

CHAPTER 1

INTRODUCTION

- 1 The scheme of the Report is to examine the purpose, structure and working of the criminal courts in the criminal justice system and to consider:
 - re-structuring and improving the composition of the criminal courts, introducing new criteria and procedures for allocating work between them and better matching of courts to cases;
 - introducing a new structure for direction and better management of the criminal justice system as a whole, with a view to improving the quality of justice, efficiency and effectiveness of the criminal process;
 - removing work from the criminal process that should not be there, and providing within it alternative forms of disposal for certain types of case;
 - improving preparation for trial and trial procedures, and reform of the law of criminal evidence ; and
 - simplification of the appellate structure and its procedures.

- 2 Throughout, I have tried to keep an eye on our newly acquired domestic law of human rights, the potential of information technology, not only to improve existing and familiar ways of doing things, but to re-shape our practices and procedures, and to the urgent need to enhance public confidence in the criminal justice system as a whole. I add that the last of those - public confidence - features in almost every issue raised by the Review. It includes among its many aspects, questions of diversity, civilised treatment of all involved in or exposed to the criminal justice system, public accessibility to the courts, to the law that they administer, and to ready information of what they are doing.

AIMS OF THE CRIMINAL COURTS

- 3 The Government has identified certain ‘overarching’ aims of the criminal justice system, including the courts’ contribution to it.¹ I have been urged to undertake a similar exercise of my own for the purpose of the Review. I was and remain sceptical of the practical value of such an endeavour in considering what, if any, reforms to recommend in the structure and working of the courts. The collection of fairly obvious generalities that such definitions normally entail is important as a reminder of the various interests for which provision needs to be made. A checklist of interests is also helpful to the courts when making decisions. But, as the civil courts’ experience of ‘the overriding objective’ of the new Civil Procedure Rules has shown, the weight to be given to the respective interests varies according to the circumstances of the case.
- 4 However, it is necessary to look beyond bare functional descriptions of the criminal courts, such as: the conviction of the guilty and the acquittal of the innocent;² deciding whether the accused is guilty and the appropriate sentence if he is;³ or “providing a fair trial and just disposal”.⁴ Once the courts are considered in the context of the criminal justice system as a whole, including the community at large and the various agencies and others involved in the process, it is obvious that their purpose and function are not confined to the forensic practicalities of convicting and sentencing the guilty and acquitting others. So, it is necessary to keep an eye on the over-all purposes of criminal justice.
- 5 Similar considerations exercised Lord Woolf in formulating the “overriding objective” of the Civil Procedure Rules, namely “of enabling a court to deal with cases justly,”⁵ and “so far as practicable:
- (a) ensuring that the parties are on an equal footing;
 - (b) saving expense;
 - (c) dealing with the case in ways which are proportionate
 - (i) to the amount of money involved;
 - (ii) to the importance of the case;
 - (iii) to the complexity of the issues; and
 - (iv) to the financial position of each party;
 - (d) ensuring that it is dealt with expeditiously and fairly; and

¹ see *Criminal Justice Strategic Plan 1999 -2002* and *Criminal Justice Business Plan 2000 -2001*

² *Report of the Departmental Committee on Jury Service*, Cmnd 2327 (HMSO, 1965), para 13

³ *Review of the Crown Prosecution Service*, Cmnd 3960 (HMSO, 1998), Ch.7, para 4

⁴ a possibility suggested by Professor John Spencer in his capacity as a consultant to the Review

⁵ Civil Procedure Rules Part 1

(e) allotting to it an appropriate share of the court's resources, while taking into account the need to allot resources to other cases.”

- 6 Now, formulating such an overriding aim or objective for civil justice must have been difficult enough. It is an even more problematic task for criminal justice. First, there are more than just the courts and the immediate parties to consider; there are a number of criminal justice agencies and other bodies and individuals, such as victims, witnesses and jurors. The prosecutor has a higher burden of proof than a plaintiff in a civil case, and in many criminal cases the accused's liberty and/or reputation is more likely to be at stake. The undertaking and outcome of criminal proceedings are usually of much greater consequence to the public than in civil proceedings. And, as a by-product of the criminal burden and standard of proof, and of an accused's 'right of silence', defendants in criminal cases have certain absolute rights, not enjoyed by their civil counterparts, that may modify their obligation to co-operate in the forensic process. It follows that there is more to identifying the aims of the courts in the criminal justice system than attempting a definition of a just trial and/or a sentencing process simply by balancing the interests of both parties, coupled with some regard to the commitment of public resources and of involved individuals to the task.

- 7 Second, there is the more fundamental question of the main purpose of the criminal justice system in all its parts. The Government has defined two 'aims' for the system, namely reducing "crime and the fear of crime and their social and economic costs" and dispensing "justice fairly and efficiently and to promote confidence in the law".⁶ They are purportedly particularised - but in fact largely repeated - in the form of 'objectives', for many of which there are set somewhat mechanistic performance measures or targets. The second of those aims, which is primarily directed at the courts, has the following objectives:
 - “to ensure just processes and just and effective outcomes;
 - to deal with cases throughout the criminal justice process with appropriate speed;
 - to meet the needs of victims, witnesses and jurors within the system;
 - to respect the rights of defendants and to treat them fairly;
 - to promote confidence in the criminal justice system.”

⁶ see *Criminal Justice System: Strategic Plan 1999-2002*, para 1.3

- 8 I am content to take those predictable general aims and particularising objectives for the criminal courts as an appropriate starting point for the Review. The first of the aims, reduction of crime, and part of the second, efficient and effective process, are much as Professor Andrew Ashworth has described the “general justifying aim” of the criminal justice system, namely “crime control” by detecting, convicting and duly sentencing the guilty.⁷ It is implicit in that formulation that the system should also acquit those not proved to be guilty - which comes within the Government’s second aim. But it does not follow that the operation of the system or its general aim should be to make it as difficult as possible to convict the guilty or, under the banner of the presumption of innocence, to advance every possible forensic device as an obstacle to conviction. Equally, as Professor Michael Zander observed in the concluding sentence of his dissent in the Report of the Runciman Royal Commission, “[t]he integrity of the criminal justice system is a higher objective than the conviction of any individual”.⁸
- 9 However, we should not expect too much of the criminal justice system, the courts in particular, as a medium for curing the ills of society. Courts undoubtedly have deterrent, rehabilitative and reparative roles, but they are all too often the last resort after all other attempts to deter and/or reform have failed. In their present sentencing role they are a blunt instrument of social repair. However, with development of new and constructive combinations of punishment and rehabilitation - one form of ‘restorative justice’ - they may have more of a role, with other agencies, in diverting people from crime before recidivism sets in.
- 10 Below the general aim or aims of a criminal justice system, familiar and well accepted principles may be identified at various levels of generalisation. They are not so much principles as blinding glimpses of the obvious. Thus, at the highest level, it could be said that the fundamental principles of a good system are that it should be just and efficient. To those in a jurisdiction like ours that depends heavily on lay magistrates and juries, could be added a third, lay and local involvement in the administration of criminal justice. Drop to a lower level of generalisation, and several important, but commonplace principles or notions emerge. Most are gathered together in Article 6 against the back-cloth of our common law tradition of adversariality: the presumption of innocence, the right to silence, legality and due process, right of access to a court, a fair and public hearing and so on. I mention all of these in various contexts in the Report, but cannot here, by a process of analysis or assignment of priorities, draw on them to provide an over-all approach or answer to the many practical questions posed in the Review. Different priorities apply in different contexts and circumstances.

⁷ *Concepts of Criminal Justice* [1979] Crim LR 412, at 412

⁸ *Royal Commission on Criminal Justice*, Cm 2263 (HMSO, 1993), p 235

STARTING POINTS

- 11 I gather under this heading a number of fairly obvious features of our system of criminal justice that give rise to important practical issues. I take them as starting points for more detailed discussion in later chapters and, where appropriate, to indicate the main issues and my lines of thought on them.

A right to a fair trial and ‘balance’

- 12 Procedural fairness has always been a feature of our law. Its articulation as such by our recent adoption of Article 6 adds little of substance to the tradition, though it may generate much litigation on its application in individual circumstances. My main concern here is with the notion of ‘balance’. In determining the provision of courts, manner of trial and the search for fair, speedy and otherwise efficient procedures, it should be remembered that they are not there just to protect defendants. They also serve the community. And the criminal process is not a game. It is a search for truth according to law, albeit by an adversarial process in which the prosecution must prove guilt to a heavy standard.⁹
- 13 I do not regard it as within my terms of reference to consider whether, as a generality, the present balance of a criminal trial should be tipped so as to favour one party more than the other, as variously urged by some in the course of the Review. A defendant’s right to a fair trial is as near absolute as any notion can be. However, in its application to different circumstances and on a case by case basis, considerations of balance or proportionality inevitably intrude.
- 14 In 1972 the majority of the Criminal Law Revision Committee, in their Eleventh Report,¹⁰ were sympathetic to the idea of a balance, in the narrow sense of tilting it in favour of the prosecution. For them, a fair trial was one which would “secure as far as possible that the result of the trial [was] the right one” even if that meant modification of procedural rules protecting an accused’s right of silence.¹¹ The Report provoked so much controversy that the Government of the day took no action on it.¹²
- 15 A few years later, in 1978, the Philips’ Royal Commission looked again at the problem of balance, though in a broader sense than had the Criminal Law

⁹ cf the German inquisitorial system in which the courts are enjoined to find the truth and where there is no provision for a formal plea of guilty, but in which, nevertheless, they have to be sure of guilt before they can convict

¹⁰ *Eleventh Report of the Criminal Law Revision Committee*, Cmnd 4991 (HMSO, 1972)

¹¹ *ibid* paras 12, 15 and 16

¹² it was subsequently revived in the Runciman Royal Commission Report and is now to be found in the Criminal Justice and Public Order Act 1994, ss 34-37, enabling the court in certain circumstances to draw adverse inferences from silence

Revision Committee. It described it as its ‘central challenge’ and a difficult one:

“1.12. At first sight the notion of a fundamental balance of the kind specified may appear unarguable, almost axiomatic, a matter of common sense, but further consideration of the matter raises a number of difficult, and perhaps, in the last analysis, insoluble questions. Can there be in any strict sense an equation drawn between the individual on one side and society on the other? Is it the balance of some sort of social contract between the individual and society? What are the rights and liberties of the individual which are assumed to provide part of the balance? Who gives and what justifies them? Are they all of equal weight; all equally and totally negotiable or are some natural, absolute, fundamental, above the law, part of the human being’s birthright? On the other side of this assumed balance, especially in an increasingly heterogeneous and specialised society, how is the interest of the whole community to be defined with any useful precision? And where does one see, where do the police see, the role of the police being applied; in one or other of the scales, or at the fulcrum, or both? What is clear is that in speaking of a balance between the interests of the community and the rights of the individual issues are being formulated which should be the concern not only of lawyers or police officers but of every citizen.”

1.20. In the context of an increasing complexity of society and the growing power of the state the individual has found it difficult to organise for his own protection and has got caught in the dilemma of looking to the state for help whilst fearing the misuse of powers that have been given to institutions of the state. The need to define and assert the rights of the individual, to seek a balance, has assumed urgency and significance.”¹³

- 16 The Philips Royal Commission decided to look for and formulate a framework of first principles as a means of measuring the adequacy of the then existing procedures, of proposals to change them and of the likely contribution of the latter to establishing a proper balance.¹⁴ The first principles - or ‘principal standards’ that it identified and formulated for each of these enquiries were: “Are they fair? Are they open? Are they workable?”¹⁵

¹³ *Report of the Royal Commission on Criminal Procedure*, Cmnd 8092 (HMSO, 1981), paras 1.12 and 1.20

¹⁴ *ibid*, para 1.35

¹⁵ *ibid*, para 2.18

Applying those principles to, *inter alia*, the defendant's right to silence, the Commission recommended no change.¹⁶

- 17 The Runciman Royal Commission was cautiously receptive to the notion of balance:

“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 ... will be correct [T]here are issues on which a balance has to be struck...”¹⁷

- 18 Imprecise though the Runciman approach may be, I agree with it, certainly when questions arise as to the form of provision of a system of courts and procedures for administering the criminal justice system. A balance of some sort has to be struck between the community's interest in providing an efficient and economic system for administering justice, bearing in mind also its many other commitments, and the manner of fair trial that it provides for offences of different seriousness. There is also, in appropriate circumstances, a place for such considerations by a court when deciding contentious procedural issues between the prosecution and an accused. It is a reassurance that this seems to be of a piece with Strasbourg jurisprudence where, for example, there is an issue between an accused's procedural claim based on his right to a fair trial and disruption of the prosecution or exposure to harm of its witnesses¹⁸ and/or victims.¹⁹

Lay justice

- 19 For reasons that I give in Chapters 4 and 5, I accept that resolution of questions of fact going to the issue of guilt should continue in the main to be the responsibility of lay magistrates and juries. For centuries both tribunals of fact have been corner-stones of our system of criminal justice. In their different ways they continue to be practical and public manifestations of the citizen's involvement in the administration of criminal justice and his

¹⁶ *ibid*, Ch.4

¹⁷ *Royal Commission on Criminal Justice*, Chapter 1, para 27

¹⁸ see eg *Doorson v Netherlands* [1996] 22 EHRR 330, ECtHR and *Van Mechelen v Netherlands* [1997] 25 EHRR, 647, ECtHR

¹⁹ see eg *Baegen v Netherlands* [application no 16696/90, 27/10/95]; *Z v Finland* [application no 22009/93, 25/2/97]; and *TP v United Kingdom* [application no 28945/95, 10/5/01]

leavening of the power of state institutions. It is useful citizenship and is, or should be, a powerful contributor to public confidence in the system.

- 20 As to lay magistrates and their role as summary judges, they do not only have centuries of tradition and public acceptance to commend them. They reflect - imperfectly, but with scope for improvement - the mix of the community from which they are drawn. Among their strengths are independence, a range of backgrounds, experience and a common-sense approach to their task. The weight of the submissions and other evidence in the Review is that they do their work conscientiously and well.²⁰ There are over 30,000 of them, as against about 100 stipendiary magistrates, now called District Judges (Magistrates' Courts). They are, in the main, laymen and laywomen, not professional lawyers, but they receive training and acquire considerable experience of the law that they are regularly called upon to apply. And, although they usually sit as a court of three and tend to be slower than a District Judge, who sits on his own, they account for the vast majority (91%) of summary work, which itself accounts for 95% of all prosecuted crime. Less than 1% of their decisions are the subject of appeal to the Crown Court. Even smaller percentages of their work are the subject of appeals to the High Court by way of case stated or judicial review.
- 21 All that is simply a summary of my decision taken early in the Review that lay magistrates should continue to exercise their traditional summary jurisdiction. As appears in Chapter 4, I am nevertheless of the view that there is considerable scope for making them, as a body, more representative of the community, nationally and locally, and for improving the method of their appointment, the provision for their training, management structures and working procedures.
- 22 As to juries, my experience in the Review has been the same as that of the Runciman Royal Commission.²¹ There is wide and firm support for jury trial. Few proposed its general abolition. Many vehemently urged its retention in its present form. Some suggested research with a view to determining whether it is as sound a form of trial as many believe. Others were of the view that juries are not the appropriate tribunal for many cases of certain types and levels of seriousness that now come before them.
- 23 Unlike the Runciman Royal Commission, I do not believe that it is necessary or desirable to amend section 8 of the Contempt of Court Act 1981 to permit research of a more intrusive kind than is already possible. As I indicate in

²⁰ it is interesting to note that in the 1998 British Crime Survey, 61.1% of the public thought that magistrates were out of touch with what ordinary people thought, compared to 80% who thought that the professional judiciary were

²¹ *Royal Commission on Criminal Justice*, Chapter 1, para 8

Chapter 5,²² there is already a wealth of useful jury research throughout the common law world. Much of it is of a kind that would not offend the 1981 Act; and it shows where the strengths and weaknesses of juries lie and the considerable scope for improving their composition and the way in which they work. Those were the major issues under this heading in the Review.

- 24 In Chapter 5, I have looked at proposals that a defendant should be entitled to waive jury trial in all or certain classes of case presently triable on indictment. I have also considered whether there is a case for removing or qualifying a defendant's present right to trial by jury in certain procedures and types of case, notably: serious fraud or other complex or technical cases, alleged offences by young defendants, offences triable either on indictment or summarily - 'either-way' offences, and fitness to plead.
- 25 As to the mode of trial of 'either-way' offences - in respect of which the Government twice failed in its parliamentary attempts at reform last year²³ - where a democratic society like ours has devised different forms of trial according to the type and/or seriousness of the crime alleged, it must be for it to draw the line between them, and from time to time to vary it, according to its perception of public interests and the individual's right to a fair trial.²⁴ The critical questions, which I examine in Chapter 5, are by what criteria should cases be allocated to one or other form of tribunal where legislation permits a choice, and should the court or the accused decide? Other common and civil law countries draw lines between different levels of jurisdiction, but often at a higher level of seriousness than we do. And our system is probably unique in that, in a large range of offences many of them often relatively trivial in nature, the accused, not the court, decides how and where he is to be tried.

Professional judges

- 26 There were few proposals in the Review for any radical changes in the judicial structure. But there was considerable dissatisfaction with the match, or mis-match, of judges to work, and with the inflexibility of their deployment between different courts and levels of jurisdiction. Many consider that this mis-match and inflexibility causes inefficiency and sometimes injustice. In Chapters 7 and 6 I have considered changes to court structures and to the system of deployment of judges at first instance and on appeal in order to meet these criticisms.

²² paras 76 - 87

²³ Criminal Justice (Mode of Trial) Bills Nos 1 and 2

²⁴ relatively recent examples of such change were the conversion of the following former 'either-way' into offences triable summarily only: taking a vehicle without consent, common assault and battery, (see Criminal Justice Act 1988, ss 37 and 39) driving whilst unfit to drive through drink or drugs (Road Traffic Offences Act 1988, s 9 and Sched 2 Pt I) and criminal damage to the value of less than £5,000 (see Magistrates' Courts Act 1980, s 22)

Local justice

- 27 Local justice, like lay justice, is considered by many to be a fundamental principle or requirement of our criminal justice system. It has three aspects. The first is geographical locality. All other things being equal, it is clearly desirable for reasons of convenience that courts should be readily accessible to their local communities. There has been much concern about court closures in rural areas in recent years. Clearly, some courthouses are little used and some could not realistically be improved to the standards now rightly demanded of courts. But decisions on court closure should not be taken without assessment of their implications for all involved. It is not solely or even primarily a matter of the potential savings to the courts and their administration. Second is the locality of those dispensing justice, particularly magistrates and jurors. As the embodiment of local lay justice, it is important that, so far as practicable, they should truly reflect the mix of the community from which they are drawn. Third, there is the question of courts, in their application of the law to the facts, responding to local needs or other circumstances, for example, when there are local surges of particular types of offence or where there is endemic deprivation. However, such locality should be balanced against a national framework for clarity and consistency in the application of the law.

Adversarial process

- 28 Like the Philips²⁵ and the Runciman²⁶ Royal Commissions, I consider that there is no persuasive case for a general move away from our adversarial process. Not only is it the norm throughout the common law world, it is beginning to find favour in a number of civil law jurisdictions which have become disenchanted with their inquisitorial tradition. However, as I discuss in Chapter 10, there are already signs of an inquisitorial approach in some of our pre-trial and public interest immunity procedures. And some have argued for its introduction to the trial process for certain purposes, for example, in the treatment of expert evidence and in cases involving the evidence of very young children, matters that I have considered in Chapter 11.

²⁵ *Report of the Royal Commission on Criminal Procedure*, para 1.8

²⁶ *Report of the Royal Commission on Criminal Justice*, paras 11-14

Categorisation of offences

- 29 The division of offences into those triable only summarily by magistrates or a District Judge and those triable only on indictment by a judge and jury is of long standing. Of lesser antiquity is the hybrid category of ‘either-way’ offences that were introduced in a small way in the mid-nineteenth century and that have grown in fits and starts throughout the twentieth century to the large number they are today. The basic framework of these three categories seems to me to be sound in principle, but to need attention in their use, particularly as to the manner of determining mode of trial in ‘either-way’ cases. I have, therefore, accepted the three categories of offence and that those triable on indictment only should go to what is now the Crown Court and that those triable summarily only should remain in what is now the magistrates’ courts. As to the wide category of ‘either-way’ offences, I have not sought to resolve the mode of trial issue by suggesting transfers from one category to another at the margins - though individual candidates could be found. In Chapters 5 and 7 I have looked instead for alternative and appropriate ways of trying some of those cases and, also, for a new system for determining how they should be tried.

Complexity

- 30 The strongest impression that I have formed of the criminal justice system in the course of the Review is of the complexities in every corner of it. Their consequence is much damage to justice, efficiency and effectiveness of the system and to the public’s confidence in it. The central thrust of this Report has been to find ways of removing or reducing these complexities and the damage they do. The ‘system’, a legacy of centuries of piecemeal change, is a mix of autonomous national and local bodies attempting to collaborate and consult with each other through a network of committees at different levels. There is no over-all direction; there are no over-all lines of management or accountability; there is, instead, co-ordination of variable quality, and cross-reporting. In Chapter 8, I consider the introduction of a single line of national direction and local management of the criminal justice system as a whole, headed by a national Criminal Justice Board supported by local Boards. For their part, the courts are presently split into two quite separate structures of the Crown Court and magistrates’ courts, separately administered and financed, each with distinct practices and procedures. In Chapter 7, I consider the creation of a new unified Criminal Court made up of three Divisions and supported by a single administration and, so far as practicable, using common practices and procedures. In Chapters 9, 10, 11 and 12, I consider what can be done to simplify court procedures in preparation for and at trial and on appeal, including, in Chapter 11, changes to some basic rules of the law of

evidence. The criminal law as a whole suffers from centuries of haphazard statutory and common law accretion, a process that has accelerated dramatically in recent years. It is all immensely complicated for lawyers and laymen alike, and urgently in need of codification, as I mention at the end of this chapter and in many other parts of the Report.

Public confidence

- 31 Public confidence is an elusive concept, first in identifying it as an attitude of the community at large, and second in evaluating how well informed it is. By its very nature, the criminal justice system is bound to engender a significant level of dissatisfaction from those, like convicted and sentenced offenders, who feel that it has treated them unjustly, or those, like victims, witnesses, and jurors who believe that it has treated them with indifference or insensitivity. More generally, the system falls between the views of many who consider that it is not tough enough in catching, convicting and sentencing criminals and of many others who maintain that it fails to have sufficient regard for the rights of the individual and for those, including some members of ethnic minorities, who come from deprived backgrounds or who are otherwise vulnerable. Not only are people's attitudes to the criminal justice system conditioned by their own different experiences of it, they often result from their ignorance of the system and of the nature and effect of courts' decisions. This is all too apparent from the results of attempts, through polls, surveys and the like, to gauge the levels of confidence of a broad cross-section of the community. And there is the tendency in much of the media to misunderstand and to misreport what happens in court. Although the courts and criminal justice agencies have become increasingly aware of the need to raise their level of performance and to inform the public better than they have done, there is more to do.

- 32 Public confidence is thus, and is likely to remain, an imprecise tool for determining how well a criminal justice system is performing and what needs to be done to improve it. Public confidence is not so much an aim of a good criminal justice system; but a consequence of it. The aim should be for those responsible to inform themselves in a more thorough and measured way than they do now of what changes are required and, in making them, adequately to explain them to the public. That is a very general proposition, easy to articulate and hard to achieve. But I make it here more as a caution against attempting insufficiently informed reforms in response to perceptions by some of injustice or discrimination and against treating such perceptions as proxies for a low level of public confidence.

Ethnic disadvantages

- 33 Much of what I have said about public confidence is of particular importance under this heading. In recent years, and given special impetus by Sir William Macpherson's *Report of the Stephen Lawrence Inquiry*,²⁷ there has been growing concern that members of ethnic minority communities experience discrimination within the criminal justice system. The way in which data on race and criminal justice is currently collected is so unsatisfactory and the issues are so complex that it is difficult to determine whether the concern is well-founded. There is evidence, however, that members of ethnic minority communities are under-represented in various ways in the courts and criminal justice agencies and bodies of various sorts. For the reasons I gave in the last paragraph, it would be a mistake to attempt to skew the system or the criminal justice process in response to perceived weaknesses. But the perceptions should be thoroughly tested and, if well-founded, remedied. As I say later in the Report,²⁸ the first step should be to establish a system for comprehensive and accurate collation of data about minority ethnic representation in the system and relative outcomes of each stage of its process. Once such information is available the criminal justice agencies would be in a far better position than they are to work with minority ethnic organisations and others to eliminate discrimination and counter any fears that prove to be unfounded. There is now an urgency about this. Professor Roger Hood set alarm bells ringing as long ago as 1992.²⁹ The Runciman Royal Commission in 1993 urged thorough monitoring in connection with various racial issues brought to its attention.³⁰ But little seems to have been done. Part of the problem, no doubt, is the primitive state of information technology for the criminal justice system as a whole and among its various agencies, another area in which I make a call for urgent action in various contexts in the Report.

Politics

- 34 It would be naïve to suggest that politics should be removed from the forces driving change in the criminal justice system. As for any other field of public concern, politicians have a legitimate interest in the formation of criminal justice policy and in legislative and other means of implementing it. However, the criminal justice system and the public's confidence in it are damaged if, as has happened all too often in recent years, insufficiently considered legislative reforms are hurried through in seeming response to political pressures or for quick political advantage. I take it as a legitimate starting point that there should be some mechanism of objective and informed

²⁷ *Report of the Stephen Lawrence Inquiry*, Cmnd 4262-1 (HMSO, February 1999)

²⁸ Chapter 8, para 66

²⁹ R Hood, *Race and Sentencing: A Study in the Crown Court* (Oxford, 1992)

³⁰ *Report of the Royal Commission on Criminal Justice*, Chapter 1, para 26

assessment between the rawness of political enthusiasms of the moment and the transformation of their products into law. More is needed than the present unofficial, often perfunctory and late consultation with the higher judiciary, coupled with the absence of any consultation for the purpose with the Criminal Justice Consultative Council. In Chapter 8, I consider a new and more effective consultative mechanism in the form of a Criminal Justice Council alongside what should, in consequence, be a more timely and well used line of informal consultation with the Lord Chief Justice and other higher judiciary. The Council's function, unlike that of the Law Commission, which is to undertake specific law reform projects, would be to keep the criminal justice system under review and to examine and initiate proposals for reform.

CODIFICATION

35 I take the opportunity early in the Report to join the swelling chorus for codification of the criminal law, a basic tool for understanding and application of the law commonplace in many civil and common law jurisdictions. As Lord Bingham of Cornhill has recently illustrated in his plea, *A Criminal Code: Must We Wait For Ever?*,³¹ the chorus has been swelling for a long time. It began in the early nineteenth century, and was the subject of many authoritative reports and parliamentary attempts until the late part of the century and revived again in 1965 with the establishment of the Law Commission. The Commission, working through a distinguished team of lawyers, began work on the production of a code, publishing the first version in 1985 and a revision in 1989. In its Report containing the revision, it summarised the need for it in the following terms:

“The position of the common law in criminal matters, and in particular the interface between common law and statutory provisions, undoubtedly contributes to making the law obscure and difficult to understand for everyone concerned in the administration of justice, whether a newly appointed assistant recorder or magistrates' clerk. Obscurity and mystification may in turn lead to inefficiency: the cost and length of trials may be increased because the law has to be extracted and clarified, and there is greater scope for appeals on mis-directions on points of law. Moreover, if the law is not perceived by triers of fact to be clear and fair, there is a risk they will return incorrect or perverse verdicts through misunderstanding or as deliberate disregard of what they are advised the law is. Finally, the criminal law is a particularly public and visible part of the law. It is important that its

³¹ originally in a speech delivered at a dinner for HM Judges at the Mansion House in London on 22nd July 1998 and now published in his collection of essays and speeches, *The Business of Judging* (OUP, 2000) pp 295-297

authority and legitimacy should not be undermined by perceptions that it is intelligible only to experts.”³²

36 The Law Commission, the judiciary at all levels, distinguished academics, practitioners and many others with experience of the problems and needs of the criminal justice system have since continued to press for this reform, but to no avail. The nearest we get to it is some consolidation of statutes from time to time when the law in a particular area has become so dispersed that it has become unmanageable, but without attention to its equally inconvenient and unstructured overlay of case law. A recent example is the Powers of Criminal Courts Act 2000, on which the ink was barely dry before it was subject to amendment by other statutes. In a codified system, the law – both statutory and case law and practice – is, where necessary, reformed as well as restated, and the code itself is amended on a regular basis to keep it up to date, a task that electronic technology could aid dramatically. I am pleased to see that the Government has also recently indicated its support for a core criminal code.³³ It should consist of four parts:

- **A Criminal Offences Code** – The Law Commission has already done much of the groundwork for this in a series of Reports on Legislating the Criminal Code, starting with its 1989 draft.³⁴ It should be given the responsibility, and the necessary resources, to produce the Code and subsequently to keep it under regular review.
- **Code of Procedure** - In Chapter 10 I consider the need for replacement of the separate practices and procedures of magistrates’ courts and the Crown Court with a single procedural code or, if my recommendations for a new unified Criminal Court are accepted, for a code for the three Divisions of that Court. As I recommend in Chapter 10, the responsibility for producing and subsequently maintaining the Code should vest in a new statutory Criminal Procedure Rules Committee working under the general oversight of the new Criminal Justice Council. Like the Civil Procedure Rules, it should be enshrined in primary legislation with a clear statement of principles and detailed in subordinate legislation enabling ready amendment to keep it up to date.
- **A Code of Criminal Evidence** – In Chapter 11 I recommend that there should be a wide-ranging and principled reform of the law of criminal evidence, and have suggested that it should include consideration of a general move away from many rules of inadmissibility to trusting courts, judges and lay fact finders alike, to give relevant evidence the weight that it deserves. Such a review would lay the foundation for a Code of Criminal Evidence, for the production and maintenance of which, in due course, a standing body should be appointed to work under the oversight of the Criminal Justice Council.

³² Law Comm Report No 177

³³ *Criminal Justice: The Way Ahead*, Cmnd 5074, (HMSO, February 2001), para 3.57

³⁴ Law Comm Report No 177

- **A Sentencing Code** – As I mention briefly in Chapter 11, codification of our law and practice of sentencing is urgently needed, despite the recent consolidation exercise and with or without implementation of the significant reforms of sentencing proposed in the recent Report of the Halliday Sentencing Review, *Making Punishments Work*.³⁵ Again, this should be the responsibility of a standing body working under the oversight of the Criminal Justice Council.

Accordingly, I recommend that, under the general oversight of the new Criminal Justice Council and with the involvement and support as necessary of the Law Commission, A Code of Criminal Law should be produced and maintained in four sections:

- **criminal offences;**
- **criminal procedure;**
- **criminal evidence; and**
- **sentencing.**

Postscript

- 37 In the treatment of various subjects and in making recommendations in the body of the Report I have taken the liberty, for convenience of expression, of appearing to assume that some of my recommendations for structural reform will be adopted, for example, for a new Criminal Justice Board and Criminal Justice Council and a unified Criminal Court and its Divisions. Whenever I have done so, I have tried to make clear whether other individual reforms are equally applicable to present structures or, with adaptation depend on the proposed new structures. Also, and solely for simplicity of expression, I have in general confined pronouns to the masculine throughout, and mostly used the word ‘magistrates’ when referring to ‘lay magistrates’ in order to acknowledge the different nomenclature now that stipendiary magistrates have become District Judges (Magistrates’ Courts).

³⁵ *Report of the Review of the Sentencing Framework for England and Wales*, (Home Office, July 2001)