial nature of the proceedings is greater and the defendant is understandably therefore even less inclined to be cooperative or helpful.

<sup>36</sup> The importance of this point is emphasised in paragraph 55 below.

<sup>37</sup> *Interim Report of the National Steering Group*, LCD, March 1993, Table IV. The lengthening of the trial is undesirable but if the reason is that the PDH results in better preparation of the case, there is at least some compensating advantage.

<sup>38</sup> The Working Group consisted of representatives of the Lord Chancellor's Department, the Home Office, the Law Officers, the Crown Prosecution Service, the Justices' Clerks Society, HM Inspectorate of Constabulary, the Metropolitan Police and the Hampshire Constabulary.

<sup>39</sup> The idea for an automatic Plea and Directions Hearing appears to be based on a long-standing practice on the North Eastern Circuit.

- (1) All parties (prosecuting and defence counsel, defence solicitors, CPS and defendant) are required to come to court on a fixed date<sup>40</sup>. This seems to work satisfactorily. It requires very little chasing. They come.
- (2) The defendant has an early opportunity to discuss his plea in person with a barrister. Often it is not the barrister who would ultimately conduct his trial if there were one, but it is a barrister. This is a considerable advantage—especially if, as will commonly be the case, he has previously only discussed his case with a solicitor's clerk.
- (3) The PDH is a convenient opportunity for the two opposing counsel to confer to see whether there is any basis for a plea (or charge) bargain where the prosecution drops more serious charges and the defendant thereupon pleads guilty. At present this opportunity does not usually present itself before the day of trial. The effect of bringing it forward should be to reduce the number of last minute guilty pleas on the day of trial (cracked trials). The experiment with Recommendation 92 suggests that this is happening<sup>41</sup>.

The majority's proposals envisage that the question of a plea of guilty in response to reduced charges would be one of the matters dealt with in the exchange of forms between the parties. But a written exchange between solicitors is unlikely to be as effective in producing a plea as discussions in person between the barristers, with the defendant, the CPS and the solicitors all present.

- (4) Whether as a result of the defendant's own independent decision to plead guilty, or because he reaches that decision upon advice from his own lawyers, perhaps as a result of a deal agreed between the opposing lawyers, there are a large number of guilty plea cases which can be disposed of at an early stage. It is obviously desirable that this should happen. The automatic PDH provides a convenient occasion. It appears from the first results from the pilot experiment that this is in fact occurring. According to the figures, the early guilty plea category rose from 46% to 52%<sup>42</sup>.

Moreover, under the Commission's proposals for Sentence Canvass<sup>43</sup>, the category of those willing to plead guilty early should increase even further. The PDH would be the earliest possible occasion for the defendant, having had a Sentence Canvass, to get the full benefit of the sentence discount.

Under the majority's proposal, defendants would be able to indicate their willingness to plead guilty and in that event, no doubt, the case would be brought on. But this would only happen where the defendant indicated on paper that he was ready to plead guilty. By contrast, under the automatic PDH the stimulus to plead guilty would often be generated on the occasion of the hearing. Without the hearing, many of those same cases would end in a guilty plea only at a later stage.

- (5) If it appears that the case is to go forward as a contest, the barrister would normally have an opportunity at the PDH to consider what further steps need to be taken by his instructing solicitors to get the case ready for trial. Sometimes he would communicate such views informally and orally to the representative of the solicitors' firm present at the PDH. Sometimes he would write them down there and then by 'endorsing' them on his brief. Sometimes he would send the solicitors a more formal and extended 'advice on evidence' from chambers.

<sup>40</sup> The date does not require to be negotiated. It is at present set automatically as so many days after committal to the Crown Court.

<sup>41</sup> The Interim Report on the pilot study (note 37 above, Annex E), states that cracked trials were reduced from 31% to 19% of all cases. This is a very considerable improvement, with major implications for both the courts and witnesses. Before the pilot experiment, cracked trials accounted for 40% of all 'fully bound' witnesses required to attend at trial; after the pilot this had been reduced to 20% (p.6, para.17).

<sup>42</sup> Interim Report, note 37 above, Annex E.

<sup>43</sup> Report, chapter 7, paragraphs 49–58.

Any of these forms of assistance should have the effect of improving the quality of preparation of cases<sup>44</sup>. The Interim Report on the pilot experiment states:

The indications are that Recommendation 92 is improving the preparation and disposal of Crown Court cases. The extent of this will not be clear until completion of the pilot. . . It is however already clear that the key to any improvement is early and adequate preparation by both prosecution and defence. . .<sup>45</sup>.

This is extremely important—considerably more important than ‘clarifying the issues for the jury’ or ‘streamlining the trial’ or ‘saving costs’. It is central to whether justice is done because it directly concerns the question whether the defendant’s case is properly put to the court by his lawyers. Critical to that is whether the case has been properly prepared by the solicitors. (Sir Patrick Hastings QC, one of the greatest advocates of the century, said ‘at least 90 per cent of cases win or lose themselves and the result would have been the same whoever the counsel’<sup>46</sup>—meaning that preparation is much more often the basis of success than advocacy.)

One of the most serious defects in the existing system is inadequate preparation of routine cases by defence lawyers<sup>47</sup>. Among the many reasons for this is that the work in most solicitors’ firms is done by clerks, with insufficient guidance from solicitors in their own firms and, too often, with no guidance from a barrister. The early opportunity of a face-to-face consultation with a barrister for both the defendant and the representative of the solicitors’ firm is therefore one of the potentially most valuable aspects of the automatic Plea and Directions Hearing for cases that end as trials<sup>48</sup>.

By contrast, under the majority’s scheme, in a significant proportion of cases there would have been no pre-trial conference *with any barrister*<sup>49</sup>. If Recommendation 92 made a dent on that problem, it would be worthwhile for that alone.

- (6) The present pilot scheme with Recommendation 92 includes provision for a detailed questionnaire, the answers to which are checked through at the PDH in court *by the judge himself* on the basis of responses given by counsel. The questionnaire requires detailed information about just the kind of matters that the majority’s scheme is designed to elicit by forms exchanged between the parties<sup>50</sup>.

The fact that the questions are put by a judge is critical. Counsel having to attend and answer a judge is more likely to produce answers than merely having to exchange forms. Knowledge that counsel has to answer the judge is also apt to have the effect of concentrating the mind of the instructing solicitors on all the matters in issue.

- (7) The involvement of a judge in a hearing in every case may at first sight

<sup>44</sup> As was noted (see text with note 35 above) the study of pre-trial conferences in personal injury litigation in New Jersey found that they resulted in better preparation of the case (at p.68).

<sup>45</sup> Note 37 above, para.23 at p.9.

<sup>46</sup> P. Hastings, *Cases in Court*, Pan Books, 1953, p.250.

<sup>47</sup> See for instance, M. McConville and J. Hodgson, *Custodial Legal Advice and the Right for Silence*, Royal Commission on Criminal Justice Research Study No.16, 1993, and M. McConville, J. Hodgson, L. Bridges, *Standing Accused*, OUP, forthcoming.

<sup>48</sup> It is appreciated that at many court centres the present facilities for such consultations are woefully inadequate.

<sup>49</sup> According to the defence barristers in the Crown Court Study (sect.2.6.1) there was no pre-trial conference with counsel in 58% of cases. According to defence solicitors there was none in 59%. Not surprisingly, it was considerably more common to have had no conference when the defendant ended by pleading guilty. But, according to the barristers, there was no pre-trial conference in 37% of contested cases, and according to defence solicitors in 46%. Whichever figure was correct, the proportion is considerable.

<sup>50</sup> There are 18 questions covering such matters as the number of prosecution witnesses to be called for cross-examination by the defence; the facts that are admitted; any ‘anticipated point of law likely to arise on trial’; an estimate of the likely length of the case; witness availability; and counsel’s availability. The exact scope and nature of the questions put is not however the issue here. That would be a matter for consideration and would obviously be much influenced by the rules as to what the defence should be required to disclose.

seem to be a waste of scarce resources<sup>51</sup>. But it is probably, on balance, both cost and benefit effective in that it should achieve various important objectives which either would not otherwise be achieved at all, or if at all, to a lesser extent or with even greater costs:

- The PDH is usually brief—typically between 5 and 30 minutes.
- It serves multiple purposes, including actual disposal of as many as half of all cases and, potentially, better preparation of a considerable number that end as contests.
- It provides a prospect that pre-trial information about the case, important to permit accurate listing, will actually be forthcoming—and at a very early stage.
- It avoids the inefficiencies and delays of the majority's scheme associated with securing the filling out and timely delivery of the compulsory forms. It also largely avoids the need for the monitoring of performance by the courts and of the imposition of sanctions for non-compliance. Instead of a complex procedure which would result in a high 'failure' or non-compliance rate there would simply be one short hearing.

If this is right, it would be the answer to the majority's 'dismay' at the thought of PDHs in about half of all cases 'with few significant decisions being taken at those hearings'<sup>52</sup>. There would of course be cases where no significant decisions were made. The question (resolvable by proper research) is how many would there be of that kind—as against the cases in which something positive was achieved? (Under the majority's scheme there might be reason for even greater dismay at costly, inefficient and often ineffective pre-trial procedures in a much higher proportion of cases.)

56. After the PDH, there should in most cases be no need for any other formal pre-trial procedure—though obviously there would sometimes be informal contact between the parties. In most cases, the matters that required sorting out before the trial, could be dealt with adequately at a pre-hearing on the morning of the actual trial before the jury was empanelled.

57. A pre-hearing on the day of the trial to 'clear the decks' has two great advantages over a PTR that takes place earlier. First, it applies only to cases that are actually going to be contested. Secondly, it will, by definition, be attended by the trial judge and the barristers who are to conduct the trial. By contrast, any earlier PTR will in practice often be attended by a judge and counsel who, in the event, will not be at the trial<sup>53</sup>.

58. The majority says that the judge at an earlier PTR should be able to make rulings binding on both the judge and the parties at the trial and, in principle, this may be desirable. But in practice it is clearly unsatisfactory—and as a result the judge at an earlier PTR will often prefer to put off making important rulings for fear of tying the trial judge. It is plainly best if rulings that affect the trial are made, so far as possible, by the trial judge after submissions from trial counsel. A hearing on the day, before the jury is sworn, makes this possible.

59. In a very small minority of cases there could be a need for a separate PTR. Unlike the majority, however, I do not think it would be right to permit the parties to demand a separate PTR (and the services of a court and a judge) as of right. Since PTRs seem generally to make trials longer rather than shorter, I would confine them to the smallest possible number of cases. I would permit the parties to ask for a PTR (or to have the case simply listed for mention). But, in

<sup>51</sup> Some of the judges in the three pilot courts are said to be of this opinion. But even if it seems a waste of time to them, it does not follow that in terms of the system as a whole it actually is a waste of time.

<sup>52</sup> Report, chapter 7, paragraph 14.

<sup>53</sup> In the Crown Court Study (sect.2.8.4) the pre-trial hearing was in front of someone other than the trial judge in 83% of cases.

regard to a full-scale PTR, I would make it the court's task to decide whether it was *necessary* to have a PTR and would have guidelines that severely restricted use of PTRs<sup>54</sup>.

60. It is not suggested that automatic early PDHs in all cases would always be efficient and effective. They would not. But the choice is not between one system that would work perfectly and another that would work badly. It is rather between two systems neither of which would work perfectly. The question is which would work better. This can only be resolved by careful experimentation and proper research<sup>55</sup>. (Very possibly it will prove that what emerges as the best solution is different from either model. Moreover, the ultimate model may need to be different in different areas, or different courts.)

61. I would recommend that the task of conducting such research be entrusted to the Home Office Research and Planning Unit which has research resources not available to the Lord Chancellor's Department. Considerable sums of public money are at stake. It seems appropriate to try to get the system that on balance provides the best results and best value for money.

### III The Court of Appeal's power to quash a conviction (or order a retrial) on account of error at trial or malpractice by the prosecution

62. When convictions are quashed by the Court of Appeal it is usually because there has been some error or irregularity at the trial or some procedural or legal defect in the pre-trial process, or there has been serious malpractice by the prosecution. Typically, the trial judge misdirected the jury on the law or the evidence, or his summing up was unbalanced, or he wrongly admitted inadmissible evidence<sup>56</sup>. The Commission is unanimous in believing that the Court of Appeal's past practice of allowing many guilty persons to escape their just deserts simply because there has been a defect in the process leading to their conviction requires reconsideration. But the Commission is not unanimous as to how the problem should be addressed.

63. The majority of the Commission propose that, where there is an appeal against conviction, the conviction should be upheld unless the ground of appeal is such as to undermine the conviction—in the sense that the Court of Appeal concludes that the verdict is no longer safe. In that event, it would quash the conviction. The gravity of the defect on its own would no longer carry any weight. The question would always be only whether the verdict was safe. If the Court of Appeal thinks the defect *may* make the conviction unsafe, it would order a retrial. (One of the consequences of such a change of approach would be significantly, perhaps drastically, to reduce the number of successful appeals against conviction.)

64. Two Commissioners and I would go further in regard to errors of law or procedure *at the trial*, other than minor errors or irregularities. As stated in chapter ten of the Report, paragraph 37, we would in addition give the Court of Appeal the power to order a retrial in such cases even though the error or defect cannot be said to make the verdict unsafe. In our view defendants should not be serving prison sentences on the basis of trials that are seriously flawed. If the court holds that the error at the trial is a serious one but that for any reason a retrial is not a practicable or desirable option, it would have to quash the conviction.

65. Where however the basis of the appeal is something that occurred *pre-trial* the view taken by the minority depends on the gravity of the defect. If the defect is minor or 'harmless' error, we agree with the majority that the appeal should

<sup>54</sup> At the Central Criminal Court the rule-of-thumb is that there should normally be a PTR for cases likely to last more than four weeks—though sometimes one will be held for shorter cases.

<sup>55</sup> Research would show for instance whether automatic PDHs could work tolerably well in the largest court centres.

<sup>56</sup> See Kate Malleson, *Review of the Appeal Process*, Royal Commission on Criminal Justice Research Study No.17, 1993, Table 1.1 which showed that 60% of successful appeals were based on errors by the trial judge.

fail. On this the Commission is therefore unanimous. If the defect, though not of the gravest kind, is of the level of gravity that now leads the court to quash the conviction, I and another Commissioner believe that the Court of Appeal should continue to be empowered to deal with such defect even though it may not render the conviction unsafe. The typical case would be a serious breach of PACE or of its Codes of Practice. Since the introduction of PACE in January 1986 there have been dozens of cases that have gone to the Court of Appeal where the substance of the appeal has been that the police broke one or other of the PACE rules<sup>57</sup>. Many have concerned failure to comply with the rules regarding access to a solicitor, or provision of an appropriate adult or with the rules regarding recording of interviews. In a proportion of such cases the Court of Appeal has held that the defect was sufficiently serious to require that the conviction be quashed.

66. The majority would limit the Court of Appeal's power to deal with breaches of PACE to those cases where the breach rendered the jury's verdict unsafe. In my view this is insufficient because it ignores the important role that the Court of Appeal plays in upholding the PACE rules—quite apart from the question whether the breach affected the verdict. Breaches of PACE are automatically breaches of police disciplinary rules but as the Report states<sup>58</sup> 'there are hardly any formal disciplinary proceedings for breaches of PACE'. If any action is taken, even for serious breaches of PACE, it virtually never goes beyond mere 'advice' to the officer concerned. The role of the Court of Appeal in promoting observance of the complex and crucial network of PACE rules is therefore of great importance. The majority's approach would weaken this role. I would however wish to see the Court of Appeal, wherever possible, deal with a serious breach of PACE by ordering a retrial rather than by allowing a guilty person to go free by quashing the conviction. Retrials are not ideal<sup>59</sup> but where there has been a serious breach of PACE they can be preferable to allowing a guilty person go free.

67. If however the pre-trial malpractice is of the most serious kind, the Court of Appeal must be able not simply to order a retrial but to quash the conviction. This is the only appropriate response where prosecution agencies have fabricated or suppressed important evidence or where the defendant has been subjected to serious violence in the course of interrogation. Obviously, if the fabricated or suppressed evidence or the confession produced by violent means was the only or the main evidence for the prosecution, the Court of Appeal would have no difficulty in quashing the conviction. In such a case the Commission is unanimous as to the outcome. But it may be that there is other, reliable evidence showing that the defendant committed the offence. Nine of my ten colleagues believe that if there is sufficient sound evidence, even the most serious misconduct by the prosecution should not result in the conviction being quashed.

68. I cannot agree. The moral foundation of the criminal justice system requires that if the prosecution has employed foul means the defendant must go free even though he is plainly guilty. Where the integrity of the process is fatally flawed, the conviction should be quashed as an expression of the system's repugnance at the methods used by those acting for the prosecution.

69. The majority's position would I believe encourage serious wrongdoing from some police officers who might be tempted to exert force or fabricate or suppress evidence in the hope of establishing the guilt of the suspect, especially in a serious case when they believe him to be guilty. There have unfortunately been some gross examples of such conduct.

70. The position adopted by the majority also seems to me to risk undermining the principle at the heart of section 78 of PACE which explicitly gives the court

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<sup>57</sup> For a list see M. Zander, *The Police and Criminal Evidence Act 1984*, (Sweet & Maxwell, 2nd revised ed.) 1990, pp.206–8. For a more recent and fuller loose-leaf compilation see *Butterworths Police and Criminal Evidence Act Cases*, Part VIII, sections E to L.

<sup>58</sup> Chapter three, paragraph 102.

<sup>59</sup> They are however frequent in many common law jurisdictions including Australia, Canada, Ireland and New Zealand. Michael Knight, *Criminal Appeals* (Stevens, 1970) reports, for instance, that in Ireland in the period 1954–1964 retrials were ordered in three-quarters of all quashed conviction cases.

the power to exclude evidence on the ground that it renders the proceedings 'unfair'. The word 'unfair' expresses the underlying moral principle and the Court of Appeal has repeatedly used this new statutory power very broadly to express its refusal to uphold convictions based on unacceptable police practices even when it could not be said that the misconduct had any impact on the jury's verdict.

71. Section 78 would of course remain—but the majority would in effect be encouraging the Court of Appeal to undercut a part of its moral force by saying that the issue of 'unfairness' can be ignored where there is sufficient evidence to show that the defendant is actually guilty. Any judge concerned to discourage prosecution malpractice would I believe be dismayed by the majority's position. In terms of the message sent to the police service and other prosecution agencies it could undo much of the good effect being achieved by the attitude of the judges to section 78 of PACE.

72. But the matter goes beyond discouraging prosecution malpractice. At the heart of the criminal justice system there is a fundamental principle that the process must itself have integrity. The majority suggest that the answer to prosecution wrongdoing in the investigation of crime is to deal with the wrongdoers through prosecution or disciplinary proceedings. Even were this to happen (and often in practice it would not), the approach is not merely insufficient, it is irrelevant to the point of principle. The more serious the case, the greater the need that the system upholds the values in the name of which it claims to act. If the behaviour of the prosecution agencies has deprived a guilty verdict of its moral legitimacy the Court of Appeal must have a residual power to quash the verdict no matter how strong the evidence of guilt. The integrity of the criminal justice system is a higher objective than the conviction of any individual.

MICHAEL ZANDER

# Appendix One

## Appointment and programme of work

1. We were appointed by the Royal Warrant reproduced on pages i-ii. We have met 43 times. We received written evidence from over 600 organisations and individuals. These are listed at Appendix Three, with an asterisk denoting those who gave oral evidence to us. We held seven seminars at which we discussed the main issues with practitioners and other experts and we spent seven days receiving oral evidence. We would like to thank all those who gave evidence to us as well as those who attended our seminars.
2. We commissioned (and have published) 22 research studies by academic criminologists or lawyers. These are listed at Appendix Four. In one of these studies we collected, through questionnaires issued to the main participants, virtually comprehensive information on all Crown Court cases dealt with between 17 and 28 February 1992. This has been published as the Crown Court Study (research study no. 19).
3. We visited, collectively or in groups or individually, all parts of the criminal justice system and discussed its workings with police officers, forensic scientists, crown prosecutors, defendants, appellants, defence solicitors, barristers, magistrates and judges, among others. These visits and discussions were invaluable and we are most grateful to all those who assisted us in the course of them.
4. We visited Scotland twice and met the Lord Advocate, the Lord Justice-General, other members of the judiciary, and representatives of the Crown Office, Scottish advocates and solicitors, the Procurator Fiscal Service and the Strathclyde Police. We should like to thank all those who contributed so much to the success of the visits and to helping us learn at first hand about the workings of the Scottish criminal justice system.
5. In order to obtain information about other countries' jurisdictions we issued a questionnaire to selected Government departments and academic experts in those countries. The responses to this questionnaire have been analysed and published separately<sup>1</sup>.
6. There have been continuing developments in the criminal justice system running in parallel with our own programme of work. The recommendations of the Lord Chancellor's Working Group on Pre-trial Issues<sup>2</sup> have begun to be put into effect, the Criminal Justice Consultative Council<sup>3</sup> has been established, and the Law Commission, having reported on corroboration, has resumed its work on the definition of conspiracy to defraud and begun work on the

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<sup>1</sup> See chapter one, paragraph 13, note 4.

<sup>2</sup> See chapter five, paragraph 35, note 9.

<sup>3</sup> The Criminal Justice Consultative Council was first announced in December 1991 and followed a recommendation by Lord Justice Woolf in his report on the 1990 prison disturbances. Since 6 July 1992 its Chairman has been a serving Lord Justice of Appeal. Its terms of reference are:

"To promote better understanding, co-operation and co-ordination in the administration of the criminal justice system, in particular by:

- (i) considering reports about developments in and affecting criminal justice;
- (ii) considering other information about the operation of the system; and
- (iii) overseeing the arrangements for Special Conferences, but excluding consideration of individual cases."

particularisation of indictments. All this has taken place in the context of the major changes to the criminal justice system which followed the reports of the Royal Commission on Criminal Procedure<sup>4</sup> chaired by Sir Cyril Philips and of the Departmental Committee on Fraud Trials<sup>5</sup> chaired by Lord Roskill. These changes have included the passing of the Police and Criminal Evidence Act in 1984, the establishment of the Crown Prosecution Service in 1986, and the implementation of a new regime for serious fraud in the Criminal Justice Acts of 1987 and 1988. It is still too early for their long-term effects to be assessed. But we believe that our recommendations take full account both of the benefits to the system which have resulted from these changes and of the unforeseen but remediable difficulties which they have raised in their turn.

## Acknowledgements

7. We gladly record our gratitude to the members of our Secretariat. Shirley Morgan and Marcia Reid typed with astonishing speed and accuracy all our discussion papers and other working documents as well as the successive drafts of our report. Without them we could never have adhered to the timetable that the Government set us. Bernard Lane, assisted by Paul Patterson, Ingrid Wheeler and Priti Patel, made with great efficiency the arrangements necessary for the trouble-free running of our meetings, visits, seminars and oral evidence sessions. He also made a notable contribution to the drafting of our discussion papers and parts of our report. Our research director, Julie Vennard, oversaw and advised us on the formidable programme of projects that we commissioned (see Appendix Four). We also benefited greatly from her wide knowledge and experience of other research findings relevant to our field. Nigel Osner, Jonathan Potts and Mary Newman analysed the evidence submitted to us and prepared discussion papers on vital aspects of our terms of reference. They and we were greatly helped in this by our research assistants, Anne Quinn and Giles Crown. Nigel Osner, Mary Newman and Anne Quinn also assisted in the drafting of our report. Our most important debt is to our Secretary, James Addison. Without his tact, skill and determination our report could neither have been completed so punctually nor have reflected so accurately the outcome of our research and discussion. He not only directed the work of the Secretariat with great efficiency but made a major intellectual contribution to the report. He takes with him to his next assignment the admiration and gratitude of us all.

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<sup>4</sup> See chapter four, paragraph 23, note 10.

<sup>5</sup> See chapter seven, paragraph 59, note 19.

# Appendix Two

## THE MEMBERS OF THE ROYAL COMMISSION

Viscount Runciman of Doxford CBE FBA	Chairman of Andrew Weir and Co. Ltd. Senior Research Fellow of Trinity College Cambridge. Joint Deputy Chairman, Securities and Investments Board. Treasurer, Child Poverty Action Group.
Sir Robert Bunyard CBE QPM	HM Inspector of Constabulary, Commandant of the Police Staff College, Bramshill. Formerly Chief Constable of Essex.
Professor Sir John Cadogan CBE FRS	Formerly Director of Research, The British Petroleum Co PLC. Visiting Professor of Chemistry, Imperial College of Science and Technology.
Professor John Gunn	Professor of Forensic Psychiatry, Institute of Psychiatry. Former member, Home Secretary's Advisory Board on Restricted Patients.
Rt Hon Sir John May	Conducting Guildford and Woolwich Inquiry. Retired Lord Justice of Appeal. University Commissioner. Previously Chairman of Inquiry into UK Prison Service (1978-79). Member of Parole Board (1977-80).
Mrs Yve Newbold	Solicitor. Company Secretary, Hanson plc. Non-Executive Director, British Telecom. Governor, London Business School. Member of Advisory Board of Crime Concern. Member of Civil Service Final Selection Board.
Ms Usha Prashar	Formerly Director, National Council for Voluntary Organisations. Formerly Fellow of the Policy Studies Institute and Director, Runnymede Trust. Currently part-time Civil Service Commissioner and member of Lord Chancellor's Advisory Committee on Legal Education and Conduct.
Miss Anne Rafferty QC	Barrister. Recorder. Formerly member of Pigot Committee on the Giving of Evidence by Vulnerable Witnesses. Vice Chairman and former Secretary of the Criminal Bar Association.

Sir John Wickerson	Solicitor. Managing partner, Ormerod Wilkinson. Chairman, Croydon Community NHS Trust. Deputy Chairman, R Mansell Ltd. President of Law Society (1986-87). President, London Criminal Court Solicitors Association (1980-81). Honorary member, American Bar Association, Canadian Bar Association, New Zealand Law Society.
Sir Philip Woodfield KCB CBE	Formerly Permanent Secretary, Northern Ireland Office. Staff Counsellor for the Security and Intelligence Services. Chairman, London and Metropolitan Local Government Staff Commission. Chairman, Scrutiny of Supervision of Charities, 1987.
Professor Michael Zander	Professor of Law, London School of Economics. Solicitor. Legal Correspondent, The Guardian 1963-1987.

# Appendix Three

## LIST OF WITNESSES

The following organisations and individuals made written or oral submissions or both to the Royal Commission. Those who gave oral evidence are marked with an asterisk.

### Organisations

Amnesty International  
The Association of Chief Officers of Probation  
The Association of Chief Police Officers  
The Association of Chief Police Officers Committee on Terrorism and Allied Matters  
The Association of Chief Police Officers (Scotland)  
The Association of Consulting Scientists Ltd  
The Association of County Councils  
The Association of First Division Civil Servants (The Crown Prosecution Service Section)  
The Association for Juvenile Justice and the National Intermediate Treatment Federation supported by the Standing Committee for Juvenile Justice  
The Association of Metropolitan Authorities  
The Association of Police Surgeons  
The Association of Small-Medium Sized Enterprises  
BAT Industries  
The Birmingham Law Society  
The Board for Social Responsibility of the Church of England  
The Bradford Law Society  
The Bridgewater Four Campaign  
Brighton Borough Council (Police and Public Safety Sub-Committee)  
The Bristol Racial Equality Council (Criminal Justice Working Group)  
The Britain and Ireland Human Rights Project  
The British Academy of Experts  
The British Academy of Forensic Sciences  
The British Association for Applied Linguistics  
The British Association in Forensic Medicine  
The British Association of Social Workers  
The British Computer Society  
The British Deaf Association  
The British Importers Confederation  
The British Medical Association  
The British Psychological Society  
The British Railways Board  
The British Retailers' Association  
The Building Societies Commission

The Catholic Bishops' Conference of England and Wales Advisory  
 Committee on Racial Justice and Community Relations  
 The Canadian National Judicial Institute  
 The Centre for Community Studies  
 The Centre for Crime and Social Justice in conjunction with the North  
 Western Legal Services Committee  
 The Centre for Explorations in Social Concern  
 'Childline'  
 Children's Legal Centre  
 The 88 Club  
 The Commission for Racial Equality\*  
 The Committee on the Administration of Justice, Belfast (The Northern  
 Ireland Civil Liberties Council)  
 The Confederation of British Industry  
 Conviction  
 The Coroners' Society of England and Wales  
 The Council of Churches for Britain and Ireland Community and Race  
 Relations Unit  
 The Council of Her Majesty's Circuit Judges\*  
 The Criminal Bar Association\*  
 The Criminal Justice Consultative Committee  
 The Crown Office  
 The Crown Prosecution Service\*  
 The Croydon Duty Solicitor Group  
 The Danny McNamee Support Group  
 The Defence Research Agency  
 The Departmental Working Group on Long Criminal Trials  
 The Department of Health  
 The Department of Trade and Industry  
 The Devon and Exeter Incorporated Law Society  
 Disaster Action  
 The Dixons Group plc  
 The Domestic Violence Forum in Hammersmith and Fulham  
 East Lindsey Constituency Labour Party  
 Education and Training for Women  
 The Equal Opportunities Women's Advisory Group of the Metropolitan  
 Borough of Calderdale  
 Exeter Victim's Support Scheme  
 The Family Courts' Consortium  
 Forensic Access  
 The Forensic Science Service\*  
 The Forensic Science Society  
 The Free Church Federal Council  
 The General Council of the Bar\*  
 The General Medical Council  
 Glasgow Bar Association  
 The Guild of British Newspaper Editors  
 The Hackney Community Defence Association  
 The Haldane Society of Socialist Lawyers  
 The Harrow Council for Racial Justice  
 The Hazards Campaign

The Health Visitors' Association  
 The Home Office\*  
 The Howard League for Penal Reform  
 HM Customs and Excise  
 HM Inspectorate of Constabulary\*  
 HM Prison Service  
 HM Treasury  
 The Independent Commission Against Corruption, Hong Kong  
 The Institute of Barristers' Clerks (Electronic Listing User Group)  
 The Institute of Biology  
 The Institute of Community Studies  
 The Institute of Judicial Administration, University of Birmingham  
 The Institute of Race Relations  
 The Institute of Shorthand Writers and The National Society of Stenotypists  
 The Institution of Professionals, Managers and Specialists  
 The Irish Embassy  
 The Irish Prisoners Support Group  
 The Judges of the Western Circuit  
 The Judicial Studies Board  
 Justice\*  
 Justice for Women  
 The Justices' Clerks Society\*  
 Just Television  
 The Laboratory of the Government Chemist  
 The Labour Party  
 Lancaster University Law Department  
 The Law Society\*  
 Legal Action for Women and associates  
 The Legal Action Group\*  
 The Legal Aid Board\*  
 The Legal Aid Practitioners' Group  
 Legal Secretariat to the Law Officers  
 Legastat Copying  
 The Liberal Democrat Lawyers Association  
 The Liberal Democrat Party  
 Liberty\*  
 Lloyd's of London  
 The London Borough of Hackney Women's Unit  
 The London Borough of Newham and The Association of London Authorities  
 The London Criminal Courts Solicitors' Association  
 The London Magistrates' Clerks' Association  
 The London Stock Exchange  
 Long Lartin 22  
 The Lord Chancellor's Department\*  
 The Magistrates' Association\*  
 Manchester City Council  
 The Manchester McKenzie Organisation  
 Mediation UK  
 The Methodist Church Division of Social Responsibility

The Metropolitan Police  
 The Metropolitan Police Forensic Science Laboratory\*  
 The Metropolitan Stipendiary Magistrates\*  
 The Ministry of Defence  
 The NAMAS Executive  
 The National Association for the Care and Resettlement of Offenders  
 The National Association of Local Government Women's Committees  
 The National Association for Mental Health (MIND)  
 The National Association of Probation Officers  
 The National Campaign for the Reform of the Obscene Publications Act  
 The National Children's Bureau  
 The National Society for the Prevention of Cruelty to Children  
 The National Union of Civil and Public Servants (Crown Prosecution Service and Lord Chancellor's Department Groups)  
 The Northern Ireland Office  
 North Tyneside Council  
 The Nuffield Foundation  
 The Penal Affairs Committee of Quaker Social Responsibility and Education (Religious Society of Friends)  
 The Police Complaints Authority\*  
 The Police Federation  
 The Police History Society  
 The Police Service of England and Wales\*  
 The Police Superintendents' Association  
 The Pre-Trial Issues Steering Group  
 The Professional Association of Teachers  
 The Public Affairs (Women's) Sub-Committee of Oxford City Council  
 The 9B Regional Duty Solicitor Committee  
 The Regular Judges at the Central Criminal Court  
 The Relatives and Friends of Prisoners Committee  
 The Repeal of the Prevention of Terrorism Act Campaign  
 The Repeated Attacks and Murder Group of Leeds  
 Rights of Women  
 The Royal College of Physicians of Edinburgh  
 The Royal College of Psychiatrists  
 The Royal Society of Chemistry  
 The Royal Society for the Prevention of Cruelty to Animals  
 The Runnymede Trust  
 The Salvation Army  
 The Scottish Office and The Scottish Courts Administration  
 The Scottish Police Federation  
 The Securities and Investments Board  
 The Security Service  
 The Serious Fraud Office\*  
 The Sheffield Justice for Women Campaign and the Central Regional Council  
 The Society of Black Lawyers\*  
 The Society of Conservative Lawyers  
 The Society of County Secretaries  
 The Society of Labour Lawyers  
 The Society of Public Teachers of Law, Criminal Law Group

The Society for the Reform of the Criminal Law  
 Soroptimist International of Wakefield  
 The Southall Black Sisters  
 The Standing Advisory Commission on Human Rights (Northern Ireland)  
 The Standing Conference on Archives and Museums  
 The Thomas Green Campaign  
 The Trades Union Congress  
 The United Kingdom Federation of Business and Professional Women  
 The United Reformed Church (Church and Society Department)  
 University of Leeds Centre for Criminal Justice Studies  
 Victim Support\*  
 Wakefield District Council  
 Wandsworth Panel of Lay Visitors  
 The West Midlands Police Authority  
 The Women and Justice Forum  
 The Women's National Commission  
 The Women's Campaign for Justice for Women  
 The Women's Committee of Leeds City Council  
 The Women's Unit of Bristol City Council  
 The Working Group on Long Fraud Trials

## Individuals

Miss A Abdullah  
 Mr P J Ablett  
 The Rt Hon The Lord Ackner  
 Mr E Adams  
 Mr F S Adjaye  
 Dr G Adshead  
 Lord Airedale  
 Mr C D Alderman  
 Lord Alexander of Weedon QC  
 Mr T W Allen  
 Mr D Alton MP  
 Mr H C Al-Vakeel  
 Mr G A Anderson  
 His Honour Judge Anwyl-Davies QC  
 Mr M G E Aspin  
 Mr A Atherton  
 Atter Mackenzie (solicitors)  
 The Honourable Mr Justice Auld  
 Mr O Y Baddiel  
 Mr R J Balmain  
 Professor M Banton JP  
 Mr E Barber  
 Mr H Barnes MP  
 Mr J Barradell  
 Mr B Basham  
 Messrs S M Bass, O M Woodcock, J Patterson and N J Siderfin  
 Mr C Batts  
 Mr M Beckman QC

Lord Benson GBE FCA  
 Mr P Blackburn  
 Mrs V A Blackwell  
 Sir Louis Blom-Cooper QC  
 Mr G Boal QC  
 Dr H Booth  
 Mr T Boswell MP  
 Mr S Bower  
 Mr M Bowley QC  
 Mr N Boyd-Ratcliff  
 Mr J Brazier MP  
 Mr J K Bredar  
 Mr T Brett  
 Mr P E Bridge  
 Mr L Bridges  
 Mr F E A Briggs  
 Dr O Briscoe  
 The Honourable Mr Justice Brooke  
 Mr A C Brown  
 Mrs V M S Bruce  
 Mr B W Budd  
 Dr J H Burgoyne and Partners  
 Mr J Burrow OBE  
 Mr C R Butt  
 Dr B Caddy  
 Mrs J Cadwallader  
 Mr K Cahill  
 Mr M J A Camden  
 Mr J C Cant  
 Professor D V Canter  
 Mr J Cappa  
 Mr S Carne  
 Mr K Carter  
 Mr P Carter  
 Mr K Caruso  
 The Honourable Mr Justice Cazalet  
 Mr P Chadd QC  
 His Honour Judge Chalkley  
 Mr M Chance  
 Mr M S Charles  
 Mrs A L M Chiabrando  
 The Rt Hon Kenneth Clarke QC MP (then Secretary of State for the Home Department)\*  
 Ms D Cleave  
 Mr J Clitheroe  
 Mr P Coad  
 Mr M G Cohen  
 Dr J B Coker  
 Mr W P Coldrick  
 Mr J A Colla  
 Mr J Collingwood

Mr R F Collins  
His Honour Judge Colston QC  
Viscount Colville of Culross QC  
Mr A Conduit  
Mr T A Coningsby  
His Honour Judge Coombe  
Mr J Corbyn MP  
Mr M Corkery  
Ms Jean Corston MP  
Mr P Cosgrove  
Mr M Cousens  
Mr J G Craddock  
Mrs A Craven  
Mr L Crawford  
Mr J Croft CBE  
Mr T Cruise  
Mr R Cryer MP  
Mrs M G Cullin  
Mr D Cummings  
His Honour Judge Curtis QC  
Mr C Dafis MP  
Mr R Dando  
Mr I L Davies  
Mrs J Davies  
Mr J Davies OBE  
Mr S Davis  
Mr N C Deane  
Mr V Deans  
Mr C Dehn QC  
Mr C Denning  
Professor I H Dennis  
Mr H Dewing  
Mrs A Dixon  
Dr D Dixon  
Mr M Doherty  
The Rt Hon Lord Donaldson of Lymington  
The Honourable Mr Justice Drake DFC  
Mr D Dudley  
Mr A Duff  
Edward Fail, Bradshaw and Waterson (solicitors)  
Mr J W Edwards  
Mr W P W Elwell  
Dr R W Emmerson  
Mr T D Erikson  
Mr R Everest  
Mr F V Eyles  
The Rt Hon Lord Justice Farquharson\*  
Professor E P Fellgett  
Mr N Fielding  
Mr D Fitzpatrick

Mr J FitzPatrick  
Mr R D Flanders  
Mr P Flynn MP  
Mr P Foot  
Mr B J Ford  
Ms R Franey and Mr G McKee  
Mr A L Freedman  
Mr P Frye MP  
Mr R Gale MP  
The Honourable Mr Justice Garland  
Mr D F Gibbs  
Mr W S Gilchrist  
Mr J A C Gillett  
Mr K Gillings  
Glaisyers (solicitors)  
The Rt Hon Lord Justice Glidewell  
Mr M J Gluckstead  
Mr P H Godsmark  
Mr G Goldberg  
Mr J Goldberg QC  
Mrs L Golding MP  
Messrs J Goldring QC and C Wide  
His Honour Judge Goodall  
Councillor E Goodman  
Sheriff G H Gordon QC  
His Honour Judge Gosling  
His Honour Judge Gower QC  
Professor D G Grahame-Smith  
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# Appendix Four

## THE RESEARCH SERIES

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1	<i>A Report on the administration of criminal justice in France and Germany</i> by Leonard H Leigh and Lucia Zedner.
2	<i>Preparing the record of taped interview</i> by John Baldwin.
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- 21      *Human factors in the quality control of CID investigations* by Barrie Irving and Colin Dunnighan.
- 22      *The questioning and interviewing of suspects outside the police station* by Stephen Moston and Geoffrey Stephenson.

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