CHAPTER 10

PREPARING FOR TRIAL

INTRODUCTION

1 A wide misconception of the general public is that all or most of the criminal justice process takes place in court. But proceedings in court require preparation – much and by many. The trouble is that the process, by its very nature – fragmented among various government departments and agencies and adversarial as between prosecution and defendant – does not encourage joint and efficient preparation. There are constitutional and administrative divides, sharpened by separate budgets, that get in the way. There are limits to what can be expected of co-operation between the parties, particularly when the issue is as to guilt as well as sentence. Guilty defendants seeking to avoid conviction have not the same urgency as the public about the need for an efficient criminal justice system. Some innocent defendants, advised by their lawyers to keep their cards close to their chests, are equally unenthusiastic. And, as is now increasingly recognised, there are other individuals involved in the process, such as victims, witnesses and jurors whose interests need attention.

2 In all of these respects the process of criminal justice is a more difficult ground for orderly preparation by the parties and management by the court than in the case of civil disputes where the issue usually concerns two parties only, where legal protections for the defendant are less rigorous and where preparation for trial does not normally require input from public bodies. Unfortunately, the already infertile ground for efficient preparation of criminal cases - vital to just and efficient court proceedings - is aggravated by a number of unnecessary defects in the system. With will and resources, something can be done about them. There is now wide acceptance that there is scope for greater intervention by the court and various agencies, and for more vigour and co-operation by the parties without prejudice to their respective interests, in the preparation of cases for hearing.

3 Before considering areas for improvement, I should summarise the basic aims as I see them. Underlying them all is the truism that, although efficiency of the criminal justice process is an important end in its own right, it has a greater importance in its contribution to the overriding consideration in every case – a fair hearing leading to a just outcome.

4 First, the key to a just and efficient criminal process – good case preparation – is identification at the earliest possible moment of the likely plea and, if it is to be one of not guilty, the issues. There is a culture of last-minute decisions, which must be attacked if there is to be any significant improvement. Too often cases are warehoused between hearings, so that little is done until the next hearing is imminent. There should be active preparation for trial without constant recourse to the court. This depends in large part on the prosecution charging correctly at the outset, its timely and adequate disclosure of its proposed evidence and of all material otherwise relevant to the issues as it knows or believes them to be, and on the defence's early indication in response to such material of the issues it intends to take. The need for early and adequate identification of issues applies to proceedings in all courts, not just those to be tried by judge and jury; but, of course, the manner of securing it will depend on the proceeding and on the nature and complexity of the case.

5 In all this, regard must be had to the prosecution's obligation to make the court sure of guilt and the defendant's right of silence. But neither is threatened by requiring a defendant to identify with some precision the matters of fact and/or of law that he intends to put in issue. If his intention is to put the prosecution to proof of everything, or only to take issue on certain matters, he is, of course, entitled to do so when the matter reaches trial. But to delay telling the court and the prosecution what he challenges as a matter of tactics, has nothing to do with the burden and standard of proof or his right of silence. Those fundamental principles are there to protect the innocent defendant from wrongful conviction, not to enable the guilty defendant to engage in tactical manoeuvres designed to frustrate a fair hearing and just outcome on the issues he intends to take.

6 Second, the parties, not the court, are responsible for the preparation of their respective cases for trial and, as part of that, for informing each other of the issues, the scope of the evidence and points of law for resolution. Pre-trial hearings can be of great help if needed and held at the right time in the preparation for trial, but they should be reserved only for such matters as the parties cannot resolve informally between themselves. At present pre-trial hearings in their various forms,[1] in all but the most complex cases, are mostly unnecessary and misused. They are treated primarily as a means of bringing everybody together in court, to enable advocates to meet their clients (often

[1] see para 204 - 220 below

for the first time and to take instructions), theoretically to focus on the issues of law and fact and to make decisions as to the conduct of the case. Of course, it is a good thing to do all of that, but a pre-trial hearing in court is not the place or the means for it, save as a last resort. It is misused largely because of a mix of failures by the prosecution and defence, aggravated by lack of resources on both sides. Sometimes, the charges are unrealistic because the prosecution has failed to review its case at an early stage and/or it has not served its proposed evidence or made due disclosure. This in turn has encouraged the defence to delay in its preparation or prompted an unwillingness to indicate a plea or the issues it intends to take at trial. There is also little incentive for publicly funded defence solicitors and counsel to prepare early for trial because they are not paid a discrete fee for a conference with their client or for early preparation. And, as they are paid a derisory fee for attending a plea and directions or other form of pre-trial hearing, there is also little incentive to prepare properly for it or for the trial advocate to attend.

7 Third, where there is a need for a pre-trial hearing the court and the parties should take full advantage of it to resolve all outstanding issues as to the conduct of the trial and to deal with any preliminary issues of law or fact that will assist that resolution. This calls for the court to adopt a more interventionist and authoritative role than has been traditional in identifying the issues for trial and in securing the proper preparation by both parties to deal efficiently with them. This in turn requires adequate preparation, not only by the parties and their advocates, but also by the judge with the benefit of sufficient time out of court in which to do it.

8 Fourth, there is the problem to which I have referred, of the uncooperative or feckless defendant and/or his defence advocate who considers that the burden of proof and his client's right to silence justifies frustration of the orderly preparation of both sides' case for trial. Experience in this country and elsewhere in the Commonwealth[2] indicates that, in the main, court sanctions won't compel the sort of forensic discipline that efficient case preparation requires, that they could cause injustice one way or the other and could often delay trial and increase expense rather than the reverse. However, the Review has indicated some general themes for encouraging better preparation and compliance with any directions that the court might be called upon to give. They include the introduction of a discipline of formal written orders (commonplace in the civil jurisdiction), a combination of incentives and change in professional culture, the latter aided by a properly structured system of payment which rewards preparation for trial, professional management systems that are subject to regular audit and, in extreme and clear cases, by professional sanctions and/or of loss legal aid accreditation. Among the incentives for the defendant himself might be the introduction of a system of

[2] see para 231 below

advance indication of discounted sentence for a plea of guilty[3] and retention of bail or custodial privileges after a plea of guilty and before sentence.

9 Fifth, critical to a better system of preparation for trial is the development and introduction of a form of information technology that is common to all criminal courts, the various criminal justice agencies serving them and defence advocates. Such technology should enable each agency, prosecutor and defence advocate to make its or his appropriate input to a single case file, draw from it what it or he needs and it is appropriate for it or him to have, and for the ready transmission and updating of papers in the case. Coupled with this, there is scope, already being developed, for greater use of video-link technology to link courts and lawyers on both sides and defendants in or out of custody. With such facilities, it should be possible to do much of what is now the subject of wasteful and inefficient pre-trial hearings, including custody remand productions, and bail applications. In that electronic way, it should also be possible to recover some of the 'locality' of access to justice lost in the modern trend to concentration of courts into fewer larger centres. All of that requires common planning, management, commitment and pooling of resources by the courts, all the criminal justice agencies and also - and this is important – defence lawyers who will use and share the benefits of the new system. Hence the urgent need, to which I have referred throughout this Report, for a criminal justice system centrally planned, funded and directed.

10 Much of what I have said about the need for efficient case management was succinctly put by the Runciman Royal Commission, in 1993, summarising its intentions for its recommendations for change in the Crown Court, namely:

> "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 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".[4]

[3] see paras 91-114 below

[4] Chapter 8, para 1

FOUR ESSENTIALS

11 Early identification of the issues, whatever form it takes, depends crucially on the ability and willingness of the prosecution and defence lawyers to do their respective jobs properly. There are four main essentials:

- a strong, independent and adequately resourced prosecutor in control of the case at least from the point of charge;
- an experienced, motivated defence lawyer or lawyers who are adequately paid for pre-trial preparation;
- ready access by defence lawyers to clients in custody; and
- a better system than at present of communicating and transmitting material between all involved in the criminal justice process and with the court.

A strong and independent prosecutor

12 The Crown Prosecution Service has still to fill its proper role which, in my view, should be closer to the more highly regarded Procurator Fiscal in Scotland or the Office of the Director of Public Prosecutions in Northern Ireland. The Glidewell and Narey reforms have gone some way in this direction, but there is more to do. The prosecutor should take control of cases at the charge or, where appropriate, pre-charge, stage, fix on the right charges from the start and keep to them, assume a more direct role than at present on disclosure and develop a more proactive role in shaping the case for trial, communicating appropriately and promptly with all concerned. For all this the Service needs greater legal powers, in particular the power to determine the initial charge, and considerably more resources, in particular trained staff and information technology, than it has had in the first fifteen years of its life and than presently proposed.[5] The Government has recently committed itself to provide "a better resourced, better performing Crown Prosecution Service, more effective in prosecuting crime and progressing good quality cases for court".[6] These are fine words, but are reminiscent of previous expressions of intent that were not implemented.

I recommend that the Crown Prosecution Service should be given greater legal powers, in particular the power to determine the initial charge, and sufficient resources to enable it to take full and effective control of cases from the charge or pre-charge stage, as appropriate.

[5] see IBIS *Medium Term Strategic Plan,* Annex B (Home Office 1999)
[6] *Criminal Justice: The Way Ahead*, February 2001, CM 5074 paragraph 3.13

Efficient and properly paid defence lawyers

13 The contribution of defence lawyers to the just and efficient working of the system is equally critical. They too need to be properly resourced – paid – if they are to make a proper contribution consistent with their duty to their clients and the court. They also need to keep abreast of changes in law, procedure and technology through continued professional development. The basis and levels of their pay are not directly within my terms of reference. But I cannot ignore some of the effects of poor payment in publicly funded cases on the working of the criminal justice process.

14 Nearly all criminal defence work is publicly funded, accounting, in 2001-2002, for 7% of the total budget of £12.8 billion for the criminal justice system.[7] Publicly funded defence lawyers, the Bar and solicitors, need more support than they receive at the moment, in the form in which the prosecution case is presented to them and in proper pay for necessary preparatory work. There has been much change as to public funding in the course of the Review, and more is to come. The Legal Services Commission took over from the Legal Aid Board the public funding of defence work in April 2000.[8] And on 1st April 2001 the Criminal Defence Service was established under the aegis of the Commission to undertake piloting and research into a mixed system of public funding of criminal defence through salaried employees and contracted private practitioners.[9] A new system of franchising solicitors for publicly funded work in magistrates' courts was introduced in October 2000 as a preliminary to the implementation of a contractual scheme with the Criminal Defence Service on 2nd April 2001. There are similar proposals for franchising solicitors in the Crown Court from 2003.[10] Negotiations are also under way with the Bar Council over the extension of franchising arrangements to barristers' chambers.

15 Salaried public defenders will be introduced as part of a four year pilot starting in 2001/2002. Six offices will be established, each based in its own premises away from the Legal Service Commission's regional offices. The first pilot areas will be Birmingham, Liverpool, Middlesbrough and Swansea (with two more yet to be announced).[11] The intention is that the salaried and franchised services will operate alongside each other, with the work of the

[7] compared with 62% spent on the Police, 15% on the Prison Service, 4% on the Probation Service, 5% on the Crown and Magistrates' Courts, 3% on the CPS and SFO, 2% on the Criminal Injuries Compensation Scheme and Victim Support; see *The Criminal Justice System Strategic Plan 1999-2002*

[8] Access to Justice Act 1999 s 1

[9] ibid, s 12

[10] Legal Services Commission Corporate Plan 2001/02 – 2003/04 para 3.9 - 3.15

[11] ibid para 3.20

former being subjected to independent monitoring by outside researchers, who will publish comparative reports. All materials developed by the Criminal Defence Service in relation to public defenders will be made generally available on its website for the benefit of the whole profession.

16 As to public funding of private practitioners, this is not the place to examine in detail what has gone before or what is to replace it. To set the scene, however, I should mention the introduction in January 1997 of a graduated standard fees scheme, the system of calculating all defence advocates' fees, including those of QCs, for cases lasting up to ten days in the Crown Court. The Lord Chancellor has recently amended the scheme so as to extend it to cases lasting up to 25 days and has also reduced the level of fees so as to achieve parity between defence fee levels and those paid to prosecution advocates. In doing so the Lord Chancellor stated that his intention was to reduce the total cost of advocates' fees for Crown Court defence work by about 10%. The Bar Council supports standard fees in principle, but argues that these reductions have occurred over a period during which procedural burdens on them and the costs of practice have increased. And it claims that the true effect of the reductions cumulatively amount to at least 25% for the junior Bar, 36% for Queen's Counsel and 27.5% for the criminal Bar over-all.

17 Before summarising the fee structure itself I should record, with all the emphasis I can, that the general thrust of the criminal graduated fees scheme, and of the latest extension of it, is fundamentally flawed in that it does not provide an adequate reward or incentive for preparatory work. Quite apart from the interest of justice in securing a fair trial, the scope for savings and improvement in the efficiency of trial preparation are enormous. Yet the current fee structure, present and, seemingly, proposed, for publicly funded defence work perversely discourages, rather than encourages, efficient preparation.

18 In brief, the payment scheme in magistrates' courts is for a flat fee in all cases for a guilty plea and a graduated payment for most trials. These fees include a notional element for case preparation, but it is not separately identified. Longer and more complex cases are subject to the taxation procedure (i.e. scrutiny after the event by court staff of what has been done in the case). In magistrates' courts, the defence solicitor, who holds the budget, runs the case as he sees fit and, if he instructs counsel, pays him from that budget.

19 In the Crown Court, solicitors and barristers are paid separately. For guilty pleas and trials lasting up to two days, solicitors are paid standard fees which, again, include a notional element for preparation including securing proper prosecution disclosure, taking instructions from the defendant and preparation and service of the defence statement. For longer trials, solicitors' bills are subject to taxation, though the Lord Chancellor is considering other ways of

remunerating this work. In the very longest of trials (generally those lasting more than five weeks) the Criminal Defence Service enters into a specific contract with solicitors and counsel for the work that is to be undertaken.

20 As I have indicated, counsel is paid on the basis of standard graduated fees for trials lasting, now, up to 25 days. Though these fees contain notional elements for preparation, barristers receive no identifiable or discrete fee for any preparatory work, which ought in many cases to include advising on prosecution disclosure, holding a conference with the defendant (in prison, if he is in custody) and advising on the form of the defence statement, on evidence and the general conduct of the case. The one exception is an allowance of a flat fee of £75 (shortly to rise to £100) for preparing for and attending a plea and directions hearing – less than many a tradesman might charge for an hour or two's work even after the increase. The expectation is that counsel instructed for the trial will attend the plea and directions hearing. But such hearings are not listed to suit his availability and he is frequently engaged in another case when it takes place. The reality is that other – sometimes less experienced - counsel attend them. They will have had little or no part in such preparation of the case as there has been, and no authority to advise or commit the defendant to any critical matters needing resolution. It is no wonder that defendants, who have yet to see their trial counsel, are reluctant to enter pleas at that stage or to commit themselves to a firm strategy for the trial.

21 The problems of the inadequacy of payment for preparatory work and of the perverse structure discouraging rather than encouraging professional diligence at that critical stage of the process is common to proceedings in magistrates' courts and the Crown Court. But they are particularly pressing and costly in the latter. The perversities take two forms. The first, which is inherent in the system, is that the longer the trial the greater the brief fee. Poor preparation by one or both sides almost always lengthens trials and the system rewards them for it with additional fees. The second is where the defendant, for want of proper preparation by either or both sides or for some other reason such as lack of access to him in prison, initially pleads not guilty and only later changes his plea to guilty on the day of trial. In that event his lawyers receive more money in the form of a 'cracked trial' fee than they would have done if he had pleaded guilty from the outset.[12]

22 Those responsible in the Lord Chancellor's Department for devising an extension and modification of the existing graduated fee scheme are well aware of these features. In fact, many of the problems inherent in the standard fee system derive from the Lord Chancellor's Department's and the Legal Services Commission's concern about their own administrative and financial

[12] I am indebted to His Hon Judge David Mellor, the Resident Judge at Norwich, for this practical analysis

requirements, regardless of the consequences for other parts of the system. Standard fees suit both the Department and practitioners, since they are cheap to administer, predictable in quantity and quick to pay out. But they do not provide any incentive for adequate and timely preparation.

23 In my view, there is an urgent need for a change in the system of payment of defence lawyers to ensure that proper and timely preparation is encouraged by the payment of adequate fees for preparation. These fees could be calculable, whether on a percentage basis or otherwise, by reference to the over-all fee, and be deductible from it if want of proper preparation results in unnecessary pre-trial hearings and/or increases the length of trial. In the event of change of trial advocate, any difficulties as to entitlement to the preparatory fee should be capable of resolution by professional regulation. In addition, or alternatively, if my recommendations in paragraphs 221-228 below are adopted, in jury and other appropriate cases such a payment might be tied to the preparation of a case and issues summary.

24 A suggestion of His Honour Judge David Mellor, which I find attractive, focuses more sharply on the contribution of preparation to the process. It is that, in all but the largest cases requiring individual assessment or tender, the basic or 'core' fee should be a standard graduated fee for *preparation*. It would be on a graduated basis calculated according to weight and complexity. All other payments would be in the form of standard graduated uplifts on that figure, depending on whether the preparation results in a plea of guilty or a trial. There would be an enhanced uplift where it could be shown that preparation has shortened a trial, and daily payments ('refreshers') for trials lasting beyond one day.

25 For its part, the Legal Services Commission is proposing a system of 'quality assurance standards' for Criminal Defence Service contracted lawyers, but plans its introduction only after the outcome of its pilots to be conducted over the next four years.[13] The criteria for such a system should be selected so as to measure the *quality* of decisions as well as the achievement of staged targets, since the latter may not be a true measure of progress. Devising a system may not be easy; but there is already some experience in operating quality assurance standards in publicly funded work.[14] Contracts could provide for spot auditing of files and otherwise monitoring performance. In extreme cases, they could enable the Commission, subject to a right of appeal,[15] to remove or not renew the offending practitioner's contractual entitlement to undertake publicly funded work or to confine him to certain types or volume of work. An analogous regime could be devised for barristers' chambers, once franchising arrangements are extended to them.

[13] see the LCD Consultation Paper, *Criminal Defence Service: Choice of Representative*, June 2000, CP 10/00, para 4
[14] see eg *Legal Aid Franchise: Quality Assurance Standard*, Fourth Edition, April 2000, Legal Services Commission
[15] ibid, see eg Chapter 9

26 A third option would be to tie the judge's role in case preparation to triggering payment. It could build upon an interesting pilot project shortly to be undertaken at the Crown Court in Manchester Minshull Street under the supervision of His Honour Judge Woodward. Under the scheme, technological support has been provided to a dedicated Crown Prosecution Service team, four firms of defence solicitors and six sets of chambers and to the court. It will enable all the preparatory stages in criminal cases (excluding child abuse cases and those with more than four defendants) to be logged on a common access secure website, using forms derived from (but more detailed than) those used for plea and directions hearings. Protocols will set out what should be achieved by whom, and on what timescale. At a set point in time, the judge will interrogate the website, and if the case is ready, make the appropriate orders and allocate a trial date. Such "electronic" pre-trial case preparation is likely to have significant advantages over the present system. First, since a pre-trial hearing would not normally be required, it would be more convenient for trial advocates to attend properly to the preparation of their cases. Second, there would be significant savings in court time and in the accompanying expense and inconvenience. Third, it would be possible to tie the procedure to the payment of a realistic figure to defence lawyers if and when the case is certified by the judge as ready for listing. If the judge were to consider that a hearing is still necessary to bring the case to a stage of readiness, payment would depend upon the outcome of the hearing. If the case presented evidential or other difficulties which clearly merited an oral hearing, this could be indicated by the judge, and remunerated by an additional fee; but, if there were no such justification, it would not be payable. Such a system could, therefore, provide both incentives and sanctions.

27 I do not attempt more than to emphasise an urgent need to remove the perversities in the present system and to suggest possibilities for a better one. Those responsible should explore and develop a solution in close consultation with the Criminal Justice Council and the legal professions.

I recommend that urgent consideration should be given to changing the structure of public funding of defence fees in the criminal courts so as properly to reward and encourage adequate and timely preparation of cases for disposal on pleas of guilty or by trial, rather than discourage such preparation as it perversely does at present.

Ready access by defence lawyers to their clients in custody

28 Critical to the process of preparation is early and ready access by defence lawyers to their clients. This should not be a problem where defendants are on bail, save for the unsatisfactory arrangements for payment for preparation, including conferences, to which I have referred. It is, however, a real problem where defendants are in custody. Defence lawyers often have great difficulty in gaining access to their clients in custody at times and for sufficient periods for them to take proper instructions and to advise. This is particularly so for pre-trial conferences in prison in the late afternoon or early evening, often the only time that busy practitioners can manage if they are engaged in court on other matters in the day. It is also a problem at court during trial, when it is frequently necessary to discuss the case before or after the day's proceedings and the defendant is brought to court late and returned promptly to prison.

29 There are no national standards or rules governing the access of unsentenced prisoners to their legal advisers. Practices as to prisoners' access to the telephone to talk to their advisers and for legal visits vary from prison to prison, and in some instances even from shift to shift within the same establishment. A recent thematic review by the Prison Inspectorate of the treatment and conditions of unsentenced prisoners[16] found that, over-all, remand prisoners, particularly those in custody for the first time, had difficulty in obtaining legal advice in prison and that prison officers were rarely proactive in helping them to do so. Here are some of the practical difficulties, most of which the Inspectorate highlighted:[17]

- often there is a problem in locating a defendant in custody; having found him, there is then considerable delay in getting through to the appropriate prison on the telephone to book a visit, a difficulty that the Prison Service have acknowledged, blaming it on lack of sufficient resources to fund additional telephone lines;
- prisoners cannot normally receive telephone calls from their solicitors;
- prisoners can only use the telephone by means of phone cards, the purchase of which can take up to six days to arrange after arrival in prison;
- the best time to contact solicitors by telephone is in the morning before court, but at that time prisoners are usually locked up in their cells or working;
- prisoners are most commonly given access to telephones in the evening when their solicitors' offices are closed;
- telephone calls in the main part of the day are on application only and not always granted because of staff shortages or other difficulties;

[16] *Unjust Deserts : A Thematic Review by HM Chief Inspector of Prisons of the Treatment and Conditions for Unsentenced Prisoners in England and Wales*, (Home Office, December 2000)
[17] ibid, para 4.25

- legal visits have to be booked in advance, which can take several days due to difficulties in telephonic communications or slow processing of mail (which is not conducive to the preparation of defence statements within 14 days of primary prosecution disclosure[18] as required by the Criminal Procedure and Investigations Act 1996);
- some prisons only allow legal visits in the evenings and, even then, allow insufficient time for them; and
- although prison officers should not open confidential correspondence, prisoners often find that letters from their solicitors have been opened.

30 It is not surprising that the Inspectorate found that Prison Governors frequently failed to discharge their responsibilities under Prison Service Rules to allow remand prisoners effective access to their legal advisers:

> "In our view the barriers to effective communication with legal advisers constitute an obstacle to the fair and just treatment of unsentenced prisoners which may well not stand up to legal challenge under the Human Rights Act, Article 6 which guarantees rights consistent with the proper preparation and conduct of a defence, including the right to consult with a lawyer prior to and during the trial. …."[19]

31 I should not leave that finding without also referring to the undoubted reluctance of a significant proportion of both the Bar and solicitors to visit their clients on remand in prison, partly because of the difficulties it presents for them, but also because they are not paid properly for it. Quite apart from the injustice to defendants, those difficulties are another good example of one agency making relatively minor economies at the expense of a much greater cost to other agencies and individuals involved in the criminal justice process. If remand prisoners and their legal representatives could contact each other more readily, they could, together, prepare their defences more efficiently and earlier, and the need for defendants to attend pre-trial hearings simply in order to meet their legal representatives would go. It would also remove the need for many such hearings altogether. I should add that, in any event, many remand prisoners would prefer to remain at prison and participate in any preliminary court proceedings through video-link than endure the discomfort and other inconvenience of court attendance, which also puts them at risk of the upheaval of having to transfer to another cell on their return to prison.

32 There are a host of obvious answers to most of the difficulties that I have mentioned, which may involve large or relatively small initial expense to the Prison Service and other agencies, but which would almost certainly achieve

[18] see paras 127 – 140 below
[19] *Unjust Deserts* para 4.34

long-term savings for it and for the criminal justice system as a whole. For example, the arranging of legal visits could be expedited and eased by the basic means of installing dedicated telephone lines in prisons, and/or by the provision of a secure internet facility for on-line booking of visits, a facility at present only available in 2% of the country's prisons. Another and more significant improvement in its potential for savings in time and expense, would be the introduction of widespread video-conferencing arrangements between defence lawyers, operating from their own offices or a shared facility, and prisons. Such steps would remove the root causes of many of the difficulties in communication between remand prisoners and their legal advisers. With or without them, there is an urgent need for the formulation of national standards accompanied by protocols with others including the Bar Council, the Law Society and the Criminal Defence Service, to ensure that unsentenced prisoners in custody are at no disadvantage to those on bail in preparing their defences.

33 Accordingly, I warmly support the Prison Inspectorate's recommendation in its thematic review[20] that the Prison Service should introduce standards for access to due process for unsentenced prisoners which ensure that they experience no greater jeopardy than bailed defendants in preparing for their trial.

Better communication systems

34 Fundamental to all improvements in case preparation at the pre-trial stage is the need to harness advances in information and communications technology. In para 26 above, I have described the pilot exercise due to be undertaken in Manchester into electronic plea and directions 'hearings'. In my view, this points the way forward to a system in which prosecution and defence can exchange information quickly and cheaply, and in which the court can monitor progress without the need to call the parties in for a hearing. Video-conferencing also has an important part to play in allowing face to face communication without having to assemble everyone in the same room. The Lord Chancellor's Department is introducing discrete, secure audio-visual links from all magistrates' courts to the 'local' prison, to be used for remand hearings.[21] The use of these could be extended to solicitors who wish to take instructions from their clients. There need only be a simple booking system which might allow access to the facility even outside normal court hours. In the longer term, the recommendations I have made in Chapter 8 for electronic case files would allow all those involved in the case to work online, extracting the information they need and making their own contribution. The potential of such technologies for increasing the efficiency with which cases are prepared

[20] ibid para 4.35
[21] see paras 259-261 below

is very significant. Without them, case management systems for criminal cases will remain anchored in the last century.

IDENTIFYING THE ISSUES

The charge

35 A significant contributor to delays in the entering of pleas of guilty and in identifying issues for trial and, in consequence, the prolonged and disjointed nature of many criminal proceedings, is 'over-charging' by the police and failure by the Crown Prosecution Service to remedy it at an early stage. All too often the prosecutor does not review the case thoroughly or with a sufficiently realistic eye until late in the day. This results, as I have already noted, in the defence tendering and the prosecution accepting last minute changes of plea to lesser offences, including those of defendants in 'either-way' cases who only opt for trial with a view to securing a reduction in charges in the Crown Court. And, even where last minute reductions or changes in charges do not produce pleas of guilty, much time and money may have been spent by both sides in preparing for a bigger and more complex trial than in the event takes place. The Crown Prosecution Service Inspectorate, in its Annual Report for 1999-2000, noted that about 23% of all indictments in the Crown Court had to be amended before trial.

36 This pattern encourages defendants who believe, rightly or wrongly, that they have been overcharged to maintain tactical pleas of not guilty until the last minute. It can also give rise to hasty, ill-considered and inappropriate acceptances by the prosecution of pleas of guilty, which bewilder and distress victims, distort sentencing decisions, engender appeals against sentence and, sometimes, artificially prevent the Court of Appeal, from doing justice in the case. There are, of course, other reasons for last minute changes of plea, including a reluctance by defendants to face reality, a hope or expectation that proposed prosecution witnesses may not turn up to give evidence at the trial or simply a short-term consideration of retaining prison privileges or prolonging remand on bail for domestic reasons. Nevertheless, a mistaken decision as to charge at the start of the case can have a fundamental and damaging effect on the preparation by both sides for trial and in the court's attempts at efficient case management. In human terms, the effect of prolongation, repeated attendance at court and uncertainty of witnesses, victims, the accused himself, relatives and others concerned in the proceedings can be disruptive and distressing.

Public prosecutions

37 Much of the problem is due to the fact that the police, not the Crown Prosecution Service, initiate prosecutions. The police charge. The Crown Prosecution Service reviews the charge after the event; and, in doing so, it applies a more stringent test than that of the police, as I describe below.[22]

38 The police, in charging, act under the operational direction and policies of their individual Chief Constables, each subject to the oversight of his own police authority. In most cases they do not have the benefit of advice from the Crown Prosecution Service at this early stage. Its role has been almost wholly reactive – quite unlike that of the procurators fiscal in Scotland who have a grip on the case and what to charge from the very start. The Service is normally only brought into the picture for advice and review when the charge has been preferred or the summons issued, and the potential for damage created. The recent location of Crown Prosecution Service lawyers at police stations to be available to advise the police on charging and other matters has led to some improvement. However, the Crown Prosecution Service Inspectorate, in its Annual Report 1999-2000, still found that 22% of police charges relating to assault, public order and road traffic offences were incorrect.

39 We talk of 'the prosecution' as if it were a single entity. The Philips Royal Commission envisaged that, although the police and prosecutors would have separate and distinct responsibilities, the system would:

> "depend … upon co-operation, with checks and balances operating within a framework in which all are seeking the same objectives. This unity of purpose, but independence of responsibility could be symbolised by providing that all cases … brought by the police are brought in the name of the Crown and by designating the local prosecutor as 'the Crown prosecutor'.[23]

40 But there is no unified prosecution. The police and Crown prosecutor are institutionally, financially and culturally separate from and independent of each other. In recent years the Glidewell and Narey reforms have gone some way to encouraging greater unity of effort and to involve the prosecutor earlier in the process. Sir Iain Glidewell and his colleagues urged a shift in the centre of gravity of the Crown Prosecution Service's operations from magistrates' courts towards the Crown Court, a devolution of power from the Crown Prosecution Service headquarters to local Chief Crown Prosecutors,

[22] para 43

[23] *Report of the Royal Commission on Criminal Procedure*, (January 1981), Cmnd 8092, Ch 7, para 7.8

establishment of its 'proper role' as an integral part of the criminal justice system[24] and a clearer definition of the proper relationship and responsibilities of the police, the Service and the Courts.[25] As to the Service's relationship with the police, they recommended that the police should remain responsible for investigation and charging and the preliminary preparation of case papers, and that the Service should be responsible for the prosecution process immediately following charge, advising as to any further investigation and the preparation of the case file, arranging the initial hearing in the magistrates' court and witness availability, warning and care.[26] In the area for which both services would have a continuing role, the preparation of the case file, they recommended the creation of combined Crown Prosecution Service and police 'criminal justice' units headed by a Service lawyer, which were also to have sole conduct of fast-track cases and to be responsible for case management in magistrates' courts.[27] They also recommended the creation of what are now called criminal trial units consisting of lawyers with support staff, to be responsible for all prosecutions in the Crown Court and to act as advocates in trials of either way cases in magistrates' courts.[28] Martin Narey, in his Report,[29] also advocated the need to bring police and the Service closer together in the preparation of cases for trial by locating prosecutors in police stations to advise their administrative support units.[30]

41 Most of the Glidewell and Narey recommendations have been adopted and are being implemented after local pilots. Crown Prosecution Service staff are now increasingly located in or close to police stations working in liaison with the police in criminal justice units and are receiving papers for review shortly after charge. Although there are some difficulties in providing accommodation for them to work together in this way, early signs[31] are that the new system is producing some improvements in efficiency and savings, but not, in the main, in the accuracy of charging. An evaluation[32] of the pilot schemes to implement the Narey recommendations showed, for example, that, in six areas where a Service lawyer was 'on call' for 24 hours a day, there had only been twelve calls for advice on charging over a period of six months. Seemingly, police officers in those areas felt that they were capable of handling matters themselves or were content to wait for advice in normal working hours. Although the officers' assessment of the position may have been correct, the continuing large proportion of prosecution cases that are discontinued or proceed with reduced charges suggests that there is still much wrong with the system. The authors of the evaluation recommended other

[24] *A Report Of The Review of the Crown Prosecution Service,* (The Stationery Office, 1998) Ch 1 paras 26, 37, 61 and 65
[25] ibid Ch 7, paras 4 and 8
[26] ibid Ch 1, paras 27-28
[27] ibid Ch 8, paras 11 and 12
[28] ibid Ch 8, paras 21 and 22
[29] *Review of Delay in the Criminal Justice System*, Martin Narey, February (1997)
[30] ibid Ch 3, pp 10-11
[31] *An Early Assessment of Co-located Criminal Justice Units* a report by the Glidewell Working Group, January 2001 – available on the CPS website:www.cps.gov.uk
[32] *Reducing Delay in the Criminal Justice System: Evaluation of the Pilot Schemes* (Ernst and Young), (1999), Home Office

strategies to achieve more and earlier co-operation between police and the Crown Prosecution Service. This has been given added urgency since the abolition, from 15th January 2001, of committal proceedings for indictable-only offences,[33] resulting in the Crown Court receiving serious cases within days of charge. It will become even more pressing if my recommendations, in Chapters 5 and 7, for abolition of committal proceedings in 'either-way' offences and/or for the creation of a unified Criminal Court with three levels of jurisdiction are accepted.

42 The hope, expressed in the Philips Royal Commission Report,[34] that the expertise of the police in investigating would simply be supplemented by the legal expertise of Crown prosecutors failed to acknowledge that the scope and manner of investigation largely determine and shape the ensuing legal process. Moreover, that Report was written against a very different procedural landscape. Notable changes have since combined to require more carefully prepared and faster prosecutions than before, for example: the Criminal Procedure and Investigations Act 1996, imposing on the prosecution rigorous and elaborate obligations of advance disclosure; the Crime and Disorder Act 1998, establishing simpler and faster procedures towards trial; the Human Rights Act 1998, introducing its potentially more testing Article 6 notion of a right to a fair hearing, including the right to prompt notification of the accusation; and Government initiatives to reduce delay.

43 As I have said, the police and the Crown Prosecution Service have different tests for charging. The Police and Criminal Evidence Act 1984 and its Code of Practice C[35] require an investigating officer, 'without delay' to bring a detained suspect before the custody officer for charging at the point where he considers that there is sufficient evidence for a successful prosecution and that the suspect has said all that he wishes to say about the offence. This test is different in one respect, and arguably different in another, from those governing the Service under the Code for Crown Prosecutors.[36] The Service may only continue a prosecution if it passes both an evidential test, expressed in the Code as whether "there is enough evidence to provide a realistic prospect of conviction", and also a public interest test. As to the respective evidential tests, the police tend to apply a lower threshold of probability in considering whether there is sufficient evidence to charge than will satisfy the Service at the review stage of "a realistic prospect of conviction". This is commonly the case when determining specific charges in a range of options where certain evidence, for example, medical or other expert evidence, has yet to be obtained. And, as to the public interest test, not only is it not an express requirement for a police officer considering whether to charge, it is

[33] Crime and Disorder Act 1998, ss 51 and 52
[34] para 7.17
[35] para 16.1
[36] *Code for Crown Prosecutors,* fourth edition, issued in September 2000 by the Director of Public Prosecutions pursuant to the Prosecution of Offences Act 1985, s 10

hardly appropriate for him to shoulder that responsibility, especially in circumstances where the suspect is detained and he has to decide quickly.

44 In my view, consideration should be given to a move towards earlier and more influential involvement of the Crown Prosecution Service in the process to the point where, in all but minor, routine cases, or where there is a need for a holding charge, it should determine the charge and initiate the prosecution. The precise offences that could be left to the police without advance intervention by the Service could be provided by national guidelines contained within the Criminal Procedure Code that I have proposed. There would be nothing revolutionary or constitutionally difficult about such a shift. It would approximate to the arrangements of many other national and local prosecuting authorities in this country responsible for both investigation and prosecution of offences within their jurisdiction, including the Serious Fraud Office and various Government Departments, including the Departments of Trade and Industry, Health and the Revenue Departments. To my mind, since the Service has been given ultimate responsibility for the shape of the prosecution in its function of review of the charges and evidence supporting them after the start of proceedings, it would be logical and, certainly, more efficient to give it that control from the start. I note that the authors of the Review of the Criminal Justice System in Northern Ireland are of a similar view.[37]

45 Such a change, including correlation of the higher evidential and public interest tests at the stage of charge by the Crown Prosecution Service or, in minor, routine cases, by the police, would possibly require greater use of police bail to complete the investigation before charge. But this should be offset by: earlier involvement of the Service with the police in the investigation of the more serious cases; in consequence, a better understanding by the police of the evidential test governing decisions to prosecute; earlier pleas of guilty to properly investigated and charged prosecutions; a general increase in the speed with which cases proceed to trial; and greater confidence of victims, witnesses and the general public in the process as a result of fewer cases being discontinued after charge or continuing on reduced charges.

I recommend that:

- **the Crown Prosecution Service should determine the charge in all but minor, routine offences or where, because of the circumstances, there is a need for a holding charge before seeking the advice of the Service;**

[37] *Review of the Criminal Justice System in Northern Ireland,* (The Stationery Office, March 2000), paras 4.138-141

- **in minor, routine cases in which the police charge without first having sought the advice of the Service, they should apply the same evidential test as that governing the Service in the Code for Crown Prosecutors;**
- **where the police have preferred a holding charge, and in other than minor, routine offences, a prosecutor should review and, if necessary, reformulate the charge at the earliest possible opportunity; and**
- **'minor' or 'routine' offences for this purpose should be identified in the Criminal Procedure Code that I have recommended or in other primary or subsidiary legislation.**

Private prosecutions

46 The English criminal law is, historically, founded on the basis that every citizen has the right to invoke it by private prosecution. The entitlement has survived the development in the 19th century of organised police forces, not least, as one contributor to the Review has observed, because of the absence until the introduction in 1986 of a national prosecuting authority in the form of the Crown Prosecution Service.[38] Even now there is no single prosecuting authority for all matters. The Crown Prosecution Service, though by far the most comprehensive prosecutor on a national scale, coexists with a large number of other specialist national prosecutors, including the Serious Fraud Office, Customs and Excise and the Department of Trade and Industry, public agencies, such as the Driver Vehicle Licensing Authority, the Health and Safety Executive, and local authorities responsible for enforcing a wide range of environmental and consumer legislation and by-law control. Along with this mix of public prosecutors, the private prosecutor survives – just. The Philips Royal Commission in 1981 noted that, although the citizen had an almost unlimited right to issue proceedings, there were such severe restrictions on it in practice that it was very rarely used. This is still the case. The Prosecution of Offences Act 1985, which established the Crown Prosecution Service under the leadership of the Director of Public Prosecution, expressly preserved the right of private prosecution in cases not instituted by the police and certain other agencies, but it also empowered him to take over any private prosecution. Having done so, he may discontinue it where (though only where) he considers there is no evidential or legal case to answer.[39] And, as mentioned at para 51 below, there are a number of offences in respect of which the Attorney General's or Director's consent to prosecution are, in any event, required. In addition, there are formidable

[38] SJ Wooler, Chief Inspector, CPS Inspectorate
[39] Prosecution of Offences Act 1985, s 6(2) and *R v DPP, ex p Duckenfield* [2000] 1 WLR 55

practical constraints on its exercise, including legal uncertainty as to the power to charge as distinct from laying an information for a summons or warrant for arrest, the need for some familiarity with legal process, the motivation to use it and the necessary financial resources.

47 A strong case has been advanced for abolition, or at least review, of the little that remains of an effective right of private prosecution.[40] The argument is that what might once have been a valuable safeguard against improper failure to prosecute has now been overtaken by other safeguards, and that even that limited use has a potential for expensive disruption of the system that is no longer justifiable. It is only in a very small number of cases that prosecutors wrongly decide against prosecution, leaving private individuals, successfully or not, to take up the baton.[41] And there have been some recent high profile cases where the Director, having taken the advice of experienced counsel, has decided not to prosecute, and ensuing private prosecutions have failed, sometimes after long trials mainly at the public's expense.

48 On the other hand, many feel that the right of private prosecution, though now largely a relic of our slow and incomplete move towards a single national prosecuting authority, may on occasion still operate as a necessary and effective safeguard against failure by public prosecutors properly and vigorously to enforce the criminal law. Like Burke's justification of the Royal Prerogative, its strength may lie in its availability when needed rather than in the extent of its use. For that reason, coupled with the relatively infrequent recourse to it, I am disinclined to recommend its abolition.

49 As a practical matter, there is clearly a need for an effective system for alerting the Director of Public Prosecutions to the initiation of private prosecutions, so that he may consider his power to intervene. There is no obligation on a private prosecutor to notify the Director before or within a specified time after he has begun a private prosecution, and no formal machinery by which the court concerned notifies him. In practice, the Director usually learns informally, if not through court staff, through the presence of Crown prosecutors in court at the time, or because the defendant asks him to take over the case and drop it. In my view, there should be a clear safeguard against private prosecution without merit, in the form of a duty on the court to inform the Director promptly of any private prosecution initiated before it.

50 The Philips Royal Commission's suggestion was that the would-be private prosecutor should first apply to the Crown prosecutor who, if satisfied, in accordance with his normal prosecuting criteria, that the matter should

[40] by, among others, the Chief Inspector of the CPS

[41] The Inspectorate Annual Report (1999-2000), noted that in 98.2% of cases checked, the CPS were correct in their assessment of evidence, and in 99.7% they were correct in their assessment of the public interest

proceed, should undertake the prosecution. The Commission recommended that if the Crown prosecutor declined to prosecute, the complainant should be entitled to apply to magistrates for leave to do so himself. At that hearing the prosecutor would be required to explain his decision. Since the Director does not apply a public interest test for allowing private prosecutions to continue, the effect of this proposal would have been to preserve, although in reduced form the limited right of private prosecution. But it would also have introduced a cumbrous form of pre-charge check and, in my view, an inappropriate forum for it. As the Law Commission recommended,[42] when considering this as an aspect of the regime of consents to prosecution, it would make a more efficient safeguard against abuse to require the court to notify the Director on receipt of the application for a summons. In my view, the only filter on private prosecutions should be the power of the Director to take over the conduct of proceedings and discontinue them. But I do not see why, in considering whether to discontinue, he should not apply his normal public interest test as well as the evidential test.

I recommend that:

- **the right of private prosecution should continue, subject to the power of the Director of Public Prosecutions, on learning of a private prosecution, to take it over and discontinue it;**
- **any court before which a private prosecution is initiated should be under a duty forthwith to notify the Director of it in writing; and**
- **the Director, in deciding whether to discontinue a private prosecution that he has taken over, should apply the public interest test as well as the evidential test set out in the Code for Crown Prosecutors.**

Consent to the charge

51 About 150 statutes creating criminal offences require the Attorney General's or Director of Public Prosecution's consent before proceedings are instituted. Most of these preceded the creation of an independent prosecuting agency in the form of the Crown Prosecution Service. In all cases where the Director's consent is required, it may be exercised by any Crown prosecutor,[43] which, given their general power to review and to discontinue prosecutions, effectively renders the requirement otiose. The Attorney General has not delegated his powers of consent, save to the Solicitor General.[44] Thus, the

[42] *Consents to Prosecution* Law Comm No 255, para 7.4-7.8
[43] Prosecution of Offences Act 1985, s 1(7)
[44] Law Officers Act 1997, s 1(1)

involvement in most public prosecutions of consequence of the Director, through the Crown Prosecution Service, or of the Director of the Serious Fraud Office, removes the need for most consent provisions where the decision is whether to continue, or, if my recommendation above is accepted, to initiate a prosecution.

52 The Law Commission has recently examined and reported on the continued justification for this check on public prosecutions.[45] The Government has not yet taken action on its recommendations. The Commission found that consent to prosecution is required in a wide variety of cases[46] and that it was difficult to discern a principled or otherwise rational basis for the inclusion of many of them. However, some are clearly offences in respect of which the decision to charge could involve particularly sensitive issues of public interest or of national security, for example, alleged breaches of security or public order, or offences of terrorism or corruption of a public official or public morals, such as publication of obscene material. The Commission recommended that the requirement of consent of the Attorney General or the Director of Public Prosecutions should be removed in all cases except for specified categories in which the requirement clearly protected the public interest. I support that recommendation.

I recommend the adoption of the Law Commission's recommendation to remove the requirement for the Attorney General's or Director of Public Prosecution's consent to prosecution, save in those categories of case where its retention clearly protects the public interest.

Mechanics of charging

53 There are two main ways of starting a prosecution. The first is by laying an information seeking the issue of a summons to an accused requiring him to attend a magistrates' court to answer the information, the second, by charge, normally at a police station. The summons procedure accounted for 54% of all prosecutions in 1999.[47] It is used by the police and other bodies when they have no power of arrest, or where that power was not exercised, and by individuals seeking to initiate a private prosecution. The application, which may be oral or in writing, is made ex parte before a magistrate - who may grant it if he considers it a proper case for process. The summons may then be given to the applicant to serve on the accused, or the court may do so on his behalf. Although, the decision whether to issue a summons is judicial,

[45] *Consents to Prosecution,* Law Comm No 255
[46] including a number of those prosecuted by various Government Departments
[47] Table 8.2, Criminal Statistics in England and Wales 1999, Home Office, Cmnd 5001

there is not normally a preliminary hearing. And, because of the large numbers of prosecutions begun in this way, magistrates' consideration of each information or batch of them is necessarily perfunctory. The majority of informations are in writing, often many dozens or even hundreds of them at a time before individual courts. Almost all road traffic prosecutions are begun in this way.

54 Turning to the second method of initiating a prosecution, police officers and other prosecuting authorities with power to initiate prosecutions may charge a suspect where they have reasonable grounds to believe that there is sufficient evidence for a successful prosecution against him. They may do so whether or not he is in custody. Most charges are made by police officers of suspects in their custody. In which event, the station custody officer is responsible for determining whether there is sufficient evidence to charge the suspect for the offence for which he was arrested and, if so, to charge him, remand him in custody or release him on bail and set a date for his first attendance at court. An accused in custody must normally be brought before a court within 24 hours.[48] And, under the Narey procedures,[49] an accused on bail is now likely to attend court within days, possibly hours, after being charged. Private prosecutors, for example those who have effected a 'citizen's arrest' and taken the suspect to the police, were thought to have a power to charge, but the law is not clear on the point, especially having regard to the station custody officer regime introduced by section 37 of the Police and Criminal Evidence Act 1984.[50]

55 In comparing the two methods of initiating a prosecution, two matters stand out. The first is the anomaly that, in the most serious cases, the police may do so by charging a suspect without the intervention of the court, yet not in the far greater volumes of lesser offences, where the process is by summons. The second is that the court's role in the summons procedure is now, perforce, exercised in so notional a manner as to make it unnecessary. And, as to the setting of the first date for attendance at court, there is no reason why the police should not have similar powers in a summoning process to those that they already have for the more serious cases in which they charge the suspect.[51] In my view, the time has come to introduce a common form for the commencement of public prosecutions and to remove from the mass of less serious ones the unnecessary, cumbersome and delaying involvement of the court. The involvement of the station custody officer in the more serious cases is primarily to protect the suspect who is in custody. The courts are well equipped in all cases to determine at an early stage after the

[48] Police and Criminal Evidence Act 1984, s 46, which requires suspects to be brought to court no later than the first sitting after charge

[49] Police and Criminal Evidence Act 1984, s 47(3A), as amended by the Crime and Disorder Act 1998, s 46

[50] see *R v Ealing Justices, ex p Dixon* [1990] 2 QB 91; not followed *in R v Stafford Justices, ex p Customs and Excise Commissioners* [1991] 2 QB 339 *and R v Croydon Justices, ex p, Holmberg* (1993) 157 JP 277

[51] Police and Criminal Evidence Act 1984, ss 46 and 47A as amended by the Crime and Disorder Act 1998

commencement of the case the legal propriety of the charge. In addition, with the earlier involvement of the Crown Prosecution Service that is taking place and that I recommend,[52] there should be less, not more, scope for misguided or baseless prosecutions.

56 The need for change of this sort was identified as long ago as 1981 by the Philips Royal Commission, which recommended[53] the replacement of the alternative methods of initiating a prosecution, which it described as "the relics of the mid-nineteenth century system". It observed that the then procedure for charging had no statutory basis[54] and that, in practice, there was little effective magisterial scrutiny in the summons procedure. It recommended that there should be a single procedure for starting public prosecutions, one in which responsibility passed from the police to the prosecutor, that it should be called an 'accusation' and that it should not be subject to any magisterial scrutiny. This is my own view save for the suggested use of the word 'accusation' which, I believe, could be confusing. The word 'charge' conveys more accurately the notion of formal commencement of proceedings and is widely understood in that sense.

57 The common form of procedure for public prosecutions that I have in mind is a charge administered orally, coupled with manual service of a written copy, or by postal service of a written charge, coupled with a statutory requirement to attend court on a specified date on pain of arrest on warrant for failure to do so, as presently required with some summonses.[55] In either case the court should be provided with a written copy of the charge at the same time. The same system could apply to private prosecutions, save that it would be wise to retain the court as a filter for frivolous or vexatious attempts at prosecution by requiring the private prosecutor first to obtain permission from the court to make a charge. Even then it should be administered in written form only by manual or postal service. Existing provisions for listing, whether on prosecution by summons or in charging, should be standardised and extended to other smaller prosecution authorities who initiate their own proceedings. With the development of an integrated system of information technology for the whole of the criminal justice system, the booking of a court time on an 'on-line' court diary should become a simple matter for all prosecuting bodies.

58 I should comment briefly on the procedure of commencing a prosecution by way of a voluntary bill of indictment.[56] Under this procedure the prosecutor may seek the consent of a High Court Judge to prefer an indictment at the

[52] see para 44 above
[53] paras 8.3-4 and 10.10
[54] see now Police and Criminal Evidence Act 1984, Code C, para 16.1-16.8
[55] for a fuller discussion of this subject, see paras 61-63 below
[56] see Indictments (Procedure) Rules 1971, r 6

Crown Court without the defendant having been committed, transferred or sent there on the charge the subject of the Bill, or where magistrates have declined to commit him for trial. The procedure had its origin in a Victorian statute,[57] and until the statutory innovations, starting in 1987, of 'transferring' and 'sending' cases to the Crown Court, was the only way[58] of by-passing committal proceedings, or overcoming refusal of magistrates to commit. Its main, albeit exceptional, use was where committal proceedings had been frustrated by the defence or, where there had been a valid committal, to secure the trial of connected matters based on evidence not available at the committal, or to join a defendant who had been separately committed for trial. There seems little point now in retaining a procedure the main rationale of which was to provide an exceptional alternative to committal proceedings, themselves being overtaken by direct access to the Crown Court, and subject to control by the Crown Prosecution Service as to the evidential and public interest merits of prosecution. In my view, the voluntary bill procedure should be abolished and such safeguards as to its use as were provided by a High Court Judge should be built into the common form for public prosecution, final abolition of committal proceedings as a route to trial on indictment and a system of allocation of cases for trial that I recommend.

59 When a case reaches the Crown Court, the original charge or summons is withdrawn and replaced by an indictment.An indictment is no more than a written accusation of the crime after its signature, usually, by a member of court staff. No matter how a case is commenced, the Crown Court cannot try it unless this has occurred. Yet, an indictment normally does little more than re-state in different form the contents of a charge or summons. Although indictments, charges and summonses are governed by similar considerations as to particularity of accusation, duplicity, accuracy and so on, the formalities of drafting and preferring an indictment are peculiar to the Crown Court, in the main contained in the Indictments Act 1915 and the Indictment Rules issued under it.

60 The thousands of indictments that are prepared, lodged and signed each year amount to a significant administrative burden for the prosecution and courts to administer. The strongest argument in favour of the present system, that it acts as a check on the legal basis of the prosecution case, does not withstand examination, since neither by law or practice does the signatory normally consider the contents of the indictment. That is left for the judge at the plea and directions, or other pre-trial hearing. Indictments merely highlight the gap between the Crown Court and magistrates' courts, and further mystify the court process to 'outsiders'. It would be far simpler and more logical to maintain the same form of charge throughout the case and subject it to the same procedural and drafting requirements in all Divisions of the Court. To

[57] Vexatious Indictments Act 1859

[58] save for two other rarely used procedures; see *R v Raymond* [1981] 1 QB 910, CA, per Watkins LJ, giving the judgment of the Court at 914F-915C

signify the final settlement of the prosecution case, the prosecution should be required to serve on the court and all parties at the latest by the pre-trial assessment date[59] a final trial copy of the charges on which it will rely. Thereafter, further amendments or alterations should be permissible only with the leave of the trial court.

Warrants

61 The technical requirements for the issue of warrants is complex and detailed, and I do not propose to set them out here, except as necessary to illustrate the problems they present in respect of defendants who fail to appear in response to a summons. At present, failure to attend court on a summons does not automatically result in the issue of a warrant of arrest; the court must first be satisfied that the summons has been served. Assuming that the summons was for a summary-only offence, and was not issued on the basis of information sworn on oath (which the majority will not have been), a police officer, or other suitable person must go to court to swear on oath that the information contained in the summons is true to the best of their knowledge. The court may then issue a warrant for failure to attend.[60] If the matter is indictable, a warrant may be issued without the information being sworn.[61]

62 I believe that these procedures are unnecessarily complex. There seems little logic in requiring a sworn information in summary-only cases, but not in indictable cases. It is supposed to act as a safeguard, since summonses that are posted may not have come to the notice of the person to whom they are addressed. But if a defendant has not received a postal summons, the procedure of swearing an information on oath does not overcome the problem. It might be intended to be a safeguard against abuse, yet it also fails on that count too, since there is no pretence of testing the witness. Indeed, the Act does not even require that a person with first hand knowledge of the offence swears the information. In many instances it is a wholly unrelated officer who will swear a number of informations at a time, or one who just happens to be available.

63 The procedure is, therefore, expensive and ineffective. I recommend that failure to attend court after a posted charge should enable the court, in its discretion, to issue a warrant for the defendant's arrest. The court could refuse to issue a warrant if there appears to be a defect on the papers, or other material irregularity. The procedure could take place in open court in order to

[59] see paras 221-228 below
[60] see Magistrates' Courts Act 1980, s 13
[61] ibid, s 1

ensure open justice, but without the attendance of police officers, merely on their paper application.

I recommend that:

- **all public prosecutions should take the form of a charge, issued without reference to the courts, which should remain the basis of the accusation against the defendant throughout all stages of the case, irrespective of the level of court in which it is tried;**
- **the charge may be oral or in writing, a written copy or original, as the case may be, being served manually or by postal service;**
- **in either case, under arrangements with the court's administration, the charge should specify the date of first attendance at court on pain of arrest on warrant;**
- **the present procedure for application for a warrant, by swearing an oath as to service of process, in summary offences should be abolished and replaced by paper application considered and determined in open court;**
- **the same regime for commencing proceedings should apply to private prosecutions, save that: 1) the charge should only be administered in writing; 2) it should be subject to the prior permission of the court; 3) the permission should be endorsed on the charge sheet by an officer of the court; and 4) the court, before listing the matter should notify the Director of Public Prosecutions;**
- **the voluntary bill of indictment should be abolished and, to the extent necessary under new procedures of allocation of work in a unified Criminal Court, safeguards should be introduced to secure the interests of justice by Criminal Procedure Rules;**
- **the form of charge should be common to summary and indictable offences; and**
- **the prosecution should be entitled to amend the charge up to the pre-trial assessment date (or in a summary trial without such an assessment, up to a date to be specified), but thereafter only with the permission of the trial court.**

‘Dropping’ the prosecution

64 The Crown Prosecution Service and other prosecuting authorities may and should stop a prosecution at any stage if there is insufficient evidence to proceed or the public interest no longer favours a prosecution.[62] There are three main ways of doing so, dependent on the court dealing with the matter and/or the stage of proceedings. The choice is important since on it depends whether the prosecution may later be reinstated. The first is discontinuance on notice. This may be done in a magistrates’ court before hearing evidence for the prosecution in summary proceedings, and before committal or ‘transfer’ for trial in the case of an indictable offence. If the case is ‘sent’ rather than committed or ‘transferred’ for trial, the prosecution may discontinue at any time before the indictment is preferred. Subject to the accused’s right to insist on continuance to enable him to secure an acquittal and thus bar any further prosecution, the prosecution may later reinstate the prosecution, say, if further evidence becomes available.[63] The second is withdrawal at the hearing in the magistrates’ court, again permitting later reinstatement, but without the safeguard to the defendant of enabling him to insist on continuance to enable him to secure an acquittal. The third, the only way in which the prosecution can drop the case in the Crown Court after the indictment is preferred, is the common law device of offering no evidence, resulting in an acquittal and thus, no possibility of further proceedings for the same offence.[64]

65 The Runciman Royal Commission commented on the unnecessary complexity of these different forms and recommended[65] that the prosecution should be given the same power to discontinue cases in the Crown Court as before magistrates. However, the Government declined to follow this, and instead there is a new administrative procedure, available after arraignment and before the defendant is put in charge of a jury, enabling the offering of no evidence and entry of a verdict of not guilty by prior written consent and in the absence of the parties. I agree with the Runciman recommendation. It is clearly sensible to have a single and common form for stopping a case at the prosecution’s behest, no matter what level of court or stage of the proceedings the case has reached.

66 Such a simplification is important now that indictable-only cases are reaching the Crown Court more quickly. It will be essential if my recommendations are adopted for abolishing committal proceedings in ‘either-way’ cases, for a unified Criminal Court and for a common form of charging and allocation of

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[62] see *Raymond v Attorney General* [1982] QB 398, CA; and see the Code for Crown Prosecutors, which also governs the Serious Fraud Office and is voluntarily applied, with some modifications by other prosecution authorities

[63] Prosecution of Offences Act 1985, ss 23(9), and s 23A(5)

[64] subject to the procedure of leaving a matter ‘to lie on the file’, (see para 67 below)

[65] *Report Of The Royal Commission On Criminal Justice*, Cmnd 2263, (1993, HMSO),Ch 5, para 37 and recommendation 97

work to the appropriate level of court within it.[66] It is for consideration whether the common form should be of the discontinuance or offering no evidence variety. In either case the defendant can secure a verdict of not guilty, though in the case of discontinuance it is only by dint of insisting on the prosecution continuing, and taking the risk of conviction. In the case of offering no evidence, the decision is almost always ultimately for the prosecution, but can engage the time of the judge if asked, as he frequently is, to approve the prosecutor's decision.

67 In my view, the answer would be to combine the convenience of one procedure with the discipline of the other by enabling the prosecutor to discontinue the proceedings at any stage, up to and including the pre-trial assessment[67] without requiring the consent of the defendant or the approval of the court. This would enable a reinstatement in appropriate cases. The advantage of this procedure would be reduction of paperwork, and avoidance of the need for a hearing in the early stages of a case. But once the pre-trial assessment date has passed, the prosecution would be expected to have properly prepared its case, so that normally there should be no occasion for it to change its mind. If it then decides to drop the case, it should be entered as an acquittal. There would be no court hearing in either case unless required for consequential matters such as costs or return of property. As a safeguard, the prosecution should be able, even after the pre-trial assessment date, to apply to the court to leave the matter to 'lie on the file', but only where it could demonstrate good reason for the late decision, and the judge is satisfied that it is in the public interest. In those cases that would not have a pre-trial assessment date (generally the less serious cases), the defence should be entitled to apply for a formal acquittal upon receipt of the discontinuance notice after a stage specified in Criminal Procedure Rules.

68 Objections that a purely paper or administrative procedure would deprive interested parties, in particular, victims, of learning about the matter in a public hearing could be met by requiring the prosecutor to notify and explain the decision to them in advance of the notice of discontinuance. The Crown Prosecution Service already does this; and I return to that aspect later in the Chapter.[68] I see no danger or injustice to the parties or to any victim in removing from the procedure what remains of the courts' power to influence the outcome. The decision is now in the hands of the Crown Prosecution Service who should have the same competence and a proper regard for the public interest in deciding whether to stop as well as to continue a prosecution.

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[66] see Ch 7 paras 36 – 40, and paras 200-202 below
[67] see paras 221-228 below
[68] see paras 239-255 below

I recommend that:

- **the law should be amended to provide a form of procedure common to all courts to enable a prosecutor, without the consent of the defendant or the approval of the court, to discontinue proceedings at any stage before close of the prosecution case on trial;**
- **in the event of the prosecution discontinuing at any time before pre-trial assessment or, where there is no pre-trial assessment, before a stage to be specified, the prosecution should be entitled to reinstate the prosecution, subject to the court's power to stay it as an abuse of process;**
- **in the event of the prosecution discontinuing after that stage, the defendant should be entitled to an acquittal, save where the court for good reason permits the prosecution to 'lie on the file'; and**
- **there should be common provision for all courts, subject to their approval and the agreement of the parties, to give formal effect to such discontinuance and, where appropriate, acquittal in the absence of the parties.**

BAIL

69 A defendant's qualified right to bail must now be considered in the light of Strasbourg jurisprudence on the European Convention of Human Rights. The relevant provisions of the Convention are Article 5(1) and (3) and (4), providing for the right to liberty and security of the person, including entitlement to bail and to court proceedings to enforce it, and also Article 6(2), providing that a person charged with a criminal offence must be presumed innocent until proved guilty. Wherever possible, the courts must also read and give effect to legislation in a way that is compatible with Convention rights. The Law Commission, in a consultation paper in 1999,[69] identified three statutory provisions which, in its provisional view, should be repealed or amended because of a serious risk of non-compliance and consequent risk of claims to compensation. However, in its recent Report *Bail and the Human Rights Act 1998*,[70] it expressed the view that our law of

[69] Consultation Paper, Law Comm, No 157, 19th December 1999
[70] Law Comm Report No 269, 21st June 2001

bail is generally compliant with the Convention. More precisely, it concluded:

> "1.9. … there are no provisions which, upon analysis, cannot be interpreted and applied compatibly, or which, given appropriate training, decision-makers would be likely to apply in a way which would violate Convention rights.
>
> 1.10. This does not mean that we have given the law of bail in England and Wales an unequivocal 'clean bill of health' in the sense of being incapable of improvement following a general review…".[71]

The present system

70 After the police have arrested a suspect they may release him on bail or keep him in custody. In the latter event, they must charge him within 24 hours and bring him before a court as soon as possible, normally within 24 hours.[72] If they have not charged him, but wish to hold him while they make further enquiries, and they are investigating a serious arrestable offence, they may extend the period of custody to a maximum of 96 hours with regular scrutiny and warrants of detention from the magistrates' court. [73]

71 At an accused's first appearance before a court, both parties may make representations on the issue of bail and the court must decide whether to remand him on bail or in custody. Initial decisions may be made on inadequate or incorrect information, and defendants wrongly refused bail should have ready access to advice and help on the matter on their remand to prison. The Prison Service has a duty to assist in providing this access and, since September 1999, all remand prisons have been required and funded to provide bail information schemes.[74] Each establishment should have a bail information officer to interview prisoners, assess their cases and assemble information for the courts. Similarly, the Prison Service is obliged to ensure prisoners access to legal advice if they want it,[75] and each establishment should have an officer, known as a Legal Service Officer, for the purpose. The Prison Inspectorate's recent thematic report on the treatment and conditions of remand prisoners recorded wide variation in performance by establishments throughout the country, but over-all performance was pretty poor.[76] The Inspectorate acknowledged that the Prison Service was in a state

[71] ibid, paras 1.9-1.10
[72] Police and Criminal Evidence Act 1984, s 41
[73] there are strict criteria for determining whether detention should be authorised; ibid s 42 and 43
[74] Prison Service Orders 6100 and 6101
[75] Prison Service Order 2605
[76] *Unjust Deserts*, paras 4.09-4.17

of transition in the provision of these services and that it was too early to evaluate performance. But it urged effective monitoring by each establishment of their ready availability, and consideration of national monitoring as a key performance target for the Service as a whole.[77] This is clearly another area in which there should be national standards and, probably, protocols to which other agencies, including the Probation Service, the Legal Services Commission, the Bar Council and the Law Society should contribute and be parties.

72 In all cases the magistrates' court is the first court to consider bail. The starting point set out in the Bail Act 1976 is that all defendants charged with an imprisonable offence have a right to bail, save those charged with homicide or rape, previously convicted of such an offence.[78] It is only where the court is satisfied that the defendant falls into one or more of a number of limited exceptions that it "need not" grant bail. I stress the words 'need not', because they preserve the court's discretion or, more accurately, its ability and duty to decide the matter in accordance with the individual circumstances of each case. And, even in cases of homicide and rape, the courts retain an element of discretion since they may still allow bail "if there are exceptional circumstances".[79] The exceptions to the right to bail include where:

- there are substantial grounds for believing that a defendant, if released on bail with or without conditions, would fail to surrender to custody when required, or commit an offence while on bail, or interfere with witnesses or otherwise obstruct the course of justice;
- in a case triable on indictment, the defendant was on bail at the date of the alleged offence;[80]
- he should be kept in custody for his own protection or, if he is a child or a young person, for his own welfare;
- it has not been practicable to obtain sufficient information for the purpose of taking the decision because of the shortness of time since the institution of the proceedings; and
- if, having been granted bail in the present proceedings, the defendant has been arrested for absconding or breaching a bail condition.

73 In deciding these questions, the court is required to have regard to: the nature and seriousness of the alleged offence and the probable sentence for it if the defendant is convicted; his character, associations and community ties; his

[77] ibid, paras 4.18 and 4.19

[78] s 4; and Criminal Justice and Public Order Act 1994, s25

[79] introduced by amendment by the Crime and Disorder Act 1998, s 56 following the decision of the European Court in *Caballero v UK* [2000] Crim LR 587

[80] The Law Commission have recommended amendment of the Act so as to relegate this to one of the factors which the court may take into account when considering whether a defendant comes within any of the main statutory exceptions; Report, para 4.11

previous bail record, if any; and, except where the case is adjourned for inquiries or a report, the strength of the prosecution case.[81]

74 Where the court is minded to grant bail, it may do so subject to requiring the defendant to provide a surety or sureties or to give a security for his surrender and/or to imposing such conditions as appear to be necessary to meet the various contingencies against which it might otherwise refuse bail. [82]

Criteria

75 Deciding whether to grant or refuse bail is a difficult exercise, based as it is on predictions about future behaviour. Grant of bail may enable a defendant rightly to retain his liberty and his job or wrongly to commit an offence whilst on bail. A refusal may unnecessarily deprive him of his liberty or rightly prevent him from committing offences that he would have committed if on bail. The main criteria in the 1976 Act that I have mentioned are designed to balance the right of an innocent person, or one who should not in any event merit a custodial sentence, from being wrongfully deprived of his liberty and the need to protect the public from a person awaiting trial with a propensity to commit offences during that time. As I have said, the Law Commission is of the view that the criteria and the statutory scheme of which they form part are capable of being applied in a manner compliant with the Convention. Quite apart from the Convention, the general tenor of submissions in the Review has been that they are about as good a formulation as can be devised to strike a fair balance between the two interests.

Quality and inconsistency of bail decisions

76 The problem is rather the way in which many courts interpret and apply the criteria. The consequence of 'wrong' grants of bail can be serious and far-reaching. The most recent Home Office research suggests that persons responsible for a large proportion of offences are not being identified and restrained early enough in the criminal justice process, particularly at the stage of consideration of bail.[83] The research indicated that in 1998 24% of a sample of 1,283 alleged offenders granted bail were subsequently convicted or cautioned for an offence committed whilst on bail. For cases within that sample of vehicle crime and shop lifting, the percentage rose to over 40%.

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[81] Bail Act 1976, Sched 1 Part I, para 9

[82] ibid s 4 and Schedule 1, Part I, paras 2, 2A, 3 and 5 and 6; the Law Commission have recommended that the Act should be amended to make clear that the court must be satisfied that there are substantial grounds for believing that the defendant, if released on bail, would commit further offences, fail to surrender to bail, interfere with witnesses or otherwise obstruct the course of justice. See Report para 7.35

[83] *Offending on Bail and Police Use of Conditional Bail,* Home Office Research Findings, No 72

Unsurprisingly, the longer the period of bail, the more likelihood there was of offending in the course of it. Thus, nearly 30% of those on bail for over six months offended in the course of it, compared to nearly 15% of those brought to trial within two months.

77 The Home Office figures also indicated that 30% of young offenders breached their conditions of bail and that their rate of offending was over double that of adults. In many instances, continuation of bail notwithstanding, breaches of the original bail resulted in further breaches. As the Association of Chief Police Officers have pointed out,[84] the courts are handicapped in the case of persistent young offenders. By section 23 of the Children and Young Persons Act 1969, they cannot require them to be remanded in secure accommodation unless they are of the opinion that "only such a requirement would be adequate to protect the public from serious harm" from them. There is evidence, from the police and others, that many courts seemingly do not regard driving stolen vehicles at speed, house burglary (unless accompanied by violence) or street robbery as representing 'serious harm' for this purpose. Perhaps the answer would be to amend section 23 to allow custody for persistent young offenders in cases where previous grants of custody have failed.

78 There is much criticism of the quality and of the lack of consistency of bail decisions.[85] The criticism falls more heavily on magistrates' courts than the Crown Court, because magistrates deal with most bail applications, often in the course of a crowded list and with insufficient information. A recent study of two London Magistrates' Courts showed an average length for bail proceedings of six minutes.[86] As to information, despite the introduction in 1988 of bail information schemes, it is often incomplete and for that and other reasons inaccurate. A research study for the Home Office in 1998[87] commented on the lack of ready availability to the police, prosecutors and magistrates of the defendant's criminal record and other relevant information, the need for training of magistrates and police custody officers in risk assessment, more and better bail information and support schemes, simplification of bail notices to defendants so that they know exactly what is required of them and changes in listing to enable more communication between the responsible agencies before the first remand hearing.

79 Another problem is that lay magistrates, who often sit in differently constituted panels, are, understandably, less consistent than their professional

[84] in their submission in the Review

[85] see generally: Morgan and Henderson, *Remand Decisions and Offending on Bail: Evaluation of the Bail Process Project* 1998, Home Office Research Study No 184; Dhami and Ayton, *Bailing and Jailing the Fast and Frugal Way*, (2001) Journal of Behavioural Decision Making

[86] Dhami and Ayton, ibid

[87] Morgan and Henderson, op cit

colleagues, the District Judges who sit full time. The problem should not be overstated. The quest is for consistency in approach and general outcomes, not uniformity of individual decisions. In such a difficult predictive exercise, balancing the interests of the defendant against those of the public, where decisions have to be made quickly, and often with insufficient information, it is to be expected that seemingly similar cases sometimes result in different decisions.

80 However, the degree, or perceived degree, of inconsistency in magistrates' bail decisions is capable of undermining public confidence in the criminal justice system, and there should be no let up in attempts to reduce significant inconsistencies. With the advent of Convention rights to our law, it is even more important that magistrates and judges should persist in this endeavour. The Law Commission, has urged that they should be provided with appropriate training and guidance on the making of bail decisions, with Article 5 particularly in mind. It also proposed, as a practical aid to correctness and consistency that all courts should record their decisions in such a way as to indicate clearly how they had been reached. I strongly support those proposals.

81 There is also some evidence of a laxness on the part of the Crown Prosecution Service and the courts to breaches of conditions of bail, the outcome often being a relaxation of the conditions. ACPO has observed:

> "… Bail conditions rarely inhibit recidivists from committing further crime and police efforts to enforce bail are generally regarded with indifference by the courts. We should underline here that the complaint from police forces right across the country was unremitting, that when arrests were made for breach of bail, conditions were usually relaxed.
>
> … Advancing applications for remands in custody and dealing with defence applications for bail is not an issue which the Crown Prosecution Service generally take on with any zeal.… [I]t is an almost universal observation of operational police officers that the Crown Prosecution Service are generally 'lukewarm' to this procedure".[88]

82 Such figures and descriptions, the latter replicated in many individual submissions in the Review, suggest that, however appropriate the criteria for balancing defendants' and the public interest, the manner of their application, particularly in the case of young recidivists, often frustrates the central aim of the criminal justice system – crime control. This defect is all too public. It is of understandable concern to victims of such crimes and the public generally

[88] in its submission in the Review

who look to the courts to fulfil their role in that over-all objective. It is also dispiriting to police officers in their task of catching criminals and bringing them to justice.

I recommend that:

- **magistrates and judges in all courts should take more time to consider matters of bail;**
- **listing practices should reflect the necessity to devote due time to bail applications and allow the flexibility required for all parties to gather sufficient information for the court to make an appropriate decision;**
- **courts, the police, prosecutors and defence representatives should be provided with better information for the task than they are at present, in particular, complete and up-to-date information of the defendant's record held on the Police National Computer, relevant probation or other social service records, if any, verified information about home living conditions and employment, if any, and sufficient information about the alleged offence and its relationship, if any, to his record so as to indicate whether there is a pattern of offending;**
- **courts and all relevant agencies should be equipped with a common system of information technology, as recommended in Chapter 8, to facilitate the ready availability to all who need it of the above information;**
- **there should be appropriate training for magistrates and judges in the making of bail decisions, with Article 5 ECHR and risk assessment particularly in mind, as the Law Commission has proposed;**
- **all courts should be provided with an efficient bail information and support scheme;**
- **bail notices should be couched in plain English, printed and given to the defendant as a formal court order when the bail decision is made, so that he understands exactly what is required of him and appreciates the seriousness of the grant of bail and of any attached conditions; and**
- **all courts should be diligent in adopting the Law Commission's proposals that they should record their bail decisions in such a way as to indicate clearly how they have been reached.**

Appeals

83 Contributors to the Review have raised three main issues about appeals from bail decisions: first, the relationship between a defendant's right of appeal to the Crown Court against refusal and his right of recourse to a High Court Judge; second, as to the need for a right of appeal against conditions; and third, as to the extent of the prosecution's right of appeal against the grant of bail.

Appeal to the Crown Court and application to a High Court Judge

84 A defendant has a right of appeal to the Crown Court from a refusal to grant bail, but not against conditions magistrates have imposed on its grant.[89] There, the chain of appeal ends, though anomalously there is a statutory right in all cases to apply to a High Court Judge against magistrates' refusal of bail or the imposition of conditions in the grant of bail, empowering the judge, save in cases of homicide or rape, to grant bail or vary the conditions.[90] And a High Court Judge, sitting in chambers, also has an inherent and distinct power from that when sitting in the Crown Court, to grant bail before and after a case is committed or sent to the Crown Court.[91] This jurisdiction overlaps the original and appellate jurisdiction of the Crown Court. If nothing else, there are question marks about the right of defendants refused bail by a Crown Court judge in the exercise of his original or appellate jurisdiction, being able to renew the same application to a High Court Judge and, in the case of a conditional grant of leave by magistrates, to challenge the imposition of those conditions before a High Court Judge, but not by way of appeal to the Crown Court.

85 This is all a bit of a muddle and wasteful duplication of process. There may long have been a good reason for keeping the High Court Judge as a long-stop in support of the liberty of the subject. But there is less of an imperative for it now. We have a permanently manned Crown Court all over the country which can deal with the matter by way of appeal, and those detained in custody no longer have to await the next visit on circuit of the High Court Judge or apply to a judge in Chambers in London to seek release. It is a separate and parallel, not appellate, jurisdiction.

86 In my view, there is no longer any need for a High Court Judge to consider afresh the grant of bail after refusal by a magistrates' court or the Crown

[89] Supreme Court Act 1981, s 81(1)(g)
[90] Criminal Justice Act 1967, s 22(1)
[91] *R v Reading Crown Court, ex p Malik* [1981] QB 451 72 Cr App R 146, DC

Court. If the magistrates' court and a Crown Court judge, the latter on an original application or appeal by way of re-hearing, acting within the proper bounds of their discretion, have refused bail, it is an anomaly that another judge, albeit a High Court Judge, is entitled to exercise a further discretion in the matter. It seems to me more in accord with principle, and a better use of judicial resources, to confine any reopening of a bail decision in the Crown Court, to an appeal to a High Court Judge on a point of law. There should be an initial application in writing for leave to appeal. It should identify with precision the point of law involved, which should not include complaints about the exercise of discretion dressed up as points of law. If the High Court Judge, on examination of the application, considers that there is an arguable point of law, he should grant leave for an appeal by way of oral hearing.

87 The Law Commission have concluded that our bail procedures are in practice unlikely to breach Article 5(4) or such procedural requirements of Article 6 as are appropriate to bail applications.[92] I do not believe that the reform that I propose would breach those rights. What is required is 'judicial supervision'of a decision to remand in custody, which, the European Court has held, implies certain characteristics, namely that the defendant must be able to participate in the proceedings, that they must be adversarial in nature and possibly, if the defendant so requires, that they must be in public. It does not require, in addition, a right of appeal, or where, as here the Crown Court has dealt with the matter on appeal from magistrates, a further right of appeal.

I recommend the removal of the right of application to a High Court Judge for bail after determination by any criminal court exercising its original or appellate jurisdiction, and the substitution therefor of a right of appeal from the District Division or Crown Division (Crown Court) on a point of law only.

Conditions

88 Conditional bail is permitted by Article 5(3) of the Convention. And the lack of provision for a defendant to appeal to the Crown Court against conditions imposed on the grant of bail does not appear to infringe Article 5(4).[93] Quite independently of compliance with the Convention, it seems to me sensible, in general, to restrict a defendant's right of appeal against conditional grant of bail. Otherwise the appellate process could be corrupted by endless wrangling over conditions that in most cases should be manageable for the defendant. There are two possible exceptions in the case of conditional bail granted in the magistrates' courts. The first is where he cannot comply with a

[92] op cit, Part XI; and see *De Wilde, Ooms and Versyp v Belgium* (No 1) A12 1971 1 EHRR 373, overruling its earlier decision in *Neumeister v Austria* (No 1) A 8 (1968) 1 EHRR 91, para 24
[93] see para 87

condition of residence away from the area of the alleged offence or the home of a victim or witness and there is no suitable bail hostel placement. The second is a requirement to provide sureties or to give a security. In my view, there is a strong case in those instances for allowing an appeal from magistrates or a district judge to the Crown Division of a new unified Criminal Court (Crown Court).

I recommend that defendants should have a right of appeal against conditional grants of bail from the Magistrates' Division (magistrates' courts) to the Crown Division (Crown Court) in respect of conditions imposed as to their residence away from home and/or to the provision of a surety or sureties or the giving of security.

Prosecution appeals

89 There is also an issue about the prosecution right of appeal against the grant of bail. It has a limited right of appeal to the Crown Court against magistrates' grant of bail, but not against any attached conditions. The Bail (Amendment) Act 1993[94] confers a right of appeal only where the alleged offence is punishable with imprisonment for five years or more or is an offence of taking a vehicle without authority or of aggravated vehicle taking. And there are strict procedural safeguards to control the exercise of the right.[95] In addition, the Crown Prosecution Service's internal guidance for prosecutors urges them to do so "judiciously and responsibly" and only in cases of "grave concern". As is plain, the number of cases in which the prosecution may appeal are relatively small, and it has exercised the right in very few cases.

90 Given the difficulty for magistrates and judges deciding the matter at first instance of assessing the risk of (further) offending by those to whom they grant bail and to the potentially enormous damage to the public if they get it wrong, there is a strong case for removing the high threshold for prosecution appeals. Why, in any event, should it be limited to offences attracting custodial sentences of five years or more if the Service's criterion is 'grave concern'? And, if the test is to be one of 'grave concern', or something like it, it does not follow that the yardstick should be the seriousness of the offence, at whatever level that is pitched. Widespread or day-to-day commission of relatively less serious crimes justify similar provision. Some may amount to what are called in North America, 'quality of life' crimes and, regardless of their individual seriousness, can have a powerful impact on the local community's sense of security. In my view, the right should be extended to all cases that may attract custodial or part custodial sentences, subject to the same or similar procedural safeguards as those provided in the 1993 Act and

[94] s 1

[95] s 1(3) –(8) and Magistrates' Courts Rules 1981, r 93A

guidance to prosecutors that it is to be used with great care and only in exceptional cases.

I recommend that the prosecution should have a right of appeal to the Crown Division (Crown Court) against the grant of bail by the Magistrates' Division (magistrates' courts) in respect of all offences that would, on conviction, be punishable by a custodial, or partly custodial sentence.

ADVANCE INDICATION OF SENTENCE

91 I have called this section 'Advance indication of sentence' to underline its distinction from what is commonly called 'plea' or 'charge bargaining'. In this country, where the prosecutor has no responsibility for seeking or recommending a particular sentence, the bargaining mainly takes the form of his agreeing to drop certain charges or proceed on lesser ones in exchange for pleas of guilty to other or lesser charges. The advantage to the prosecutor, as representing the public, is that it avoids the need for a trial and consequent ordeal for victims and witnesses; and the benefit to the defendant is that he can expect a discount on sentence for his plea of guilty. The court is not a party to the agreement. The prosecuting advocate is not obliged to seek its approval, but if he does, he must abide by its view. If he does not seek the court's view, he should nevertheless inform it of what he intends to do and, if it volunteers its disapproval, he should take the view of the Director of Public Prosecutions before continuing.[96] In either event, there is no question of any agreement with or undertaking by the court as to sentence, save that it is constrained by the sentencing limits for the offence to which the defendant has pleaded guilty and should reflect the plea by a sentencing discount appropriate in the circumstances. This form of plea bargaining, though involving questions of high principle as to the sentencing process and the role in it of a sentencing discount for pleas of guilty, has not been the main focus of contributions in this area to the Review.

92 The possibility of advance indication by the court of sentence for a plea of guilty, which is not presently permitted, has attracted greater attention. Unlike plea or charge bargaining, it would not amount to a reduction of charge in exchange for a plea of guilty, but it would introduce an element of a bargain between the defendant and the court as to sentence in the event of a plea of guilty. If introduced, it would enable a defendant to know in advance where he would stand as to sentence if he pleaded guilty.

[96] see the Report of a Committee chaired by Lord Justice Farquharson, (Counsel Magazine May 1986) and *R v Jenkins* (1986) 83 Cr App R 152l

93 The issue arises for discussion because of the now well established practice of judges and, more recently, of magistrates, of discounting the 'normal' severity of sentence because of a plea of guilty, a practice now statutorily recognised.[97] The extent of the discount, for which there is still no set common law or statutory tariff, is usually within a range of 25% to 30%.[98] But it may be lower or higher than that range depending on special factors in the case. The main factors influencing the extent of the discount are how early the plea was proffered, whether its effect was to spare witnesses from the trauma of having to give evidence, whether the defendant has assisted the police, say, in the recovery of property, and also whether the defendant had little option but to plead guilty at some stage because of the strength of the prosecution case.[99] The rationale for this practice is to encourage guilty defendants to plead guilty early and thereby save public expense and private disturbance and anxiety that would otherwise have resulted from a trial. Those are usually the matters to which judges refer in their sentencing remarks when commenting on and justifying the discount, though sometimes they also talk of the plea of guilty as evidence of the defendant's 'remorse'.

94 Given the existence of such a sentencing practice, it is to be expected that a guilty defendant may wish to know what sentence he is likely to receive if he pleads guilty as against that to which he is at risk if he goes to trial. Formerly, although the practice of judges and courts varied, the defendant's counsel could seek and obtain an indication from the judge about this in his room. However, in 1970 the Court of Appeal, in *R v Turner*, sought to put an end to private meetings of this sort with the judge, save in exceptional cases.[100] The Court held that, even in such exceptional cases, the judge should not indicate the sentence he was minded to impose, save where he intended, whatever the plea, to impose or not impose a particular sentence. There are indications, despite the Court's ruling in *Turner* and its several subsequent and emphatic reminders of it, some judges and defence advocates have continued to breach it in different ways. They have no doubt been motivated for the best, for example, to secure the best possible outcome for defendants minded to acknowledge their guilt, to save vulnerable witnesses from the distress and trauma of giving evidence and to avoid great public expense of a long trial.

95 In 1993 the Runciman Royal Commission recommended that there should be a more clearly articulated system of graduated discounts so that, other things being equal, the earlier the plea the higher the discount. It also proposed a relaxation of the *Turner* rule to permit the judge, at the defendant's request, to

[97] Powers of Criminal Courts (Sentencing) Act 2000, s 152, reproducing the Criminal Justice and Public Order Act 1994, s 48 as amended by the Crime (Sentences) Act 1997

[98] See eg *R v Buffrey* (1993) 14 Cr App R (S) 511, CA

[99] see eg *R v Hollington and Emmens* (1985) 7 Cr App R 364, CA

[100] 54 Cr App R 322, CA

indicate in advance the highest sentence he would impose for a plea at that stage. It did not recommend that the judge should be permitted to indicate what sentence he would impose as compared with that which he might impose on conviction after a trial, because it considered that it could put pressure on some defendants who were not guilty to plead guilty for fear of being convicted and receiving the higher sentence.[101]

96 The National Audit Office, in its Report, *Criminal Justice: Working Together*, noted that information on the use of sentence discounts was not routinely collected and that a Court Service review had found that defendants often did not believe they would be given sufficient credit for an early plea. It recommended that the Home Office and Lord Chancellor's Department should: collect information on the use of sentence discounts; evaluate their impact on defendant behaviour; and review whether the system could be improved to encourage those defendants who plead guilty to do so as early as possible.[102] Governmental response to those recommendations has so far been muted, seemingly because of expected resistance from the bench to any requirement that they should identify, when sentencing, the sentence discount given for a plea in isolation from other mitigating factors.

97 Many of the judiciary and most criminal practitioners would like to see a return to the pre-*Turner* regime, albeit conducted in a more formal manner. They regard the matter pragmatically – given the existence of a system of sentence discounts for pleas of guilty – as a means of encouraging defendants to face up to their guilt at an early stage and before putting the public, victims and others involved to the expense and trouble of an unnecessary trial. Put another way, it would reduce the number of 'cracked trials', that is, of guilty defendants only pleading guilty at the last minute, and of guilty defendants taking their chance with a trial hoping that something may just save them from conviction. There are, of course, other reasons why defendants do not face up to their guilt earlier, including overcharging, inadequate and late preparation of the case by one or both sides and short-term considerations of retaining as long as possible their right to bail or their privileges as unconvicted remand prisoners.

98 The Bar Council and many others have urged a relaxation of the *Turner* rules. They propose a system of advance indication of sentence in the event of a possible plea of guilty, but without commitment as to the likely sentence in the event of a trial. They suggest that that such a system should have the following features:

- a publicly well defined and consistently applied scale of minimum discounts according to the stage in the proceedings that the plea is offered;

[101] Chapter 7, paras 41-58 and recommendations 156-163

[102] HC 29 Session 1999-00, 1st December 2000, paras 5.26-5.28 and recommendation 48

- the discounts should be such as to secure for the defendant a significant reduction in sentence;
- the level of discount above the appropriate minimum would remain a matter for the judge's discretion, but in exercising it, he should disregard the strength of the prosecution case since otherwise that could undermine the incentive to a defendant to enter an early plea;
- the judge should indicate the sentence he would give in the event of a plea of guilty and what his sentence *might* be if the matter went to trial;
- the present disincentive to early pleas of guilty of loss of bail or change of status for remand prisoners should be removed; and
- the procedure should be subject to review by the Court of Appeal on a reference by the Attorney General, but without power to the Court of Appeal to increase individual sentences.

99 The Bar Council suggests the following procedure. It would be for the defendant, through his advocate, to initiate it by requesting an advance indication of sentence from the judge. Before doing so, his advocate should advise him firmly that he should not plead guilty unless he is guilty. The application would be made formally in court, though sitting in private, in the presence of the defendant and his legal advisers and of the prosecution advocate. The proceedings would be recorded. The judge should satisfy himself through canvassing the matter with both advocates as to the mental competence and emotional state of the defendant and as to whether he might be under any pressure falsely to admit guilt. He should firmly warn the defendant that he should not plead guilty unless he is guilty. If satisfied as to those matters and as to the sufficiency of the information before him of the circumstances of the offence, the judge should indicate the maximum sentence he would give in the event of a plea of guilty

100 Arrayed against that seemingly just and pragmatic solution to the long-standing problems of 'cracked' and unnecessary trials and the advantage to defendants in knowing where they stand, there are powerful arguments of principle voiced in the main by leading academics.[103] They are directed, not so much against a clearer articulation of the system of sentence discounting for a plea of guilty or the relaxation of the *Turner* rule, but at the very existence of pleas of guilty as part of our criminal justice process and, in any event, against the practice of discounting sentence for a plea of guilty.

101 As to the former, Professor Ashworth and others have referred to the general absence in European jurisdictions of a procedure for pleading guilty and have

[103] see, in particular, Andrew Ashworth, *The Criminal Process: An Evaluative Study*, (OUP, 1998, 2nd ed), pp 276-297, and Penny Darbyshire, *The Mischief of Plea Bargaining and Sentencing Rewards* [2000] Crim LR 895 and the many sources there cited

urged consideration of abolition of the guilty plea itself, say, in indictable cases. They suggest replacing it with some form of judicial scrutiny of the acknowledgement of guilt. However, Professor Ashworth rightly acknowledges that "there would be tremendous difficulties in such a great cultural change".[104] I have to confess to timidity about such a radical approach given the state of development of our sentencing law and practice. There would be obvious problems in devising a new criminal justice system equipped to subject every serious criminal case to judicial scrutiny of some sort to test an acknowledgement of guilt against all the other evidence, in order to evaluate the fact of guilt and the extent of it. I cannot see in what practical way it would improve the quality or administration of justice or what significant, if any, advantage the public or defendants would gain from it. The comparison, often made in this context, with bench trials in Philadelphia, is unhelpful. There, they have earned the description of 'slow pleas of guilty' to meet those cases in which, under that State's plea bargaining system, the prosecutor and defendant have been unable to make a bargain as to the disposal of the case, and the defendant opts instead for trial by judge alone in the hope of persuading him of the level of culpability for which he contends.

102 As to the challenge to our present system of discounting sentence for a plea of guilty, Professor Ashworth's and others' arguments include the following: [105]

- defendants who plead guilty, and by that means secure a lower sentence than would have been imposed on conviction, receive a benefit that they do not deserve, since a plea of guilty does not reduce their culpability or need for punishment and/or containment;
- it is contrary to the presumption of innocence and, by implication, the defendant's entitlement to require the prosecution to prove his guilt, that, as a result of requiring it to do so, he should receive a more severe sentence than if he had admitted guilt;
- although a defendant can waive that entitlement, a system of discounting sentences is an incentive and, therefore capable of amounting to an improper pressure on him to do so;
- in other jurisdictions, for example, Scotland, no discount is given for a plea and to do so would be regarded as an improper inducement; and in many European countries, at least formally, admission of guilt is not a mitigating factor for the purpose of determining sentence;
- victims, though relieved of the ordeal of having to give evidence, may be unhappy about the lower sentence secured by the plea and untested mitigation; and
- discounting sentence for pleas of guilty indirectly discriminates against defendants from ethnic minorities who, regardless of their guilt or innocence,

[104] op cit, p 295
[105] op cit p 276-297

tend to maintain a plea of not guilty and, in consequence on conviction, face a greater risk of custody and longer sentences than white offenders.[106]

103 As to the effect, or lack of effect, of a plea of guilty on culpability, admission of guilt may not significantly reduce a defendant's blameworthiness for the offence at the time he committed it. But it flies in the face of reason to reject the admission as a relevant factor when later sentencing him, along with other circumstances which, similarly, may not bear directly on culpability such as presence or absence of previous convictions, age or current state of health, prospect of rehabilitation and the making of reparation. Given the fact of guilt, it must be a mitigating factor to admit it and an aggravating factor to persist in denying it. It is a shame that the Court of Appeal, in developing and articulating the practice of discounting sentences for guilty pleas, has not faced up to this. It has persisted in encouraging judges openly to reduce sentence for pleas of guilty while illogically enjoining them not to be open about imposing a heavier sentence (than would have been imposed on a plea of guilty) because they have persisted in denying guilt. As Professor Ashworth has noted, depending on which way you look at it, a 30% discount for a plea is equivalent to a 50% increase in sentence for unsuccessfully maintaining a plea of not guilty.[107] In my view, once guilt has been established, there is no logical reason why a dishonest plea of not guilty should not be openly treated as an aggravating factor just as an honest plea of guilty is treated and rewarded as a mitigating factor.

104 As to the argument of the effect of a sentence discount on the presumption of innocence, it only gets off the ground, and then not very far, if one equates the presumption of innocence with a right of a man subsequently found to be guilty to have put the prosecution to proof of his guilt. In my view, it is an incident of the presumption of innocence and criminal burden of proof that a defendant facing a criminal charge can require the prosecution to prove it, but that falls far short of saying that, once guilt has been established in one manner or other, that his sentence should be the same regardless. Neither our domestic law before the advent of the European Human Rights, nor the Convention itself, in particular Article 6(2), in terms or in spirit goes that far.

105 As to a system of sentence discount amounting to an improper inducement or pressure on a defendant to plead guilty when he is not guilty,[108] it is by this route, if at all, that the presumption of innocence as articulated in Article 6 and other Convention protections might enter the scene. Of course, if the present discounting practice operated in a fashion likely to induce significant numbers of innocent defendants to plead guilty when they are not, there might

[106] see Roger Hood, *Race and Sentencing*: *A Study in the Crown Court*, Oxford, 1992; and see the Runciman Royal Commission Report, Chapter 7, para 58
[107] *The Criminal Process: An Evaluative Study* p 288
[108] ibid pp 292-297

be a cause for concern. But the mere availability of a discount for a plea of guilty as one of a number of matters of mitigation, when coupled with a system requiring defendants to be properly advised, does not, in my view, justify characterising it as an improper inducement or pressure on an innocent defendant wrongly to admit guilt. For the reasons I have given in the last paragraph, I again distinguish between the innocent defendant and the defendant who knows he is guilty and might be minded to put the prosecution to proof of his guilt. A sentencing system should not be tailored or modified to encourage the latter to try his luck; or at least it should not reward him with the same sentence he would have received if he had not done so. Of course, no system can guarantee that individual defendants, however innocent, will not regard the likelihood of a lesser sentence as an incentive to trade it for the risk of conviction and a more serious sentence, or that lawyers will not sometimes advise their clients badly. But those are not reasons for rejecting a sentencing practice if in general it serves a proper sentencing purpose, operates justly and assists the efficient administration of justice.

106 As to the interests of victims, as I say in Chapter 11,[109] it is vital that they should be fully informed of the course of a case concerning them, that they should have an opportunity to indicate to the court the effect on them of the crime and that they should be told the reasons for its outcome. The present sentence discounting system does not affect any of those imperatives or the improving provision now being made for them, except possibly when the *Turner* rules are not observed. The proposals to bring greater openness and clarity to the exercise of sentence discounting for pleas of guilty should remove that problem and secure more effective recognition of their interest when proceedings take this turn

107 Finally, there is the argument that discounting sentences for pleas of guilty indirectly discriminates against ethnic minority offenders because they tend to plead not guilty more than white offenders and thus, when convicted, face a greater risk of custody and longer sentences than white offenders. This argument, like the earlier ones, depends largely on the equation of the presumption of innocence with the right of a guilty man to put the prosecution to proof of his guilt. The fact that, statistically, ethnic minority offenders may suffer more severe punishment than their white counterparts is a feature of the adversarial system, of which, if the research referred to is correct, they have chosen to take greater advantage. As in all adversarial systems someone has to lose, and the consequence of a defendant's loss in this one is that the presumption of his innocence has been rebutted. He, therefore, faces the sentencing consequences of all offenders who have taken the same route. Whether or not this nevertheless justifies the description of indirect discrimination, it is one that is self inflicted, for whatever reason. If the reason is one of perception - perception of discrimination in the workings of

[109] para 72

the justice system - the answer, as I have said before, is to remove any malfunctioning of that sort and adequately to inform the public of it, not to skew the system generally to meet one element of society's perceptions of it.

108 However, to conclude this difficult subject on that level of generality would be unsatisfactory and not particularly constructive. It is important to discover why one group of defendants, distinguished only by their ethnicity, should behave differently from others when faced with the same choices. There are two possible explanations. First, maybe we are not comparing like with like; perhaps, proportionately more innocent ethnic minority defendants are charged and prosecuted than innocent white defendants. Or second, all things being equal, ethnic minorities may behave differently from white defendants because of their perception of the treatment they will receive. It might of course be both of these possibilities. But we need to know, because if there is a malaise it needs to be identified and treated. On the information obtained in the Review, I cannot say that discrimination, direct or indirect, exists in this respect. And I do not consider that removal of the discount for a guilty plea because of these different behavioural patterns would be necessary or, in itself, sufficient to remove any discrimination that may exist. The matter needs to be thoroughly researched and monitored, aided by suitable information technology, to gather and analyse all relevant data. A priority, I suggest, for the Criminal Justice Board, the establishment of which I have recommended.[110]

109 Turning to the proposals for reform of our present system, like the Runciman Royal Commission, I do not see how clearer articulation of the well known principle of greater discounts for earlier pleas, or relaxation of the *Turner* rule to permit judges formally to indicate a maximum sentence in the event of a plea, would increase the risk of defendants pleading guilty to offences that they have not committed. As to how such reforms should be introduced, there are difficulties in doing it by statute, with the draftsman's tendency to be overly prescriptive. Apart from anything else, there would be difficulty in isolating graduated discounts for early pleas of guilty from other elements of mitigation. The Runciman formula of graduated discounts, *other things being equal*, might be the way, but would not lend itself readily to statutory formulation. Perhaps the answer would be for the Court of Appeal, in consultation with the Sentencing Advisory Board to devise a scheme for expression by the Court in a Sentencing Guideline, which could subsequently be embodied in a Sentencing Code.[111]

110 As to relaxation of the *Turner* rule, at whatever stage a defendant considers pleading guilty in the expectation of a lesser sentence for doing so, it is, of course, vital that he is properly and firmly advised by his advisers and left to

[110] see the Runciman Royal Commission Report, Chapter 7, para 58, and recommendation 163
[111] see Chapter 11, para 198

make his own choice. The fact that he may seek an indication from the judge of the likely maximum sentence before doing so, would not, it seems to me, materially increase the risk of untrue pleas of guilty. On the question of possible ethnic disadvantage because those from ethnic minorities are less likely to plead guilty, to the extent that it exists I do not see why it should be materially aggravated by clearer articulation of an existing sentencing practice or by relaxation of the *Turner* rule to allow a defendant who wishes to know where he stands, being told.

111 In my view, the proposed reforms would be of appropriate benefit to guilty defendants, to others, in particular victims and witnesses, involved in criminal proceedings and to the system in general in the reduction of 'cracked' and unnecessary trials. As to the problem of 'cracked' trials, the reforms should be supported, as the Runciman Royal Commission recommended, by retention of bail by those on bail and extension to convicted prisoners awaiting sentence privileges enjoyed by unconvicted prisoners.[112]

112 I do not agree with the Runciman Royal Commission that a system under which a judge informs a defendant both of the maximum sentence on a plea of guilty and the possible sentence on conviction after trial would amount to unacceptable pressure on him. That comparison is precisely what a defendant considering admitting his guilt wants to know. He knows and will, in any event, be advised by his lawyer that a plea of guilty can attract a lesser sentence and broadly what the possible outcomes are, depending on his plea. So what possible additional pressure, unacceptable or otherwise, can there be in the judge, whom he has requested to tell him where he stands, indicating more precisely the alternatives? As Douglas Day, QC, put it in a persuasive address to the Millenium Bar Conference in 2000, an open system under which a defendant "can know the sentencing options will put no more pressure on him than firm advice, in ignorance of the reality, from his legal advisers".[113]

113 In my view, the judge should tell a defendant who wishes to know the maximum sentence he would receive in the event of a plea of guilty as compared with the possible sentence on conviction after trial. Such indication, coupled with the clearer public articulation of graduated discounts for advance pleas of guilty, would enable the guilty defendant and those advising him to evaluate the judge's indication and assess the advantage or otherwise of proceeding with a plea. Where there are co-defendants and only one of them seeks an advance indication of sentence on a plea of guilty, the judge

[112] in response to a request from the Senior Presiding Judge, the Lord Chancellor in early 2000 reopened with the Home Office the issue of loss of immediate loss of remand privileges on entering a plea of guilty. I say 'reopened' the issue because earlier approaches on the subject had been opposed by the Prison Service because of operational reasons and cost. So far as I am aware, those reasons continue to prevail

[113] *Plea Bargaining,* 14th October 2000

would have to decide whether his role and culpability were sufficiently identifiable at that stage to enable him to give an indication or whether he could not do so until all the evidence had been heard. Such a system, which formally and openly involves the defendant and his advisers throughout would not, I believe, violate Article 6 ECHR. Indeed, it should be fairer than the present one since it would enable a defendant who might wish to benefit from an early plea to do so on a far better informed basis.

114 The mechanics are important. The procedure should only be initiated by the defendant after taking advice from his lawyers, which advice should include a firm warning that he should not plead guilty unless he is guilty. The request should be made formally in court, sitting in private, and should be fully recorded. It should be made in the presence of the prosecution and the defendant and his advisers. Both parties should be equipped to put before the judge all relevant information about the offence and the defendant to enable the judge to give an indication. This may not always be possible straightaway, for example, if a pre-sentence report is not available, as it mostly won't be if the defendant has hitherto pleaded or indicated a plea of not guilty. Once the judge is satisfied that he has enough information and that it is appropriate to do so, he should indicate the maximum sentence on a plea at that stage and the possible sentence on conviction after trial. If the defendant, in the light of that indication, indicates his wish to plead guilty, the judge should, by questioning him direct, satisfy himself that he understands the effect of his proposed plea, that it is true and that it is voluntary. The judge's indication should be binding on any other judge before whom the defendant may appear for sentence on the consequent plea of guilty.

Accordingly, I recommend that:

- **there should be introduced, by way of a judicial sentencing guideline for later incorporation in a Sentencing Code, a system of sentencing discounts graduated so that the earlier the tender of plea of guilty the higher the discount for it, coupled with a system of advance indication of sentence for a defendant considering pleading guilty;**
- **on the request of a defendant, through his advocate, the judge should be entitled, formally to indicate the maximum sentence in the event of a plea of guilty at that stage and the possible sentence on conviction following a trial;**
- **the request to the judge and all related subsequent proceedings should be in court, in the presence of the prosecution, the defendant and his advisers and a court reporter, but otherwise in private, and should be fully recorded;**

- **the judge should enquire, by canvassing the matter with both advocates, as to the mental competence and emotional state of the defendant and as to whether he might be under any pressure falsely to admit guilt;**
- **the prosecution and defence should be equipped to put before the judge all relevant information about the offence(s) and the defendant, including any pre-sentence or other reports and any victim impact statement, to enable the judge to give an indication;**
- **the judge should only give an indication if and when he is satisfied that he has sufficient information and if he considers it appropriate to do so;**
- **where, as a result of such an indication, a defendant's advocate indicates to the judge that he wishes to plead guilty, the judge should, by questioning the defendant direct, satisfy himself that the defendant understands the effect of his proposed plea, that it would be true and that it would be voluntary; and**
- **the judge should be bound by his indication, as should any other judge before whom the defendant may appear for sentence, on the consequent plea of guilty.**

DISCLOSURE

115 Advance disclosure by the prosecution serves two main purposes. The first is its contribution to a fair trial looked at as a whole.[114] The second is its contribution to the efficiency, including the speed, of the pre-trial and trial process and to considerate treatment of all involved in it. There are two categories of material held by the prosecution: the first is 'evidence', ie that upon which the prosecution will rely to prove its case. The second is 'unused material' which encompasses all other information and material that the prosecution has seen or collected. Early and full disclosure of all material in the first category and of relevant material in the second is vital for good preparation for trial, narrowing disputed issues, and most importantly to ensuring a fair trial. If the prosecution knows of or has information in its possession which it is not using but which may help the defence secure an acquittal, justice obviously demands disclosure. Failure of the prosecution to disclose such material has been a major factor in overturning convictions, often after the defendant has spent many years in jail, so it is imperative that the right decision on disclosure is made by the prosecution.

[114] for the purposes of Article 6, see *Benendenoun v France* 18 EHRR 54

116 Assuming that the prosecution has correctly charged the accused at the outset, there is a firm framework on which both sides can prepare for court. Critical to this exercise is a scheme of mutual disclosure. The burden of disclosure lies more heavily on the prosecution than on the defence, rightly so, for the prosecution brings the charge and must prove it. The defence need not admit or prove anything, but where it intends to put matters in issue, it should indicate them at an early stage so that both sides can concentrate on those issues in their preparation for court. The law attempts to give effect to that approach in the following manner. In indictable cases, and increasingly in summary matters too,[115] it requires the prosecution to disclose in advance the evidence and/or case upon which it intends to rely, other unused material which may be relevant to the issues that it contemplates or of which the defence inform it and copies of the defendant's custody record and record of search, if any. The defendant is required to make advance disclosure of the general nature of his defence and of any expert evidence upon which he proposes to rely. I deal briefly below with the obligation on the prosecutor to disclose his proposed evidence and, in more detail with his obligation to disclose unused material and with the corresponding and dependent obligation of the defendant to disclose the general nature of his defence.

Advance disclosure by prosecution of its proposed case and/or evidence

117 The law is somewhat muddled in its provision for advance notification of the prosecution case and/or evidence, but reasonably satisfactory in its operation. In brief, in indictable-only and 'either-way' cases there are no statutory obligations to provide copies of the proposed evidence at any earlier stage than, respectively, in cases 'sent' to the Crown Court 42 days after the first preliminary hearing there or at which the prosecution seeks committal proceedings in the magistrates' court.[116] In 'either-way' cases there is a statutory requirement on the prosecution to provide the defence, on request and before the court considers mode of trial, with copies of the parts of the witness statements on which it proposes to rely or a summary of the prosecution case.[117] The main purpose of this requirement is to enable the defence to determine its stance on the issue of mode of trial, but it also serves a useful purpose in notifying it of the nature of the case it has to meet.

118 In summary-only matters the prosecution, anomalously, has a statutory duty to make advance disclosure of unused material, but not written witness statements. And, until the issue of guidelines by the Attorney General on 29th November 2000, the latter was left to the discretion of individual prosecutors. However, those guidelines, directed at ensuring compliance with a

[115] Attorney General's Guidelines on Prosecution Disclosure, 29th November 2000; and the Criminal Procedure and Investigations Act 1996
[116] Magistrates' Courts Act 1980, s 5B(2)(c)
[117] Magistrates' Courts (Advance Information) Rules 1985, SI 1985 No 601, r 4

defendant's right to a fair trial in this respect,[118] require,[119] in addition to advance disclosure of unused material, advance provision to the defence of all proposed prosecution evidence in 'sufficient time' to allow proper consideration of it before it is called. Also, the Court of Appeal has recognised a residual common law duty on prosecutors to serve proposed evidence earlier, where it is in the interests of justice to do so, for example, where it might assist the defendant in an application for bail or for a stay of the proceedings as an abuse of process.[120]

119 Thus, in all cases there is a legal duty on or a practical requirement for a prosecutor to supply its proposed evidence in advance of the hearing. But it is still a bit of a muddle and not as rigorous as today's culture of speedy progress to hearing requires. Even the new 'fast-track' procedures allow the service of proposed evidence weeks after charge. That period between charge and service is largely 'dead-time' in the life of the case, time for completing investigation and preparation of papers which, with a more prescriptive regime, earlier involvement of the Crown Prosecution Service and the provision of adequate resources to it and the police, could often have been undertaken earlier. Whilst the effect of such delay could be lessened, on some defendants at least, by alignment of the police evidential test for charging with that of the Service[121] and proper use of their power to bail a suspect pending charge,[122] the delay in progressing cases over-all would remain much the same.

120 The Philips Royal Commission recommended the introduction of a formal and comprehensive framework of rules for advance prosecution disclosure of proposed evidence in all courts, but no rules were made.[123] The Runciman Royal Commission dealt briefly with the topic, simply stressing the need for disclosure of all prosecution evidence and unused material before the defence disclosure that it proposed.[124] In my view, there is a need for certainty and clarity of the law and, in a climate of cases moving more speedily to hearing, for the introduction of an appropriate sense of rigour to this important obligation on the prosecution to inform the defence in good time of the case it has to meet. For these purposes there should be a single set of rules providing, so far as possible, a common machinery for all levels of jurisdiction, the only practicable solution in any event if a unified Criminal Court replaces the present dual structure of courts. This could be achieved, as the Philips Royal Commission recommended, by imposing a statutory duty on the prosecution, in all cases where guilt is in issue, to provide its proposed

[118] see *R v Stratford Justices, ex p Imbert* [1999] 2 Cr App R, DC, per Collins J at pp 282-3 and Buxton LJ at p 286
[119] Attorney General's guidelines, para 43
[120] *R v DPP ex pLee* [1999] 2 All ER 737, DC
[121] see para 43 above
[122] Police and Criminal Evidence Act 1984, s 37(1)
[123] paras 8.13-14
[124] Chapter 6, paras 33, et seq

evidence in sufficient time before hearing to enable the defence to prepare for trial. The precise timescale would be prescribed by rules.

I recommend that there should be a single set of statutory rules imposing on the prosecution in all cases a duty to provide its proposed evidence in sufficient time to enable the defence adequately to prepare for trial, the precise timescale to be prescribed by rules.

Disclosure of unused material and defence statement

121 In 1997 the Criminal Procedure and Investigations Act 1996 replaced the common law rules of prosecution disclosure of unused material, introducing a staged procedure of primary prosecution disclosure, defence disclosure of the issues taken with the prosecution case and then additional and secondary prosecution disclosure informed by the defence identification of the issues. The 1996 Act has not worked well, prompting two lively questions in the Review. First, should the statutory scheme be abolished and be replaced by some other and, if so, what, scheme? Second, should and could the statutory scheme be made to work better, in particular, by the wider use of information technology for speedier collation, transmission and examination of documents?

122 The scheme is set out, repetitiously and confusingly, in a number of instruments, including: the 1996 Act, Disclosure Rules,[125] the Code of Practice issued under Part II of the Act,[126] recent Guidelines of the Attorney General[127] and Rules issued under the Crime and Disorder Act 1998. The scheme applies in its entirety to cases tried on indictment in the Crown Court and partially to summary trials in magistrates' courts. It provides for two stages and, respectively, two different levels of prosecution disclosure.

- Primary disclosure - In both jurisdictions it imposes duties on a police officer known as a disclosure officer, usually drawn from the investigating team: to record and retain all information gathered or generated in the investigation and which may be relevant to it; to prepare a descriptive schedule of the material for the prosecutor; to draw to the prosecutor's attention any material that "might undermine" the prosecution case or in respect of which he is in doubt; and to certify that he has complied with all his duties under the Code. The prosecutor must then make his own determination whether the disclosure

[125] Crown Court (Criminal Procedure and Investigations Act 1996) (Disclosure) Rules 1997 (SI 1997 No 696), made by the Crown Court Rule Committee

[126] Code of Practice under Part II

[127] *Attorney General's Guidelines: Disclosure Of Information In Criminal Proceedings*, 29th November 2000; see also *Joint Operational Instructions - Disclosure of Unused Material,* issued by ACPO and the CPS in March 1997

officer has listed all unused material in compliance with the Code and disclose to the defence all such material that, in his opinion, "might undermine" the prosecution case.[128] He must then serve such material "as soon as is reasonably practicable" after committal or after service of the evidence in 'sent' cases. In the magistrates' court, he must do so "as soon as is reasonably practicable" after the defendant has pleaded not guilty.[129]

- Defence statement - In the Crown Court the defence must and, in the magistrates' court, may, within 14 days of the prosecutor's compliance or purported compliance with the duty of primary disclosure, give to the court and the prosecutor a written statement setting out in general terms the nature of the defence. This should set out the matters on which issue is taken with the prosecution and in the case of each issue, why, and, if one of the issues is an alibi, particulars of it.
- Secondary disclosure - In all cases, where a defence statement has been served, the disclosure officer must reconsider the extent of any unused material and draw the prosecutor's attention to any that "might be reasonably expected to assist" the defence as disclosed in the defence statement, and further certify his compliance with the Code. The prosecutor, again exercising his own judgment, must then, within 21 days of receipt of the statement, disclose any such further material, unless the court on his application orders that it is not in the public interest to disclose it.

123 The level and machinery of prosecution disclosure of unused material has been a thorny issue for many years and has prompted many submissions in the Review. There are two main conflicting considerations: first, the requirement of justice that a defendant should have full disclosure of all material relevant or potentially relevant to the case he has to meet; and second, the administrative and financial burden on the police, prosecution and third parties of over-wide and potentially irrelevant disclosure.

124 In the mid 1990s the courts, taking as their starting point guidelines on disclosure issued by the Attorney General in 1981, [130] held that the defence was generally entitled to disclosure of matter that "has or might have, some bearing on the offences charged".[131] The result, described by some as close to "opening the police file to the defence", was seen by many as unnecessarily generous to the defence, too burdensome on prosecutors in having first to vet the whole file for sensitive material and costly to the criminal justice process as a whole. There were also concerns that defendants were using their new entitlement to go on 'fishing trips' to uncover relatively peripheral material

[128] subject to special provisions for 'protected material' in sexual cases under the Sexual Offences (Protected Material) Act 1997

[129] Criminal Procedure and Investigations Act 1996, s 13

[130] Guidelines for the disclosure of 'unused material' to the defence in cases to be tried on indictment (1982) 74 Cr App R 302

[131] *R v Saunders & Ors* , unreported, September 29, 1990, CCC; *R v Ward* (1993) 96 Cr App R 1, CA*; R v Davis, Johnson and Rowe* (1993) 97 Cr App R 110; *R v Keane* (1994) 99 Cr App R 1, CA; *and R v Brown (Winston*) [1995] 1 Cr App R 191, CA

and to facilitate the 'manufacture' of defences. The Runciman Royal Commission, reporting in 1993, felt that the courts' decisions had swung the pendulum too far in favour of the defence:[132]

> "… 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".

125 It was to overcome this perceived imbalance that the Royal Commission recommended the two stage regime of disclosure, which became a feature of the 1996 Act scheme.[133] However, Parliament did not adopt the Royal Commission's recommendations of the same test for disclosure at both stages, namely of "all material relevant to the offence, the offender or to the surrounding circumstances".[134] Nor did it adopt the Royal Commission's recommendation that, at the second stage, after defence disclosure of "the substance of its case", relevance was to be informed by the defence disclosure and the defence had to establish it.

126 Some consider that the present system would be fair and workable if only it were properly resourced. Most, however, are of the view that the present system is unworkable, though not all for the same reasons. I turn first to the mechanics of the 1996 Act scheme and then to the vexed question of its different tests for prosecution, primary and secondary disclosure.

Primary disclosure

127 Some consider that the system operates unfairly against defendants at the most critical, the primary, stage, for two main reasons. First, they say that the test, material that "might undermine" the prosecution case, is too narrow and that, if there is to be a test at all, it should simply be one of relevance or potential relevance to issues in the case and common to both stages of disclosure, as the Runciman Royal Commission recommended. Many go further and suggest that there should be no filtering test for disclosure and that the prosecutor should disclose everything gathered or engendered by the

[132] Chapter 6, para 49
[133] Chapter 6, para 51
[134] Chapter 6, para 52

police in the course of their investigation,[135] much as happens in many continental jurisdictions where the defence are entitled to see the prosecution 'dossier'.[136]

128 Second, critics say that it is wrong and unfair to defendants and the police to consign to, mostly, poorly trained junior police officers the heavy responsibility, often in large and complex cases, of identifying all the unused material and the candidates from it of potentially disclosable documents. Joyce Plotnikoff and Richard Woolfson, in a recent study for the Home Office, noted[137] that most police forces regard the training that they provide on disclosure as inadequate; the average length of training given to disclosure in volume and serious crime cases is less than a day. Moreover, the exercise is rapidly becoming more onerous and difficult with the wide ranging and sophisticated use by the police and other investigative bodies of information technology in the investigation of crime, often drawing on considerable banks of intelligence built up over long periods.

129 The Code and the Attorney General's Guidelines require the disclosure officer and the prosecutor to work together in the process of primary disclosure. The disclosure officer should, where necessary, seek help from the prosecutor in the preparation of the schedule of unused material and those documents in it that he considers to be disclosable. And the prosecutor should check for himself the completeness of the scheduled material and what is potentially disclosable. However, the prosecutor, for good practical reasons and his own professional commitments, is largely in the hands of the officer in the basic exercise of identification of all unused material, potentially disclosable or not. Surveys undertaken by the Criminal Bar Association in conjunction with the British Academy of Forensic Science and the Law Society in 1999, a Thematic Review of The CPS Inspectorate in March 2000,[138] the Plotnikoff and Woolfson Study and submissions in the Review all indicate that this is a fundamental failure in the system. All too often disclosure officers are late in providing schedules and material to prosecutors, leaving them little time for adequate review of the documents. Frequently the officers do not provide them with complete and accurate documentation to enable them adequately to review the schedules, or to make sound decisions as to disclosability. But even when the disclosure officer provides full, accurate and timely documentation, many prosecutors still do not have time to examine it properly to satisfy themselves of the officer's compliance and assessment as to disclosability. The seriousness of this inability is illustrated by the fact that

[135] including the Criminal Bar Association in submissions in the consultation process leading to the Attorney General's Guidelines on Disclosure of 29th November 2000

[136] however, the common and civil law systems are not readily comparable, since in the latter the 'dossier' is usually judicially compiled and may not be complete

[137] Joyce Plotnikoff and Richard Woolfson *A Fair Balance? Evaluation of the Operation of Disclosure Law* Home Office, (2001) (as yet unpublished), p 11

[138] Crown Prosecution Service Inspectorate *Report on the Thematic Review of the Disclosure of Unused Material,* 2/2000, (March 2000)

when they do examine the material, they often disagree with the assessment of the disclosure officers.

130 The police themselves recognise these weaknesses in the system. At least one force, the Kent County Constabulary, has felt the need to employ direct a number of lawyers to assist it with its heavy and growing burden of disclosure. Whilst such initiative is to be commended as a response to a failing system, the statutory responsibility for disclosure lies with the prosecutor. It is a task critical to his forensic role. Involvement by the police of other lawyers would encourage, in practical terms, shedding of some of that responsibility or at best unnecessary and costly duplication of effort. In my view, the proper answer is to provide a better system in which: police are properly resourced and trained to gather and schedule the unused material; prosecutors are provided in sufficient numbers to examine it and make disclosure decisions; and both are equipped with common information technology systems for the collation, scanning, transmission and reading of documents to ease their respective tasks.

131 The Narey reforms may go some way to achieving a better system over-all. Changes are already under way to provide new systems for the preparation and submission of files, the establishment of criminal justice units working in close co-operation with the police to support most of the casework in magistrates' courts, and trial units to handle the Crown Court work.[139] However, as a recent evaluation by the Trial Issues Group of co-located criminal justice units has reported,[140] it is not yet evident whether it will improve prosecution disclosure.

132 As I have indicated, the time limits for primary disclosure are loose and imprecise according to different procedures.[141] The result is that the decisions are often left until late in the day, and by the time the material is given to the defence there are only a few weeks to trial. Many delays and ineffective hearings are caused by ill-considered and late disclosure, which is probably why many practitioners and judges urge the introduction of more specific and rigorous time limits for primary disclosure. There is much force in this argument, especially as the defence is permitted only 14 days thereafter for service of its defence statement.

133 I favour a clear timetable for prosecution disclosure at an early stage in the case. In the Crown Court, the service of the prosecution case within 42 days of first preliminary hearing as it now is, and in the unified Crown and District

[139] CPS Inspectorate, Chief Inspector's Annual Report 1999-2000

[140] *An Early Assessment of Co-located Criminal Justice Units* a report by the Glidewell Working Group, January 2001 – available on the CPS website:www.cps.gov.uk

[141] see para 122 above

Divisions of a Criminal Court within 42 days of the allocation hearing as it would be, should whenever practicable, carry with it primary disclosure of unused material. Failing that, it should be in sufficient time to enable completion of mutual disclosure by the pre-trial assessment[142] where there is one, according to a standard timetable unless the court orders otherwise. In summary cases, which would not normally require a pre-trial assessment, there should still be primary disclosure where appropriate by reference to a clear timetable, which I suggest should be between two to three weeks after a plea of not guilty has been entered, unless the court orders otherwise. In all such cases, the standard timetable should also cover the giving of a defence statement and secondary disclosure.

134 Not surprisingly, the problems of primary disclosure give rise to many disputes, some of them requiring resolution by the courts, as to its adequacy and timeliness, the defence asking for more, and the police and prosecutors seeking to keep it within reasonable bounds. Quite apart from the disadvantages of such pre-trial wrangling between the parties, they can contribute significantly to delays and the costs of preparation for trial, and sometimes spill over into the trial itself. On occasion, they emerge for the first time on appeal when the Court of Appeal is asked to rule on the disclosability of documents not disclosed at the trial. However, I should record that, in large and serious cases, where advocates of experience are instructed by the prosecutor and on behalf of the defendant, there is often less difficulty than in the smaller cases. Both sides co-operate in early identification of the issues and tailor their respective preparation for trial without rigid adherence to the formulae of the 1996 Act. And, in all cases, the Director of Public Prosecutions has encouraged his prosecutors to short-circuit some of the problems by taking a generous view of their obligations as to materiality at the primary stage.[143] Many prosecutors, counsel and judges have gone further and have respectively advised or directed, as a matter of routine, primary disclosure of certain categories of documents, for example, crime reports, incident report books, police officers' notebooks and draft versions of witness statements where the draft differs from the final version. Many judges also direct disclosure of any material requested if it is not unreasonable to do so.

135 The Crown Prosecution Service Inspectorate noted such practices in its Thematic Review Report. It guardedly and partially accepted them as permissible, but only at the secondary stage and in relation to crime reports and logs of messages, and then only as a 'fail-safe' for all non-sensitive unused material if the police were not confident that they were able to make informed decisions about disclosure.[144] Plotnikoff and Woolfson, in their

[142] see paras 221 – 228 below

[143] *The Prosecuting Authority's Role: Disclosure under the CPIA 1996* British Academy of Forensic Science's Seminar, Gray's Inn, 1st December 1999

[144] op cit, paras 4.54-75 and 9.13

report,[145] noted that, although there is not yet a national consensus, an increasing number of police forces and Chief Crown Prosecutors, including those in the London area, have agreed on a system of routine revelation of certain categories of documents. Other prosecuting authorities, notably the Serious Fraud Office and the Commissioners of Customs and Excise also commonly provide routine disclosure, the former doing so by scanning both evidential and unused material and providing it to the defence on CD-ROM.

136 All such practices, though sensible devices to make the system work, are outside the legislation, which confines disclosability to material satisfying one or other of the two tests. Also, because not all courts have the same approach, geographical inconsistencies have developed, which further undermine the credibility of the legislation.[146] Further, if the law were amended to provide for general disclosure by the prosecution of all non-sensitive unused material, it might simply substitute for much of the present costs of police and prosecutors in determining disclosability, increased copying and transmission charges and a burgeoning of defence legal aid claims for reading vast quantities of irrelevant documents.

137 Many of the most significant practical difficulties associated with disclosure concern the volume of paperwork that modern police investigation generates. The basic production costs of photocopies have fallen steadily as technology has developed, but these are by no means the only costs involved. As any visitor to a courtroom can see, the trial process requires the assembly and maintenance of large paper files in ever-increasing numbers. All this paper has to be produced, transported (often incurring delay and significant postal and/or delivery charges), managed and stored.

138 This is an area in which modern communication technology has the potential to secure significant savings. In the recent Scottish "Lockerbie" trial at Kamp van Zeist in the Netherlands, 28,000 pages of written exhibits were scanned and stored on a bespoke database system.[147] The physical process of creating the scanned images was not that different from producing photocopies. But once the process was complete, it was no longer necessary to produce hard paper copies, since the scanned images could be grouped into case files and sent electronically to the defence and others involved or entitled to see them. If, at a later stage, others needed to be given access to all or part of the files, it could be done by further electronic transmission or by copying to a floppy disc. Nor was there any need for the parties and their lawyers to store or manage the security of 28,000 sheets of paper.

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[145] *A Fair Balance?* pp 6 and 11

[146] see T*he Report of the CPS Inspectorate's Thematic Review of Disclosure,* 2/2000

[147] see the discussion of some of the technological issues by Donna E Arzt in *The Scotsman*, 8 January 2001, p 15

139 Use of this technology could significantly speed and make more manageable and less expensive the process of disclosure over the whole range of cases. Once the prosecutor indicates to the police disclosure officer the items to be disclosed, they can be scanned onto an electronic case file, transmitted to the defence, and held available by the prosecution for disclosure to the court when necessary. Although originals of scanned documents would be available for production and examination if required, for most purposes the scanned images should suffice, both for the purpose of disclosure and, when the courts are suitably equipped, for use at trial.

140 The system that I have described would be a signal advance, but it would only be a first step. As the use of information technology widens, most documents required in any case are likely to have originated electronically. If my recommendations are accepted for a single electronic case file to which all involved have access, subject to appropriate security safeguards,[148] even initial scanning of documents would not be necessary. Disclosure would not be a matter of sending or transmitting material at all, but simply a means of the parties obtaining appropriate access to the material on the file.

The defence statement

141 The 1996 Act requires a defendant in proceedings on indictment, and enables him in summary proceedings, to serve a written defence statement on the court and the prosecutor: "(a) setting out in general terms the nature of … [his] defence;" "(b) indicating the matters on which he takes issue with the prosecution"; and "(c) stating, in the case of each such matter, the reason why he takes issue with the prosecution"; and, if the statement discloses an alibi, particulars of it, including, if known to the defendant, the name and address of every proposed alibi witness, or, if not known, any information the defendant can give that would help to find them.[149]

142 These requirements go beyond simply putting in issue prosecution assertions of primary fact. They require a defendant to challenge allegations of secondary fact and to identify issues of law, including ECHR challenges. going to the root of the charge. They also include any positive defences, for example, provocation, self-defence or diminished responsibility upon which he proposes to rely. They do not, however, require him to reveal his proposed evidence at trial, save to the extent indicated where the defence is alibi.[150] And they do not require him to state how he proposes to controvert the

[148] eg through adherence to the *BSI Code of Practice for Legal Admissibility and Evidential Weight of Information Stored Electronically*, BSI, (1999)
[149] s 5(6)
[150] note also the separate provision for advance notification by either side of any expert evidence on which it proposes to rely in the Crown Court (Advance Notice of Expert Evidence) Rules 1987 and corresponding Rules for magistrates' courts.

prosecution's case. In my view, the requirements are a logical and fair way of identifying the issues likely to engage the court at trial, of helping the prosecutor to identify any further unused material that may be of assistance to the defendant in the determination of those issues and in assisting both parties to focus on the evidence needed for that determination.

143 The function of the defence statement in the 1996 Act's scheme of mutual disclosure raises three main questions: first, as to the fairness of making secondary prosecution disclosure conditional on it; second, the particularity of the information about the defence case that it should give; and third, what, if any, proper and effective sanctions there should and could be for failure to serve it.

144 It has been argued that the linking of a defendant's right to full prosecution disclosure with his disclosure of the issues he intends to take in his defence violates his right to a fair trial under Article 6.[151] Plotnikoff and Woolfson[152] questioned the fairness of the scheme in this respect. They referred to "widespread dislike of the legislation and rejection of the idea" that there should be such linkage, "often manifested in unwillingness of the defence to submit meaningful defence statements and judicial reluctance to deny defence applications to see unused material". They commented that these attitudes frustrated the working of the scheme regardless of the performance of the police and the Crown Prosecution Service. That process of reasoning led them to urge a debate "on whether the principles upon which the Act is based remain valid and compatible with the European Convention of Human Rights". They hoped that the outcome might produce a consensus on what it is reasonable, as distinct from practicable, to require by way of defence disclosure. There are, it seems to me, at least two obstacles to this Utopian goal. First, there is the natural reluctance of many criminals seeking to avoid just conviction to co-operate with a system that would fairly and efficiently secure it. Second, there are many defence practitioners with an imprecise view of the principle of the defendant's right of silence as it applies in this context. The courts may well be asked to consider the matter before long. But the limited and somewhat general observations on the subject from Strasbourg so far,[153] do not, in my view, amount to condemnation of a system linking and limiting prosecution disclosure to the issues in play. Provided that the issues or likely issues in a criminal case are broadly interpreted, I see no canon of fairness, Article 6 or otherwise, for not tying disclosure to materiality.

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[151] see, eg Tim Owen, QC, *The Requirements of the ECHR and the PII Problem,* a paper given at a Justice Seminar on 12th June 2000 for the Review

[152] *A Fair Balance?* op cit

[153] see eg the Commission's assertion in *Jespers v Belgium* 27 DR 61, at paras 51-56 of the accused's right to know of the results of investigations "throughout the proceedings" and wide-ranging third party disclosure; and *Bendenoun v France* 18 EHRR 54; cf *R v Brown (Winston*) [1998] AC 367, per Lord Hope at pp 374F – 377F

145 It is difficult to pin down what, in practice, the 'right of silence' is for this purpose. Lord Mustill, in his illuminating analysis of the expression in *R v DSFO, ex p Smith,*[154] said that it "arouses strong but unfocused feelings" but does not "denote any single right; rather it refers to a disparate group of immunities, which differ in nature, origin, incidence and importance, and also as to the extent to which they have already been encroached upon by statute". The Philips Royal Commission considered the question[155] and a number of options, one of which was for the judge to determine, on the application of the defence, what should be disclosed. However, it felt unable to recommend it:

> "… if the judge were to be able to determine what would be relevant or useful the defence would first have to disclose its case. Such a requirement seems to us inconsistent with the central feature of the accusatorial system that it is for the prosecution to prove guilt without assistance from the defence".[156]

146 For the same reason of principle, and also of practicability, the Philips Royal Commission rejected any formal obligation of general disclosure by the defence. But it did recommend the extension of requirement of advance notification applicable to alibi to other specific defences, such as those depending on medical or other scientific evidence, which, as a result of taking the prosecution by surprise, would otherwise cause inconvenience and expense of adjournments to enable the prosecution to investigate them.[157]

147 The Philips Royal Commission's solution was that the prosecution should take responsibility for disclosure, adopting as the test whether the material would "have some bearing" on the alleged offences or surrounding circumstances.[158] However, it observed in the concluding paragraph of its treatment of the subject:

> "Our concern with disclosure has been partly motivated by our wish to improve the efficiency of the prosecution process. And in this context we believe that the defence may be more willing to make elements of their case known once a system for fuller and more certain prosecution disclosure has developed."[159]

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[154] [1993] AC 1, HL, at 30E
[155] paras 8.14-8.23
[156] para 8.19
[157] paras 8.20-8.22
[158] paras 8.14-8.19 and 9.11
[159] para 8.23

148 The Runciman Royal Commission, by a majority, took the same line as the Philips Royal Commission on an accused's right to silence when questioned by the police.[160] But it was more robust in its approach to the question of some disclosure of the defence in indictable cases.[161] It set out its stall at an early stage of the Report,[162] namely that it regarded as fundamental to both adversarial and inquisitorial systems that the prosecution had the burden of proving guilt, but did not regard that as incompatible with requiring a defendant to disclose at an early stage an outline of his proposed defence and/or to indicate that he would not call any evidence. It said:[163]

> "… 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."

It added:[164]

> "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."
>
> "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 defence until the last possible moment in the hope of confusing the jury or evading investigation of a fabricated defence."

149 Such a procedure had long applied to alibi defences.[165] Shortly before, it had been extended to require notification of any proposed defence expert

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[160] Chapter 4 para 22
[161] with the exception of Professor Zander, for whose note of dissent, see pp 221--235
[162] para 15
[163] Chapter 4, para 24
[164] Chapter 6, paras 2 and 59
[165] Criminal Justice Act 1967, s 11; now subsumed in the defence statement requirements of the 1996 Act

evidence.[166] And, in serious fraud cases, if the judge so orders, a defendant must give the court and the prosecution a statement of general nature of the defence and the principal issues raised.[167]

150 Professor Michael Zander, the dissenting member of the Runciman Royal Commission on this and two other matters, considered that to require a defendant to indicate the general nature of his defence was wrong in principle and, given the way the system works, would cause inefficiency. As to principle, his view appears to have depended on his equation of a defendant's right of silence to a right, not only to make the prosecution prove all or some of its case, but to leave it guessing until the last minute precisely what parts he requires it to prove. He said:

> "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 is going to make. They are often significantly different.
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> 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 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."[168]

151 As to efficiency, his argument was that there was little or nothing that could be done to improve case management measures of this sort because of defence counsel's inefficient ways of working and their likely uncooperative attitude to any such reform, and because of a reluctance by the judiciary to enforce it. But even in 1993 both of those stands had a certain period flavour to them, treating the defendant's right to silence more as a right of non co-operation with the criminal justice process than of putting the prosecution to proof of his guilt, and a defeatist attitude[169] to the advantages to all, including the defendant, of efficient and speedy preparation for trial.

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[166] Police and Criminal Evidence Act 1984, s 81 and the Crown Court (Advance Notice of Expert Evidence) Rules 1987
[167] Criminal Justice Act 1987, ss 9 and 10
[168] Note of Dissent, paras 1 and 2, p 221
[169] later manifested again in relation to Lord Woolf's Civil Justice reforms

152 The Runciman Royal Commission, however, had in mind only the barest outline when it spoke of defence disclosure, that is, a simple ticking of a form containing a number of standard defences, such as 'accident', 'self-defence', 'no dishonest intent' etc, though it allowed for the possible need for more tailored indications in complex cases.[170] However, it considered that the disclosure requirements of the 1987 Act for serious fraud cases, namely a written statement setting out the general nature of the defence and the principal issues taken, were too sparse, and recommended more detailed information in the form of a certified statement of what facts in the prosecution statement were denied or admitted and what facts were neither denied nor admitted in advance of proof. It recommended, in addition to costs sanctions where defence lawyers were at fault, the use, where appropriate, of contempt powers against the defendant personally.

153 It seems to me that the 1996 Act was logical in principle in treating the test of ultimate prosecution disclosure as dependent on its materiality to the issues in the case. Only the defendant knows for sure what issues he is going to take. They may be obvious enough to the prosecution at the stage of primary disclosure or they may be a mystery to all until the defendant gives some post-charge indication. I do not see it as an attack on the prosecution's obligation to prove its case and the defendant's right of silence that he should be required to identify the allegations or facts that he intends to put in issue. It does not require him to set out his defence other than by reference to what he disputes. If he intends to put the prosecution to proof of everything, he is entitled to do so. But if his intention is, or may be, to take issue only on certain matters, the sooner he tells the court and the prosecutor the better, so that both sides knows the battleground and its extent.

154 Whilst acknowledging the apparent logic of such an approach, some contributors to the Review argued that it is naïve and that the interests of justice justify a right of defence by ambush as a protection against abuse of public authority. In particular, they suggested that a defendant may be justified in holding back his defence since it may give the prosecution an opportunity before trial to strengthen or change a weak case[171] or to fabricate or falsify evidence to overcome it. To the extent that the prosecution may legitimately wish to fill possible holes in its case once issues have been identified by the defence statement, I can understand why, as a matter of tactics, a defendant might prefer to keep his case close to his chest. But that is not a valid reason for preventing a full and fair hearing on the issues canvassed at the trial. A criminal trial is not a game under which a guilty defendant should be provided with a sporting chance. It is a search for truth in accordance with the twin principles that the prosecution must prove its case

[170] Chapter 6, para 68
[171] considered by the Runciman Royal Commission, Ch 6, paras 61-62 and 65

and that a defendant is not obliged to inculpate himself, the object being to convict the guilty and acquit the innocent. Requiring a defendant to indicate in advance what he disputes about the prosecution case offends neither of those principles. Equally untenable is the suggestion that defence by ambush is a permissible protection against the possibility of dishonesty of police and/or prosecutors in the conduct of the prosecution. It may not be "the function of law to trust those who exercise lawful powers."[172] But a criminal justice process cannot sensibly be designed on a general premise that those responsible for law are likely to break it. In those cases where, unfortunately, the police or other public officers are dishonest, the criminal trial process itself is the medium for protection and exposure.

155 Another argument is that failure to provide all non-sensitive unused material from the start may deprive an innocent defendant of a legitimate defence where, because of his ignorance of what has occurred, he cannot advance an explanation of the prosecution evidence consistent with innocence.[173] But such argument confuses the nature of the defence, in the sense of why the defendant says he is not guilty, with the means available to him to advance that plea. In most cases the defendant knows why he says he is not guilty and the issues that he will take in his forthcoming trial. Even in the rare case where a defendant may not know from the start whether he has committed the offence, he can properly take broad issue with the prosecution case in his defence statement. The broader the issue the more secondary disclosure to which it will entitle him.

156 In my view, there is a sound need for a defence statement as an aid to early identification of the issues and, in consequence, an efficient process and one that is fair both to the defence and to the prosecution as the representative of the public interest. Whether it is seen as a condition of further disclosure and thus, as a means of securing a defendant's co-operation in the trial process, or simply as a logical step in the identification of the issues in the case and hence of the materiality of any as yet undisclosed material, is an arid debate. Looked at in that light, there is no good reason for the unease expressed by some at the statutory link between prosecution and defence disclosure. The unease, it seems to me, owes less to that logical link than to the perceived difference in the tests of primary and secondary disclosure, that is, the notion that primary disclosure is a limited first instalment and that secondary disclosure is a full entitlement that the defendant has to earn by co-operating with the system.

157 The Act provides, in section 11, a sanction for failure or where he seeks to advance a defence at trial inconsistent with that indicated in his defence

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[172] *pace* Roger Leng, *Disclosure: A Flawed Procedure,* in a paper at a Justice Seminar on 12th June 2000 for the Criminal Courts Review
[173] ibid

statement. The court or jury may draw such inferences from it as appear proper on the issue of guilt, though not seemingly on the issue whether there is a case to answer. However, the court or jury may not convict him solely on the strength of such inference. Where the defendant advances a defence inconsistent with his defence statement, the court must have regard to the extent of the inconsistency and any justification for it.

158 As I have indicated, the reality is that many defence statements do not comply with the requirements of the 1996 Act. They do not set out in general terms the nature of the defence or the matters on which issue is taken with the prosecution case and why. Often defence statements amount to little more than a denial, accompanying a list of material that the defence wish to see and without explanation for its potential relevance to any issues in the trial. Most judges, Crown Prosecution Service representatives or practitioners who have commented on the matter in the Review and to the Plotnikoff and Woolfson Study,[174] have said that the statements, in the form in which they are generally furnished, do little to narrow the issues at, or otherwise assist preparation for, trial. Even when a request for secondary disclosure is accompanied by some semblance of a defence statement, this may be an occasion for further wrangling over disclosure, followed by recourse to the court. More often, and for a quiet life, prosecutors provide, and judges suggest that they should provide, the further material requested even though the prosecution cannot see how it could possibly assist the defence case.

159 The 1996 Act places the responsibility for giving a defence statement on the defendant, not on his legal representative acting on his instructions. However, the time limit of 14 days from receipt of primary disclosure is tight, and the norm is for his solicitor, possibly without consulting counsel, to draft it on the defendant's behalf, often with only the barest of instructions. There is thus little scope for use of the sanction of adverse inference to encourage proper use of the defence statement. Even with the best of defence intentions, primary disclosure by the prosecution may have been defective or late; defendants, for all sorts of reasons, may not give their solicitors any or sufficient instructions, or do so in time; their solicitors may misunderstand their instructions;[175] and neither may focus sufficiently on the issues in the case. Judges are likely to be cautious before permitting a jury to draw adverse inferences where such circumstances are suggested or, at the very least, hedge their permission with emphatic warnings. And, as the editors of the current edition of Blackstone's Criminal Practice observe,[176] there is the added complication in the case of an inconsistent defence of the likely need for a

[174] *A Fair Balance?* p 13
[175] see eg *R v Wheeler* (2000) 164 JP 565, CA
[176] 2001 edition, para D6.10

'Lucas' direction as to whether the defendant deliberately lied in his defence statement.[177]

160 More effective might be a known willingness on the part of the court to adjourn a trial for the period necessary to enable the prosecution to meet any surprise defence. But this is not always easy when there are a jury and witnesses and others to consider, and it is also expensive. Of course, if the surprise defence surfaces only after the close of the prosecution case, the prosecution, with the leave of the court, may deal with it by calling evidence in rebuttal.

Secondary disclosure

161 There is much criticism of the different tests for primary and secondary disclosure. The difference between material that "might undermine" the prosecution case and that which "might reasonably be expected to assist" the defence is largely a matter of semantics. At the primary stage the prosecution knows what its own case is and what may undermine it. It may or may not have a good idea of the defence case, but cannot, until it is told, be sure of it. The test of materiality in each case should be the same; only the factual basis upon which it is determined is different. However, the words in the statutory test[178] for primary disclosure, "might undermine", invite a search only for material that might have a fundamental effect on the prosecution case. It is true that the apparent rigour of the test has been softened in the Code of Practice[179] and Attorney General's Guidelines[180] to encompass any material that might cast doubt on the prosecution case, or any part of it, or have an adverse effect on its strength. However, the word 'undermine' in the statutory formulation of the test has tended to mislead disclosure officers and prosecutors into taking too narrow a view of what should be disclosed at that stage and wrongly to withhold information on that account.

162 This tendency has been aggravated by the belief, fostered by the fact that only the secondary disclosure test includes the word 'reasonably', that the test at the primary stage is subjective whereas at the secondary stage it is objective. But fairness and common sense demand that the decision as to disclosure, at whatever stage and in whatever terms, should be reasonably based in the light of the knowledge of the disclosure officer and prosecutor as to what might be material to the issues as then known or contemplated. The fact that they may have less knowledge about that at the primary stage should not relieve them

[177] *R v Lucas* [1981] QB 720, 73 Cr App R 159, CA ; and *R v Burge and Pegg* [1996] 1 Cr App R 163, CA
[178] 1996 Act, s 3(1)(a)
[179] para 7.3
[180] paras 36-38

from an obligation to act reasonably in their light of that knowledge. In my view, the differently formulated tests for disclosure, suggesting a subjective and narrow approach at the primary stage and a broader and objective one at the secondary stage, are logically indefensible, confusing and the cause of much unnecessary pre-trial dispute and delay. They are widely condemned by judges, practising and academic criminal lawyers and many others involved or interested in the pre-trial process.

Defects of the present system

163 The Crown Prosecution Service Inspectorate, in its Thematic Review of the Disclosure of Unused Material found that the 1996 Act was not working as Parliament intended and that its operation did not command the confidence of criminal practitioners. It highlighted: the failure of police disclosure officers to prepare full and reliable schedules of unused material; undue reliance by the prosecutors on disclosure officers' schedules and assessment of what should be disclosed; and "the awkward split of responsibilities, in particular between the police and the Crown Prosecution Service",[181] in the task of determining what should be disclosed. The Inspectorate's principal recommendations were for greater involvement of prosecutors in the collation and examination of unused material and, from the start, in deciding on what should be disclosed; more involvement of counsel in the prosecution's duty of continuing review of unused material; and firmer reaction by prosecutors to no or inadequate defence statements. In making those recommendations, the Inspectorate acknowledged that, if implemented, they would have "very significant resource implications" for the Crown Prosecution Service and the police. More prosecutors would be needed to spend more time examining more material and deciding on disclosability, and police officers would have to copy more material than they do at present.

164 Plotnikoff and Woolfson, covering much the same ground, confirmed most of these all too apparent defects. In their opening conclusion they said:

> "Our findings confirmed the conclusion of the CPS Inspectorate's Thematic Review that poor practice in relation to disclosure was widespread. The study also revealed a mutual lack of trust between the participants in the disclosure process and fundamental differences of approach to the principles that underpin the CPIA. There is enormous scope to improve and monitor the working practices of all those involved…".[182]

[181] para 13.2
[182] *A Fair Balance?* p19

165 They found that government objectives for improvement in efficiency had not been achieved; that, in the Crown Court, the average length of trial had not fallen as hoped and that the scheme was expensive. It had been expected that it would be 'cost-neutral' for the criminal justice system, but in fact it was so resource intensive that it cost the Crown Prosecution Service as much or more than it saved the police and produced no identifiable, significant savings for the courts. To remedy its inadequacies would, they noted, require spending a lot more money on training and other resources. Despite their finding of widespread shortcomings in disclosure officers' unused material schedules, they disagreed with the Inspectorate's recommendation of concentrating more responsibility on prosecutors for examination of unused material and determination of its disclosability:

> "… we believe that it would be a backward step to remove responsibility from the police for decisions on disclosability …. The Code sets out for the first time the investigator's responsibility to pursue all reasonable lines of enquiry whether these point towards or away from the suspect. The ability to recognise material which may undermine the prosecution or support the defence is fundamental to this duty. Understanding relevance is crucial in deciding what items should be retained and recorded in the first place, surely a task that will fall to the police whatever disclosure regime is in place".[183]

166 And they estimated that, if the Crown Prosecution Service were to undertake the examination of all unused material, it could or would cost an additional £30 million a year and that, if defence lawyers also were to do so, it would cost the legal aid fund at least as much again.[184] Their solutions were to subject trained police personnel "to checks and balances in the form of proper quality assurance within the force, meaningful review by the Crown Prosecution Service and scrutiny in the courts…,formal feedback when things go wrong and training regimes…[to] rectify poor practice when it appears".[185]

167 To summarise, the main concerns about the disclosure provisions of the 1996 Act are: a lack of common understanding within the Crown Prosecution Service and among police forces of the extent of disclosure required, particularly at the primary stage; the conflict between the need for a disclosure officer sufficiently familiar with the case to make a proper evaluation of what is or may be disclosable and one sufficiently independent of the investigation to make an objective judgement about it; the consignment of the responsibility to relatively junior officers who are poorly trained for the task; general lack of staffing and training for the task in the police or the

[183] p 19
[184] pp 12 and 23
[185] p 19

Crown Prosecution Service for what is an increasingly onerous and sophisticated exercise; in consequence, frequent inadequate and late provision by the prosecution of primary disclosure; failure by defendants and their legal representatives to comply with the Act's requirements for giving the court and the prosecutor adequate and/or timely defence statements and lack of effective means of enforcement of those requirements; seemingly and confusingly different tests for primary and secondary prosecution disclosure; and the whole scheme, whether operated efficiently or otherwise, is time-consuming and otherwise expensive for all involved. The outcome for the criminal justice process is frequent failure to exchange adequate disclosure at an early stage to enable both parties to prepare for trial efficiently and in a timely way.

Possibilities for reform

168 Reform is needed, but it is clear that there is no consensus as to what form it should take. One suggestion is for a reversion to the common law position immediately before the 1996 Act of more extensive prosecution disclosure. Another, and more widely supported, suggestion is for automatic disclosure by prosecutors of all non-sensitive unused material held by the prosecution or to which it has access. This is strongly advocated by the Criminal Bar Association,[186] at least at the stage of secondary disclosure when a lawful defence has been indicated. It is also supported by many judges, the Law Society and JUSTICE as a pragmatic solution to the often difficult and – if it is done properly – time-consuming task for the police and the prosecutor of determining disclosability on the known and expected issues in the case. For those reasons, as I have mentioned, there has been a move in many areas towards informal and automatic disclosure of certain categories of documents, regardless of their potential materiality. And the Attorney General, in his recent Guidelines, has recommended blanket disclosure of large quantities of material seized by the police as a precautionary measure but unlikely, because of its source, general nature or for other reasons, ever to be relevant and therefore left unexamined.[187]

169 Routine partial disclosure may achieve ready savings in time and other efficiencies in relatively straightforward cases, but it still leaves considerable scope for present difficulties where material falls outside the categories for automatic disclosure, especially in large and complex cases involving wide-ranging and sophisticated investigation. Automatic disclosure of the police investigation "file", apart from sensitive material, in every case could involve enormous and unnecessary cost for the police and prosecutors, particularly in large cases where the "file" may be spread among a number of computers and between various agencies whose assistance the police may have sought. Such

[186] in its submission to the Review
[187] para 9

savings as might be made in the present task of identifying documents disclosable by reason of their potential materiality would in many instances be eclipsed by the costs of compilation by the prosecution and of examination by the defence of vast volumes of irrelevant material.

170 In my view, there is scope for an adoption of partial routine disclosure of non-sensitive unused material, but at the primary stage rather than, as recommended by the Crown Prosecution Service Inspectorate[188] at the secondary stage. It could include certain common categories of document, for example, crime reports, incident report books, police officers' notebooks, custody records, draft versions of witness statements where the draft differs from the final version and experts' reports. It could also include, as the Criminal Bar Association have suggested,[189] certain types of material by reference to their subject matter as distinct from the category of document on which it is recorded.

171 For material outside the categories for routine disclosure, I favour building on and improving the present system of two stage prosecution disclosure of information relevant to the issues in the case, coupled with a defence statement identifying those issues to the extent that they are not otherwise apparent to the prosecutor at the outset. The principle of the scheme is logical and fair – logical in that relevance of information depends on what is to be in issue – fair in that all that is required of the defendant is to say what he puts in issue. However, for the reasons I have given, the present differently expressed tests of relevance for the two stages of disclosure are not logical and are capable, in their application, of being unfair. They should be replaced with a common test. The precise formulation of the test would be for others, but I suggest that it should be more precise than that suggested by the Runciman Royal Commission of "all material relevant to the offence, the offender or to the surrounding circumstances".[190] I believe that it should be anchored to the issues in the case as the police and prosecutor know or believe them to be, for example, "material that, in the prosecutor's opinion, might reasonably affect the determination of any issue in the case of which he knows or should reasonably expect". A more readily understood, though tautologous way of putting it, would be "material which in the prosecutor's opinion might reasonably weaken the prosecution case or assist that of the defence". [191] Such a test could be supplemented by a non-exhaustive list of illustrations of its application of the sort presently contained in the Attorney General's Guidelines,[192] including for example, whether it might assist in cross-examination of prosecution witnesses or in applications to exclude

[188] *Thematic Review of Disclosure*, para 475
[189] p 12 of its submission to the Review
[190] Chapter 6 para 51
[191] ie reflecting the present glosses on the statutory test provided in the Code of Practice and the Attorney General's Guidelines
[192] paras 37 and 40

evidence or for a stay of the proceedings, or indicate a line of enquiry that might not otherwise have occurred to the defence.

172 There remains the problem of who is to have effective control - as well as ultimate responsibility, which already lies with the prosecutor - for determination of what is disclosable. As I have said, the system could be coupled with automatic disclosure of a wide range of categories of documents common to most prosecutions and already covered in the many existing informal initiatives. However, that would still leave a need: 1) for honest and competent recording and retention by the police of all unused material gathered and generated in the investigation; and 2) competent and independent evaluation of material requiring disclosure at each stage.

173 As to the former, there are many who believe that one of the greatest flaws of the scheme of disclosure continued in the 1996 Act is the trust that it reposes in the honesty, independence and competence of investigating police officers. Roger Leng, in a contribution to the Review, observed that "there is no historical justification for investing police and prosecutors with this degree of trust, if it can be avoided".[193] However, as he acknowledged, in the task of recording and retention of material collected in the course of investigation, there is little practical alternative. It is difficult to see how it can be taken away from the police or an officer involved in the particular investigation, whatever may said about the next stage, decisions about disclosability. To bring in some person from outside the police or the investigation team for this purpose or to involve the court routinely in some sort of examination of its own, as some have suggested,[194] could considerably delay and encumber trials. And it would be impractical and expensive and would duplicate the role for which an independent prosecuting authority, if properly resourced, is best suited.

174 Nevertheless, failure of the police, for whatever reason, to identify for the prosecutor all available and potentially disclosable material is a great danger to justice. The Court of Appeal, in a public interest immunity case last year, which had gone badly wrong for that reason, stressed the need for scrupulous accuracy in the information provided by the police.[195] Before considering 'farming out' the exercise to some body independent of the police or of the investigation team, with all the practical difficulties that that would involve, I believe that the present system is capable of significant tightening up in a number of ways. First, there should be statutory guidelines for recording,

[193] see eg Roger Leng, *Disclosure: A Flawed Procedure*, a paper given at a Justice Seminar on 12th June 2000 for the Criminal Courts Review
[194] see eg John Epp, *Encouraging Police Compliance with the Law of Disclosure,* [2001] 5 E & P, 147
[195] see editorial comment on *R v Jackson* [2000] Crim LR 377, at 379

retention and collation of material arising in an investigation as it proceeds.[196] Second there should be a nationally approved or agreed system of thorough training for that purpose. Third, there should be a rigorous system of spot 'audits' by HM Inspectorates of Constabulary and/or of the Crown Prosecution Service to encourage compliance. Fourth, this should be supplemented by prosecutors' rigorous observance of their own professional duty to check the police schedules against the witness statements and unused material for any likely categories of material that may have been omitted. A major part of this exercise would be, as the Criminal Bar Association has put it,[197] to test the comprehensiveness of the material against the categories a prosecutor would expect to find scheduled, given the known circumstances of the case and its background. And, fifth, failure of the police properly to schedule and to make available to the prosecutor all unused material could be a police disciplinary offence.

175 The increasing use of logging all material gathered or generated in the course of an investigation should remove some of the difficulties in this essentially mechanical but hitherto burdensome job for busy policemen. Whilst they should have an appreciation of the importance of their task to questions of disclosability, that need not be part of their responsibility as it is at present. For that reason I suggest that the officer in the case given this responsibility should no longer be called a 'disclosure' officer, but a 'collation' officer. The prosecutor, if given the time as well as the responsibility for assessing the completeness of the investigation material collated and scheduled by the police, should be as efficient as any other body within or outside the police, or the court, in making an independent check.

176 It follows that, despite the view to the contrary of Plotnikoff and Woolfson,[198] and the assistance given by the Attorney General in his recent Guidelines, I consider that there should be a shift in initial, as well as ultimate, responsibility from the police to prosecutors for determination of disclosability. Assessing the materiality of information to issues or likely issues in a criminal trial - as distinct from gathering and scheduling all unused material in an investigation - is a lawyer's task, not that of an, often relatively inexperienced investigative officer perfunctorily trained for the purpose. It is one of the most critical tasks in the preparation of a case for trial, and one that will call for a much more sure and speedy touch with the quicker pre-trial process of cases at all levels now under way. It is also essential for the prosecutor's fair conduct of the prosecution case before and at trial, not least because of his continuing duty to review the adequacy of disclosure.[199] He

[196] The Joint Operational Police Instructions (JOPI) and the 1996 Act Code of Practice; the CPS Inspectorate's Report on Disclosure, at para 3.26 et seq, stated that was non-observance of JOPI and their ambiguity as non-statutory guidelines which led to most of the failings

[197] in its Response in the consultation process on the draft Attorney General's Guidelines on Disclosure

[198] see para 165 - 166 above

[199] 1996 Act, s9

should also take steps, through a clearly and simply devised procedure, of which he should keep a record, to obtain and examine and/or otherwise identify with the degree of detail appropriate to the material and the case, all unused material, including in the examination an assessment of its likely completeness having regard to the known extent of the investigation. Whilst I consider the making of a record important as a routine discipline and working reference, I do not think he need be asked to certify it.

177 I should pause to say something of the critical role of the prosecuting advocate as adviser and, as appropriate, decision-maker at the outset of and throughout the progress of a criminal prosecution. His responsibility which, crucially, continues throughout the trial, includes attention to what the justice of the case demands by way of disclosure to the defence. As the Criminal Bar Association have noted in their submission in the Review, he can only discharge that responsibility if he is aware of the existence of potentially disclosable material as previously known issues are developed evidentially and new ones appear in the course of the trial. He must also have this information if he is to comply with his duty under paragraph 3.4 of the Code to advise on further lines of enquiry, for example, as to material held by third parties. He should be instructed and involved in any decisions as to disclosure at an early stage, especially in cases where there are difficult disclosure issues. He should also be asked to advise on the adequacy of the defence statement with a view to securing appropriate secondary disclosure and to seek further particulars where it is plainly inadequate. As in the case of the Crown Prosecution Service or other prosecuting authority, I do not consider that prosecuting advocates should be required to certify their compliance with what are essentially part of their professional obligations.

178 I have not ignored more radical suggestions that the initial decision as to disclosability should be taken out of the hands of the prosecutor, as well as those of the police. Roger Leng suggested, for example, that it should be the responsibility of the defence lawyer and that to leave it with the prosecution violates Article 6(3)(b) and (c) ECHR, which entitle a defendant to "adequate time and facilities for the preparation of his defence" and to "legal assistance of his own choosing".[200] I do not consider that it is possible to draw from Article 6 an absolute defence right to prosecution disclosure of all material, relevant or not, by conflating in that way two separate provisions of the Article. The House of Lords have recently emphasised[201] that the courts should not parse each element of Article 6 and apply it individually to each stage of procedure. The test is the over-all fairness of the process and, in applying that test the courts are entitled to have regard to proportionality.

[200] *Disclosure: A Flawed Procedure*
[201] see *R v Lambert* [2001] 3 WLR 206, HL, per Lord Clyde at 259, para 159

179 In my view, the police and prosecutors should continue to work together where necessary, but the prosecutor should examine the file and the material at the earliest possible time and make the initial decisions as to disclosability, rather than, as now, spend much time in reviewing and, often, overruling those of the officer. Although, as Plotnikoff and Woolfson have pointed out, the police would necessarily retain prime responsibility for assembling the file, that is, for retaining and recording all material gathered or generated in the investigation, they should be relieved of the additional and initial responsibility of determining what is disclosable. Although Plotnikoff and Woolfson suggest that the likely additional cost of such concentration of disclosure responsibility in the hands of the prosecutor would be an additional £60 million a year in prosecution costs and defence legal aid fees, they do not indicate the basis for that estimate. And, as I have said, the whole exercise could in the long run be significantly simplified and made less expensive by use of information technology – and that includes transmission of the material to and examination of it by the defence. Whatever the accuracy of the Plotnikoff and Woolfson figures, the likely efficiency savings to the criminal justice system as a whole and release of police officers to concentrate more on their investigative function would be significant. In any event, full and timely prosecution disclosure is so fundamental to the fairness and efficiency of the criminal justice process that if it costs more to do it properly, it is a price well worth paying.

180 As to the defence statement, I have already indicated that the present requirements, if observed, seem to be adequate to enable identification of the issues, not only for the purpose of securing disclosure of any, so far, undisclosed unused material that might be relevant, but also for the purpose of determining the scope and form of prosecution evidence required for trial.[202] I have considered whether to recommend any additional requirements, for example, a general obligation to identify defence witnesses and the content of their expected evidence similar to that where the defence is alibi or it is intended to call expert evidence for the defence. Whilst, as a matter of efficiency, there is much to be said for them, many would find them objectionable as going beyond definition of the issues and requiring a defendant to set out, in advance, an affirmative case. And they would be difficult to enforce.

181 But what if the prosecution moves the goal posts by amending the charge late in the day? The most recent Crown Prosecution Service Inspectorate Report found frequent weaknesses in the Services' review of cases going to the Crown Court, in particular, that the quality of instructions to counsel was generally low, that too many indictments needed amendment and that there had been little improvement in the management of its files.[203] And what if the

[202] paras 141-160 above
[203] Chief Inspector's Annual Report 1999-2000, paras 3.9 and 3.12

prosecution does not provide adequate or timely primary disclosure, or if, regardless of the form and time of it, the defence still do not comply with their obligations in this respect? The courts can and do penalise the prosecution in costs for their failure. But where the failure lies with the defence, as it does in many cases,[204] few prosecuting counsel are asked to advise on the non-compliance and few raise it with the court. There can be no question of the court punishing a defendant by depriving him at trial of the right to advance an unannounced defence and, as I have said, rarely by the drawing of adverse inferences of guilt. It would often be difficult to determine whether it was the defendant's or his lawyers' failure to comply and, where the issue is as to adequacy of a served defence statement, the matter could degenerate into a 'pleading' point.

182 As to financial penalties, it could be unfair and potentially prejudicial to the proper conduct of the defence, to penalise the lawyer, say by way of a wasted costs order or reduction in publicly funded fees,[205] for what might be his client's neglect or refusal to take advice. And to seek to punish a defendant in this way, say by fining or imprisoning him for contempt of court, would in most cases be both impractical and counterproductive to the fairness and efficiency of the trial process. Attempting, save in extreme cases, to solve the problem by imposing penalties on defence lawyers or defendants personally would also encourage satellite litigation. In either case the question of fault for the court could also be muddied by defence complaints of inadequacy of primary prosecution disclosure or change of charge hindering the provision of an adequate defence statement.

183 There are other and better avenues to making the defence statement requirement effective. Though even they are limited in this imperfect field of criminal litigation, with many defendants incapable or unwilling to co-operate with the system and whose hard pressed lawyers often have difficulty in obtaining instructions and, where publicly funded, are inadequately paid for preparatory work.[206] The first, as I have urged, is to provide full and timely prosecution disclosure, aided with modern communications technology. The second, as I have also urged, is to pay publicly funded defence lawyers a proper and discrete fee for preparatory work, including taking instructions from the defendant whether in custody or on bail, and the drafting of a defence statement. This may sound a basic requirement, but, for the reasons I have given, is not the case today.[207] The third is to make defendants on remand in custody more accessible to their lawyers than they are now. As I have shown earlier,[208] the limited visiting times are often difficult for busy criminal advocates and the visiting periods too short for taking adequate

[204] in Plotnikoff and Woolfson's study about 40% of the defence statements contained only a denial of guilt
[205] the latter would also be discriminatory in that no such penalty would be available in private paid defences
[206] see paras 13 - 27 above
[207] see Guidance of the Professional Conduct and Complaints Committee of the Bar Council of 24th September 1997
[208] see paras 28-33 above

instructions, a product largely of Prison Service budgetary constraints taking priority over the needs of the criminal justice system as a whole. Much could be done to meet this problem by the introduction of lawyer to prison video-conferencing facilities.[209] The fourth is for the prosecuting advocate, routinely, to advise on the adequacy of the defence statement and, where he considers it is inadequate, to request particulars of it, seeking a direction from the court if necessary. The fifth is, through professional conduct rules and guidance, training and, in the rare cases where it might be appropriate, discipline, to inculcate in criminal defence practitioners and, through them, their clients the principle that a defendant's right of silence is not a right to conceal in advance of trial the issues he is going to take at it. Its purpose is to protect the innocent from wrongly incriminating themselves, not to enable the guilty, by fouling up the criminal process, to make it as procedurally difficult as possible for the prosecution to prove their guilt regardless of cost and disruption to others involved.

184 Finally, reform of the law should be in the form of a single and simply expressed instrument. The present combination of the cumbrously drafted 1996 Act and Rules, the Code, the Attorney General's Guidelines and the Joint Operational Police Instructions is confusing and hard work for anyone to master, not least busy policemen and prosecutors. This is another job for a Criminal Procedure Rules Committee.

Accordingly, I recommend:

- **retention of the present 1996 Act scheme of material disclosure in particular, of two stages of prosecution disclosure under which the second stage is informed by and conditional on a defence statement indicating the issues that the defendant proposes to take at trial;**
- **replacement of the present mix of primary and subsidiary legislation, Code, Guidelines and Instructions by a single and simply expressed instrument setting out clearly the duties and rights of all parties involved;**
- **the same test of disclosability for both stages of prosecution disclosure providing in substance and, for example, for the disclosure of "material which, in the prosecutor's opinion, might reasonably affect the determination of any issue in the case of which he knows or should reasonably expect" or, more simply but tautologically, "material which in the prosecutor's opinion might weaken the prosecution case or assist that of the defence";**

[209] see paras 259-261 below

- **in addition, automatic primary disclosure in all or certain types of cases of certain common categories of documents and/or of documents by reference to certain subject matters;**
- **retention by the police of responsibility for retaining, collating and recording any material gathered or inspected in the course of the investigation; police officers should be better trained for what, in many cases, may be an extensive and difficult exercise regardless of issues of disclosability, and subject, in their exercise of it to statutory guidelines and a rigorous system of 'spot audits' by HM Inspectorates of Constabulary and/or of the Crown Prosecution Service;**
- **removal from the police to the prosecutor such responsibility as they have for identifying and considering all potentially disclosable material;**
- **the prosecutor should retain ultimate responsibility for the completeness of the material recorded by the police and assume sole responsibility for primary and all subsequent disclosure;**
- **the requirement for a defence statement should remain as at present, as should the requirement for particulars where the defence is alibi and/or the defence propose to adduce expert evidence;**
- **there should be more effective use of defence statements facilitated by the general improvements to the system for preparation for trial that I have recommended, and encouraged through professional conduct rules, training and, in the rare cases where it might be appropriate, discipline, to inculcate in criminal defence practitioners the propriety of and need for compliance with the requirements;**
- **a clearly defined timetable for each level of jurisdiction for all stages of mutual disclosure unless the court in any individual case orders otherwise; and**
- **the Prison Service should introduce national standards for access to due process for remand prisoners that ensure that they experience no greater difficulty than bailed defendants in preparing for their trials.**

Third party disclosure

185 The prosecutor's obligation under the 1996 Act is to disclose material "which is in his possession, and came into his possession in connection with the case for the prosecution against the accused" or which he has inspected in connection with that case.[210] In the case of material not in the possession of the police but which they or the prosecutor believe to be in the possession of a third party and of possible relevance, the Attorney General's Guidelines require them to take reasonable steps to identify and consider it.[211] Where such material is with Government departments or other Crown bodies, there are established procedures for them to co-operate in this respect.[212]

186 In the case of other third parties, agencies and individuals, for example local authorities, schools, hospitals and doctors, the guidance is that prosecutors and/or defendants should seek the co-operation of the third party concerned. This may involve extensive enquiries and considerable expense to third parties, in particular local authorities and various social services in child abuse cases, both in identifying relevant or possibly relevant material, and in considering its sensitivity. Commendably, in many areas the police have agreed protocols with all local social services departments[213] for fair and efficient working of what can be very complicated exercises in co-operation to secure informal disclosure of third party material. The Crown Prosecution Service Inspectorate, in its Report on its recent Thematic Review of Disclosure, recommended national or local protocols wherever possible.[214]

187 A major problem is late and unspecific requests by the defence for disclosure of third party material. Compliance is often difficult or impossible because of the short time available, the volume of material involved and the fact that those searching often do not know exactly what to look for because they do not know to what issues the request relates.

188 Failing agreement between the parties and third parties as to what should or can be disclosed (which may be because the third party is unwilling to go to the expense of what seems an extensive and pointless exercise and/or for reasons of public interest), the parties must seek the assistance of the court. But the only means of doing this is under the Criminal Procedure (Attendance of Witnesses) Act 1965 for securing the production of documents as evidence at court, a procedure that has been grafted onto the 1996 Act scheme of pre-trial disclosure of unused material. The applicant (prosecutor or defendant) must obtain a witness summons requiring the third party to attend and to produce document(s) at trial which the applicant believes are likely to be

[210] CPIA 1996, s 3
[211] paras 29-33
[212] *Giving Evidence or Information About Suspected Crimes: Guidance for Departments and Investigators*, Cabinet Office (March 1997)
[213] Plotnikoff and Woolfson, *A Fair Balance?* p 10
[214] para 8.32

material evidence. Such a summons can now, as a result of amendment made by the 1996 Act, also require production of the document(s) for inspection in advance of trial. If, on inspection, the applicant considers that they are not likely to be material evidence he can ask the court to discharge the summons. If he considers that the documents are likely to be material evidence, then, subject to provisions enabling the third party to challenge the validity of the summons or the likely materiality of the document(s), or to argue that they are not disclosable on public interest grounds, the summons remains in force and the third party must attend court with the documents. Such issues, though ostensibly about 'likely' material evidence, are, before trial, only about disclosure of documents to see if they are such or have some other forensic use. These issues should be put before the court at the earliest opportunity. All too often they surface late in the day, resulting in costly and disruptive delay for all concerned.

189 The problem with this adaptation of the 1965 Act procedure is that it is a mix of two quite separate requirements, namely a duty on a body or individual to attend court and produce as evidence documents considered to be "likely material evidence" with the prosecution's earlier obligation to disclose to the defence documents which it does not seek to adduce as evidence but which may be material to an issue in the case.[215] Its materiality could be such that the defence would wish to put the documents in evidence, but not necessarily; they could be material in suggesting a line of cross-examination of prosecution witnesses or of further enquiries. No doubt prosecutors, who use this procedure as an aid to discharging their duty of advance disclosure of unused material, interpret the term "likely material evidence" broadly, but it is unsatisfactory to require them to bend the words of the Act in that way.

190 In my view, statutory provision should be made for disclosure of third party documents potentially material to an issue in the case, regardless of their likely evidential character. Such an additional restriction on access to relevant matter in the hands of third parties is plainly inappropriate. No doubt, that is why the 1965 Act procedures, even as amended, are little used, and the police and concerned local agencies have turned instead to local protocols. Careful consideration should be given to devising a new statutory scheme for third party disclosure, including its cost implications, alongside and more consistently with the general provisions for disclosure of unused material. No doubt, its mechanics could be guided by the local protocols. Again, I suggest this is a task for a Criminal Procedure Rules Committee.

I recommend consideration of a new statutory scheme for third party disclosure, including its costs implications to all concerned, to operate alongside and more consistently

[215] see *R v Stratford Justices, ex p Imbert* [1999] 2 Cr App R 276, at pp 279-280

with the general provisions for disclosure of unused material.

Public interest immunity

191 The doctrine of public interest immunity enables the prosecution to withhold disclosure of material where, in the court's view, the public's interest in non-disclosure outweighs the defendant's interest in having full access to all relevant material. In reaching its decision the court must examine the material and consider the nature of the immunity claimed, the likely effect of its disclosure on the public interest, the sensitivity of the information in question and the degree to which it may assist the defence – the so-called "balancing exercise".[216] The public interest in the fair administration of justice always outweighs that of preserving the secrecy of sensitive material where its non-disclosure may lead to a miscarriage of justice.[217] That fundamental and well known common law test is reflected in the 1996 Act scheme of disclosure in its provision: "Material must not be disclosed … to the extent that the court, on an application by the prosecutor, concludes it is not in the public interest to disclose it and orders accordingly".[218]

192 The 1996 Act, reproducing the common law,[219] makes the court, not the prosecutor, the arbiter of what may be withheld from disclosure on the ground of the public interest or, as the Runciman Royal Commission recommended[220] and the 1996 Act Code of Practice describes and lists it, "sensitive material".[221] Where the prosecutor is not prepared, or is uncertain whether, to make voluntary disclosure because of the sensitivity of the material, the statutory procedure takes one of three possible forms.[222] First, and whenever possible, he should notify the defence of his intention to apply to the court for a ruling, and indicate at least the category of material in question. The court then holds a hearing at which both parties may make representations. Second, where the prosecutor considers that disclosure of the category of material would reveal what it would be contrary to the public interest to reveal, he should notify the defence of his intention to make an application, but not of the category of material the subject of it. The court then holds a hearing in the absence of the defence to determine whether they should be present and, if not, rules on the application. Third, in a highly exceptional case in which the prosecutor considers that even notification of an intention to make an

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[216] see Archbold, (2001 edition) para 12-44e
[217] see *R v Keane* (1994) 99 Cr App R 1, at 6
[218] in ss 3(6), 7(5), 8(5) and 9(8)
[219] *R v Davis, Johnson and Rowe* ; *R v Ward* ; and *R v Keane*
[220] Chapter 6, para 47
[221] paras 6.12-14
[222] s21(2) and the Crown Court (Criminal Procedure and Investigations Act 1996) (Disclosure) Rules 1997 (SI 1997 No 698), reproducing the procedure laid down by Taylor LJ in *R v Davis, Johnson and Rowe*, at 114

application would reveal too much to the defence, the prosecutor should apply to the court in the absence of, and without notice to, the defence. The court then considers whether either of the first two procedures should have been adopted and, if not, considers whether to order non-disclosure. Whichever of the three procedures is adopted, the court, if it orders non-disclosure, must keep its decision under review as the case progresses. In the magistrates' courts, the conflation of roles of magistrates as triers of fact and law has necessitated a variation of the scheme. An application by the prosecution to withhold material, if granted, may lead to the bench being disqualified and a new bench hearing the trial. But apart from that difference, the procedure is the same as that in the Crown Court.

193 The scheme that I have described is an improvement on what went before and has been generally welcomed on that account. But there is widespread concern in the legal professions about lack of representation of the defendant's interest in the second and third of the three forms of application, and anecdotal and reported instances of resultant unfairness to the defence.[223] This concern has been fuelled by the clear unease of the European Court of Justice as to whether, in the absence of the defence, hearings for such purpose are Article 6 compliant.[224] A suggestion, argued on behalf of applicants in Strasbourg[225] and widely supported in the Review, is that the exclusion of the defendant from the procedure should be counterbalanced by the introduction of a "special independent counsel". He would represent the interest of the defendant at first instance and, where necessary, on appeal on a number of issues: first, as to the relevance of the undisclosed material if and to the extent that it has not already been resolved in favour of disclosure but for a public interest immunity claim; second, on the strength of the claim to public interest immunity; third, on how helpful the material might be to the defence; and fourth, generally to safeguard against the risk of judicial error or bias.

194 In my view, there is much to be said for such a proposal, regardless of the vulnerability or otherwise of the present procedures to Article 6. Tim Owen QC, in a paper prepared for the Review,[226] has argued powerfully in favour of it. It would restore some adversarial testing of the issues presently absent in the determination of these often critical and finely balanced applications. It should not be generally necessary for special counsel to be present throughout the trial. Mostly the matter should be capable of resolution by the court before trial and, if any question about it arises during trial, he could be asked to return. If, because of the great number of public interest immunity issues now being taken in the courts, the instruction of special counsel for each would be

[223] see eg the report of a survey of the Criminal Bar Association and the Law Society, published in 1999 reporting serious failings in the system

[224] see *Rowe and Davis v UK* (2000) 30 EHRR 1; and *Fitt and Jasper v UK* (2000) 30 EHRR 441, in which the ECHR held, only by a narrow margin of 9 to 8 that ex parte hearings to determine PII claims do not violate Article 6

[225] in *Rowe & Davis v UK*

[226] *The Requirements Of The ECHR and The PII Problem* paras 20-22

costly, it simply indicates, as Owen has commented, the scale of the problem and is not an argument against securing a fair solution.

195 The role would be similar to that of an *amicus curiae* brought in to give independent assistance to a court, albeit mostly on appeal. In rape cases, where an unrepresented defendant seeks to cross-examine a complainant, the court must inform him that he may not do so, and should he refuse to instruct counsel, the court will appoint and instruct one.[227] After the decisions of the European Court of Human Rights in *Chahal* and *Tinnelly,*[228] the Government introduced such a procedure in immigration cases involving national security. Although such cases are extremely rare, it is sufficient that the principle of a 'third' or 'special' counsel being instructed on behalf of a defendant has been conceded in a number of areas.

196 The introduction of a system of special independent counsel could, as Owen has also noted,[229] in part fill a lacuna in the law as to public interest immunity hearings in the absence of a defendant appellant in the Court of Appeal, to which the 1996 Act and supporting Rules do not apply. Where there has been a breach of Article 6 because a trial judge did not conduct a public interest immunity hearing due to the emergence of the material only after conviction, the European Court of Human Rights has held that the breach cannot be cured by a hearing before the Court of Appeal in the absence of the appellant.[230] The Court's reasons for so holding were that the appeals court is confined to examining the effect of non-disclosure on the trial ex post facto and could possibly be unconsciously influenced by the jury's verdict into underestimating the significance of the undisclosed material.

197 However, even the introduction of special counsel to such hearings would not solve the root problem to which I have referred of police failure, whether out of incompetence or dishonesty, to indicate to the prosecutor the existence of critical information. Unless, as I have recommended, the police significantly improve their performance in that basic exercise, there will be no solid foundation for whatever following safeguards are introduced into the system.

I recommend the introduction of a scheme for instruction by the court of special independent counsel to represent the interests of the defendant in those cases at first instance and on appeal where the court now considers prosecution applications in the absence of the defence in respect of the non-disclosure of sensitive material.

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[227] Youth Justice and Criminal Evidence Act 1999, ss 34-40

[228] *Chahal v UK* (1996) 23 EHRR 413 and *Tinelly and Sons Ltd, & Ors v UK* (1998) 27 EHRR 249

[229] *The Requirements of the ECHR and the PII problem,* paras 24-28

[230] *Rowe and Davis v UK*

CASE MANAGEMENT

198 Case management has different and overlapping meanings. They include:

- what each side does to prepare its case for trial;
- what both parties do in the preparation of their respective cases, jointly and severally to identify and inform the court and others of the issues, the nature and forms of evidence that will be necessary at trial to determine those issues, the likely length of trial and any special requirements; and
- the involvement of the court to assist and, where necessary, resolve any difficulties in those processes, including listing the case for trial and keeping all involved informed.

199 The major impediments to correct charging and giving parties the information they need to prepare cases for hearing, should be significantly reduced by the improvements to the charging and disclosure procedures that I have recommended. But the second and third elements of case preparation must also be made to work properly. In a unified Criminal Court, many of the present procedures in the criminal justice system could be rationalised, and would contribute to better case management. The first is to simplify and speed the allocation of cases to the appropriate level of court.

Case allocation

200 At present, there are six different procedures for moving a case from magistrates' courts to the Crown Court:

- Committal for trial under section 6(2) of the Magistrates' Courts Act 1980 without consideration of the evidence – now available only for offences triable 'either-way'. The vast majority of committals occur under this procedure. Any defendant charged with an 'either-way' offence which is to be tried at the Crown Court must be committed for trial. In practice this is something of a hollow ritual, as any observer at court can see. It entails nothing more than the prosecution providing a copy of the papers and the court formally pronouncing the matter committed;
- Committal with consideration of the evidence under section 6(1) of the 1980 Act – also now available only for 'either-way' offences. Although in the past this was an opportunity for the defence to require the prosecution to call its witnesses and to challenge the evidence, that has now gone as a result of recommendations made by the Runciman Royal Commission. The procedure now consists of a reading of the papers, and legal argument before the

magistrates. This is a relatively rare occurrence and even rarer are the times when the bench will find for the defence, and refuse to commit a defendant for trial;

- Voluntary bills of indictment. As I have described earlier,[231] this is an alternative method of commencing cases in the Crown Court;
- Transfer under section 4 of the Criminal Justice Act 1987. This applies to serious and complex fraud cases. The prosecution may transfer the case direct to the Crown Court by giving 'notice of transfer' to the magistrates' court;
- Transfer under section 53 of the Criminal Justice Act 1991. This applies to certain offences of a violent or sexual nature, where there is a child witness, and allows transfer at the instigation of the prosecutor in appropriate cases; and
- 'Sending' under section 51 of the Crime and Disorder Act 1998. Where defendants are charged with indictable-only offences, they must be sent to the Crown Court forthwith after the first appearance before the magistrates. The defence has no right to challenge the sufficiency of the evidence at the sending stage, although it may do so after the prosecution serves its evidence, which it must do within 42 days of the case reaching the Crown court.[232] This procedure is likely to account for a large proportion of all cases going to the Crown Court.[233]

201 As can be seen, there is little over-all coherence or consistency in these procedures, which are a product of piecemeal reforms over the years. Some procedures allow the defence a challenge before the matter goes to the Crown Court and some do not. And there are slightly different procedures for each course. A simple form of procedure common to all cases should be found.

202 Under my recommendations in Chapter 7 for a new unified Criminal Court and for allocation and moving cases to the appropriate level of court, all cases would start in the Magistrates' Division and stay there or move by allocation to one of the other two Divisions after the first hearing. There would be wide power in all Divisions for an early hearing as to whether, on the prosecution papers, the evidence is sufficient for the court properly to convict.

I recommend that:

- **under the present system of our criminal courts, a single simple form of procedure for the movement of cases from magistrates' courts to the Crown Court should be substituted for the present mix of**

[231] see para 58 above
[232] Crime and Disorder Act 1998 (Dismissal of Sent Cases) Rules 2000
[233] in 1999- indictable-only cases accounted for about 34% of all Crown Court cases.

procedures of committal, voluntary bill, transfer and sending; and

- **if my recommendations for a unified Criminal Court are adopted, a similar procedure should govern the movement of cases, after allocation, from the Magistrates' Division to the District or Crown Divisions.**

203 It may be convenient for me to refer here to the recommendations I made in Chapter 7 about the allocation of cases involving linked offences of different levels of seriousness and linked defendants. First, all cases based on the same or similar facts or committed by the same defendant or defendants which, in the interests of justice should be heard together, should be allocated to the Division to which the most serious has been allocated. Second, once a case has been allocated under these arrangements to a higher Division than would otherwise have been the case, it should deal with it, subject only to its sentencing power being limited to that of the lower Division to which it would otherwise have gone.

Pre-trial hearings

204 In recent years, and given added momentum by the Civil Justice Reforms, the role of the court in case management has come to the fore. For many, the sooner the court takes hold of the case at an early preliminary stage, the better. The rationale for this is that the parties are not preparing their respective cases for trial as speedily or otherwise as efficiently as they should, and are not co-operating appropriately with each other on disclosure and identification of the issues. Accordingly, so the thinking goes, the police, prosecutors and professional lawyers need the goad of the court to make them do their jobs properly, and the defendant needs it to encourage him to focus on the nature of his defence, if any. The vehicle for the application of the goad is a pre-trial hearing of some sort. In magistrates' courts in cases where it is needed. it is called a 'pre-trial review'. In the Crown Court, there are four separate, but largely similar, forms of procedure. First, there is the traditional non-statutory 'plea and directions hearing', in which the judge can make non-binding rulings before the start of trial.[234] Second, there is a statutory 'pre-trial hearing' under Part IV of the Criminal Procedure and Investigations Act 1996 in which the judge can make binding rulings.[235] Third is the now well established statutory procedures of 'preparatory hearings', as the start and part of the trial, for serious or complex fraud cases under the Criminal Justice Act 1987, in which the judge can make binding rulings.[236] Fourth is the similar

[234] *Practice Direction (Crown Court: Plea and Directions Hearings)* [1995] 1 WLR 1318
[235] ss 39-43
[236] ss 7-10

and parallel form of 'preparatory hearings' for other cases of complexity or length introduced by Part III of the 1996 Act.[237]

205 Magistrates' courts also have several different types of pre-trial hearing. First, 'early first hearings' are listed for a case which is likely to be an early guilty plea. If it turns out not to be so, the court will put it over to an 'early administrative hearing'. Second, at an early administrative hearing the court takes a plea before venue, determines mode of trial and sets pre-trial review and trial dates as necessary. Where the matter is indictable-only the court deals with it as part of an ordinary remand hearing. Finally, where a case has been set down for summary trial, a pre-trial review is held where needed to assess the state of readiness. Theoretically it should perform the same function as a plea and directions hearing in the Crown Court, but usually fails to do so. That is because of lack of targets, lack of enforceable sanctions for failure to achieve them, lack of clarity about the aims of the hearing and local variations in practice.

206 Pre-trial reviews in magistrates' courts have developed piecemeal, and differ from area to area. They may be heard by one, two or three magistrates, or a justices' clerk or a combination of magistrates and justices' clerk. They may be oral or written, required in all cases or never. The form and practice is a matter for each local bench, the different forms being developed and distinguished for ease of listing, so that cases may be block listed in busy court centres. Many courts would otherwise list all of them in their remand list and deal with them as they came up. The hearings are not necessarily the first hearing in the case; they are sometimes the second or even third, so the terms 'early' or 'first' may lead to confusion.

207 For many – perhaps most – cases tried summarily and in the Crown Court, the charge(s) and the issue(s) are clear from the outset, there is obviously not much point in elaborate prosecution disclosure, and case management in the sense of seeking the court's assistance or directions is not, or should not, be necessary. But for as long as most veteran criminal court judges and practitioners can remember, preparing the more complex cases so as to keep them within their proper bounds and avoid unnecessary public and private expense and inconvenience has been a problem. The most often voiced criticisms of the various forms of pre-trial hearings over the years is that the parties are not paid to prepare cases properly and the courts have no effective sanctions to make them do so. Nevertheless, it is to the credit of prosecutors and defence lawyers that they have instinctively and increasingly looked for the help of the courts in this regard. One of the earliest examples was the Central Criminal Court's practice direction, reproduced in many editions of Archbold in the 1960s and 1970s as a guide for general use in heavy cases

[237] ss 28-38

that called for it. In 1993 the majority of the Runciman Royal Commission recommended a system of 'preparatory hearings', but only for long and complex cases. It considered that in the majority of cases reliance on informal consultation between the parties was the better course.[238] The system it suggested was similar in some respects to that of preparatory hearings for serious and complex frauds already in being.

208 Whilst the Runciman Royal Commission was working on its report, the Government had begun experimenting with a recommendation of its Working Group on Pre-Trial Issues[239] for the holding of an early plea and directions hearing in all cases committed to the Crown Court. The Working Group's proposal prevailed, and a scheme now embodied in a practice direction issued by Lord Taylor CJ in 1995[240] provides for the holding of a plea and directions hearing in all cases, (other than serious fraud and otherwise complex or long cases for which statutory preparatory hearings are appropriate). The primary function of these hearings is for the pleas to be taken and, in contested cases, for the prosecution and the defence "to assist the judge in identifying the key issues, and to provide any additional information required for the proper listing of the case". The Lord Chancellor's Department has also issued a standard check-list of questions, called the 'Judge's Questionnaire', for the judge and the parties to consider at the hearings.[241]

209 The system of plea and directions hearings has been the subject of much local experimentation and adaptation. There are mixed views among the judiciary and practitioners as to their value. Much depends on the style and vigour of individual Resident Judges and other judges in the conduct of the hearings and on the local culture of criminal court practitioners. Often, the hearings amount to little more than the judge asking the parties' representatives, by reference to the standard check-list, about the progress of their preparation for trial and what, if any, issues still require resolution. Part of the exercise is also to inform the court of the likely shape, including the main issues, and length of trial, and availability of those involved so as to enable the court to fix a trial date. In the main, they are perfunctory proceedings. As many as 30 to 40 may be listed a day in some of the larger centres, taking the form of a report on progress, good or bad, and the fixing of a trial date or the judge chivvying the parties into getting on with basic matters of preparation and to resolving issues that they may or may not have discussed before then.

210 In more complex cases, where there are issues on which the parties cannot or will not agree, there may be more substance to the hearings. But often such cases have the benefit of more experienced and better resourced legal

[238] Chapter 7, paras 4, 11 and 16
[239] in a report issued, but not published, in November 1990
[240] see Appendix B in the 2001 edition of Archbold.
[241] for the latest version see Appendix C in supplement no 3 to the 2001 edition of Archbold

representatives who have been able to resolve all or most matters informally among themselves and are there simply to inform the court of that. In large part, therefore, the involvement of the judge is to monitor progress and to chase the parties in their preparation for trial. As to the latter, all courts now have 'case progression officers' whose function is to remind the parties of imminent deadlines in the timetable of preparation and to initiate action by the court when they fail to meet them. Depending on the size of the centre and the relationship that the officer can build up with local prosecutors and defence solicitors, this can be a valuable additional spur to efficient and timely case preparation. But, like the plea and direction system itself, it can also lead to parties waiting for the 'wake-up' call of the hearing or the telephone call or letter of reminder.

211 As I have indicated, there are no fewer than four separate, but largely similar forms of preliminary hearing for Crown Court cases. They are a good example of the unsystematic and overlapping way in which the legislature, when it intervenes in matters of criminal law, burdens and confuses its procedures. In all of them arraignment may take place and, if there is an acceptable plea of guilty and the case is ready for it, the judge can proceed to sentence. Where the matter is to be contested and there are substantial outstanding issues, the hearings can be of real utility, for example as to the adequacy of mutual or third party disclosure or in ruling on claims of public interest immunity or on matters of law on agreed facts. But in all of them, there is little difference in effect between the 'binding' orders made in the statutory procedures and those made in the non-statutory plea and directions hearings. And, in all of them the court has little effective sanction to enforce its directions if the parties are unable or unwilling to comply.

212 There are also problems in tailoring the time-tabling of pre-trial hearings to the parties' progress, or lack of it in preparing for trial. The regime for plea and directions hearings, of within four weeks after committal or, in "sent" cases, service of evidence when the defendant is in custody and within six weeks if on bail, is no doubt a reassuring target for the Court Service with its own targets and key performance indicators in mind and for the Government with its commendable aim of speeding the criminal justice process. For cases not needing such a hearing, it is an unnecessary and expensive intrusion in getting the case to trial. For cases needing a plea and directions hearing, the timing is often too tight. For example, when a defendant is in custody, the time taken to complete mutual disclosure often results in the plea and directions hearing taking place before the defendant has given a defence statement. And it is rare, even in bail cases, for the prosecution to have given secondary disclosure within the six weeks allowed for the hearing. The result is, that by the time of the initial plea and directions hearing, the parties are often nowhere near identification of the issues or assessment of the evidential and other requirements for trial, far less a realistic joint estimate of the likely length of the case to enable the Court to fix a firm date for listing. In many cases one or more further costly plea and directions hearings may be

necessary. Or the parties may commit themselves to a trial date when they do not yet know the precise issues in the case, what evidence they require to deal with them and what other pre-trial complications may emerge.

213 The result is that this well-intentioned, but rigid time-table, accompanied by equally insistent Court Service targets for trial dates, achieves the reverse of what is intended, because the parties become committed to a trial for which they may not be ready. It can generate, rather than reduce, last minute changes of plea ('cracked trials') or inability to start the trial on the day listed for it ('ineffective trials'), all because the timetable of disclosure and for preliminary hearings is not consistent or sufficiently flexible to meet the different circumstances of individual cases.

214 Some judges and legal practitioners consider that pre-trial hearings of one sort or another are a useful means of getting the parties together to focus on the matter of the plea and, in the event of a contest, the issues and the likely evidence required. There is also the convenience to defence practitioners of having defendants in custody brought from prison to court for a conference. Frequently, the last factor is the most important in the exercise. For reasons that I have given,[242] defence lawyers are often unable – and sometimes unwilling – to visit and take instructions from clients in custody. In my view, this is a major blot on our system of criminal justice. It should be a fundamental entitlement of every defendant, whether in custody or on bail, to meet at least one of his defence lawyers in order to give him instructions and to receive advice at an early stage of the preparation of his case for trial, and certainly before a pre-trial hearing.

215 Consideration should also be given to the unnecessary expense and disruption to the prison system and to the physical and mental well-being of prisoners in ferrying them to and from court for this purpose. In many instances, this involves long uncomfortable journeys and tedious hours of waiting before and after a conference with legal advisers and the proceedings in court. Prison governors and prisoners alike complain about the lateness of return from court, a particular problem in the case of young prisoners and adult women who, because of the fewer establishments accommodating them, generally face longer journeys. Astonishingly, as the Prison Inspectorate's Report on its Thematic Review on the Treatment and Conditions of Unsentenced Prisoners indicates,[243] this results in high numbers of prisoners being locked out from their prisons and having to be housed at short notice overnight in police cells. These unpleasant side effects of the plea and direction system for prisoners awaiting trial result from a combination of factors, including: excessive travel distances from prison to court as a result of the large catchment areas of

[242] see para 29 above
[243] paras 5.01-5.05

courts and prisons; general contractual arrangements between the Prison Service and prison escort contractors; inability of the contractors to collect prisoners before a certain time in the mornings; contractual constraints making it necessary for the contractors to make the maximum use of their vehicles by using them to make deliveries of prisoners to a number of different courts in the course of a single and sometimes long and tortuous journey; and the individual evening locking out times of different prisons. Conference and other conditions at court, particularly in magistrates' courts,[244] can be bad. And there is the highly unsettling effect on a remand prisoner of returning from court to a different cell and, often, a different cell-mate, a feature which the Prison Service Inspectorate regarded as of considerable importance for those newly brought into custody.[245] These unnecessary consequences can be eliminated by using available communications technology to enable prisoners to give instructions and participate in court hearings from a video-link (see paragraph 259 below for a detailed account of the possibilities and advantages of this technology).

216 Another important instance of the unsuitability of an unbending approach to plea and directions hearings is where civil and criminal matters arise out of the same or similar facts, particularly in cases involving neglect or abuse of children, where the needs of a family case may conflict with the criminal proceedings. A useful initiative to reduce this tension has been a system of joint plea and directions hearings conducted by one judge. These were successfully piloted in Norwich, Liverpool and then London and are now established as needed all over the country. They have proved to be particularly valuable in early identification of the issues, obtaining co-operation of all the parties and agencies concerned, so facilitating and simplifying third party disclosure and obtaining earlier dates of hearings in both jurisdictions than might otherwise have been the case. His Honour Judge Hyam QC, the Recorder of London, who has conducted a number of these hearings has commented on the procedure:

> "…its most striking feature is the fact that the parties, when gathered together, seem much more inclined to be co-operative than when they attend ordinary pre-trial hearings".[246]

217 In my view, this initiative is to be commended and should be given full support as a permanent feature in whatever form of case management of criminal cases that results from my recommendations. In the pre-trial assessment scheme that I recommend below, these cases are likely to be

[244] see *A Review of Custody Arrangements in Magistrates' Courts, London* Report of HM Magistrates' Courts Service Inspectorate (2000)
[245] *Thematic Review Of Treatment And Conditions Of Unsentenced Prisoners* paras 5.23 -5.24
[246] in a paper submitted in the Review

among those that will most often require an early pre-trial hearing as part of the scheme.

218 However, apart from such special cases, my view is that oral pre-trial hearings should become the exception rather than the rule. They should take place only in cases which, because of their complexity or particular difficulty, require them. In the majority of cases they are unnecessary, expensive, time-consuming and, often, because of their timing and the failure of trial advocates to attend, ineffective. Paradoxically, for the reasons I have given, they also often serve to delay rather than speed disposal of cases on pleas of guilty or by trial. Martin Narey felt unable, on the material before him, to reach a conclusion on their efficacy and recommended that the Trial Issues Group should examine whether they should be held in every case.[247] TIG did not do so, but, as I mention below, the Court Service is now piloting 'paper' plea and directions procedures.

219 Now that indictable-only cases are sent straight to the Crown Court – and, if my recommendations are adopted all cases will, after allocation, start at their appropriate level in a unified Criminal Court – the pace of preparation of cases from charge to trial should increase considerably.[248] It will become more important to provide a flexible system for tying together, in a tailor-made fashion for each case, mutual disclosure and such pre-trial involvement of the Court as the case may need. In this, recourse to the court by way of an oral preliminary hearing, other than an initial preliminary hearing, should be a last recourse rather than an early and automatic incident of the process. In this respect, it should be more like the system for pre-trial hearings in the magistrates' courts, only held where the case requires it.

220 In courts at all levels the main players – the police, prosecutors and defence lawyers – should take the primary responsibility for moving the case on. They should concentrate on improving the quality of the preparation for trial rather than trying to compensate for its poor quality by indulging in a cumbrous and expensive system of, often unnecessary and counterproductive court hearings. The way to do this, as I have urged in this and other Chapters in this Report, is by adequate organising and resourcing of the police, prosecutors, defence practitioners and the courts, including the provision of a common system of information technology for all of them and the Prison and Probation Services.

[247] *Narey Report* Ch 7, pp 38-41

[248] plea and directions hearings in 'sent' cases at present take place about eight to ten weeks after the first preliminary hearing, which approximates broadly to present target periods for committed cases

Pre-trial assessment

221 In many cases it may be plain from the outset how much or little time may be required for mutual disclosure and other preparations for trial and whether it will be necessary to trouble the parties or the court with a pre-trial hearing. In cases of size and/or complexity which look as if they will be contested, that would normally be the time to assign a judge of an appropriate level to manage and try it. But in all cases in the upper two Divisions, and as appropriate in the Magistrates' Division, the court and the parties should set a provisional time-table by reference to a suitably adapted standard check-list or case-management questionnaire, including a date before which trial should start. There is already a basis for this in the standard time-table issued by the Trial Issues Group as a guidance for the Crown Court and magistrates' courts. Thereafter, the parties should liaise with each other, informally communicating progress, or lack of it, on key tasks to the court and any others involved. In such a system, depending on the size or complications of the case, case progression officers could assume a wider role, not only chasing progress where required, but also involving themselves in arrangements for listing and, where appropriate, obtaining and transmitting written directions of the judge. In the event of failure of liaison of that sort between the parties and the court to achieve progress in accordance with a provisional or modified time-table, or in accordance with a requested or acknowledged need, say for a ruling on third party disclosure or a matter of law or evidence, the matter could be listed for a pre-trial hearing.

222 The Bar Council have suggested a more formal model of what I have in mind, in the form of a 'paper' plea and directions hearing coupled with front-loading of fees to cover preparatory work. It would build upon the Judges' Questionnaire and requirement for a defence statement by requiring the defence advocate to advise on evidence and as to a trial plan. There would be a fixed date for a paper hearing, based on the parties' answers to a supplementary or extended form of questionnaire served on the court and on each other, say, seven days before the date fixed for it. The matter would then proceed without an oral hearing unless the defendant indicates a plea of guilty, or either side require an oral hearing or the judge directs it. The defence advocate would be entitled to a fee for his preparatory work based on a percentage or percentages of the basic fee for plea of guilty or trial, plus a fee for a plea and directions hearing. The fee would be payable whether or not there is an oral hearing, thus providing an incentive to prepare properly and avoid it unless it is necessary.

223 A system of 'paper' or 'flexible' plea and directions hearings in straightforward cases is being piloted at three centres by the Court Service, following unofficial trials at two others. The criteria for determining whether a case is suitable for the procedure is left to each court to decide and a judge will make the determination on a case by case basis. I warmly commend this

initiative, but express caution as to its use as a marker for general use unless it is supported by the other mechanisms and resources, to which I have referred, necessary to improve the parties' performance in preparing for trial.

224 In my view, the time has come to replace the present mix of overlapping pre-trial procedures with a single statutory, but flexible, system of the sort that I have suggested and/or as advanced by the Bar Council. I would call it preparation by the parties for trial culminating in a 'pre-trial assessment' of the case by them and the court as to its state of readiness for trial. In most cases the assessment would be a paper exercise, the parties signifying in writing to each other and the court their readiness or otherwise for trial and the court responding in writing as appropriate. In those cases where outstanding matters could not be resolved by written directions, and an oral hearing is required, it should be called simply a pre-trial hearing and conducted at court. When the defendant is in custody and consents, he should participate in the hearing to the extent necessary by video-link from prison. Any cases likely to require an oral pre-trial hearing or substantial paper directions should, wherever possible, be allocated the trial judge who should assume responsibility for oversight of the parties' preparation for trial. Such a system of 'docketing' judges for the heavier cases should become more feasible if my recommendations for a move to fixed listing of such cases,[249] and more efficient use of judicial and everybody's time in case preparation, outside as well as inside the courtroom, are adopted.

225 If an oral pre-trial hearing becomes necessary, it should enable the judge to give binding rulings on substantive law, and procedure and evidence before the trial which may speed and simplify or otherwise shape it, subject to variation or discharge at trial as justice might require. Such hearings, particularly in indictable cases, should have two main functions: first to confine the trial and the evidence called at it to the issues of substance on which the case will turn; and second, so far as possible to resolve in advance all legal, procedural and evidential issues material to the outcome of the trial, so as to enable it to proceed smoothly and speedily without frequent interruptions for legal argument.

226 It is clearly vital that trial advocates should attend any pre-trial hearings. It should be a professional requirement that they should do their utmost to do so. Courts should do their best to list the hearings to accommodate their other professional commitments, if necessary by sitting earlier or later than the normal court working day.[250]

[249] see para 237 below
[250] see Chapter 11 para 177

227 Unlike Civil Courts, the Crown Court and magistrates' courts do not generally issue interlocutory orders to the parties in writing. The clerk of the court keeps a hand-written log of the proceedings, which should, but does not always, include all rulings, orders and directions. It is not normally checked by the judge or magistrates or the parties' representatives. The result is that frequently a judge or magistrates cannot readily tell from the file what orders were made on the last occasion the matter was before the Court for directions, the reasons given for earlier adjournments or relevant comments made from the bench. In the Crown Court it is not uncommon for there to be dispute between the parties as to what was directed on a previous occasion and for a debate to take place with the judge or his clerk in which the latter's record conflicts with what counsel have recorded on their briefs.

228 Such a casual culture of recording and disseminating courts' directions does not encourage proper respect for or compliance with them. There are exceptions. One is the Crown Court at Norwich, which routinely issues to the parties a computer print-out of the judge's order, including a 'trial by' date, a practice which, according to the Resident Judge, Judge Mellor,[251] "has significantly improved compliance rates". In my view, all rulings, orders and directions, at all pre-trial hearings, whatever their form, should be routinely recorded and, immediately or within a short time, issued to the parties in writing. If the courts were provided with the equipment, this could be done on the spot as it is in urgent cases in the County Court, and increasingly in magistrates' courts and in many of the criminal courts in the USA that I visited in the course of the Review. Or it could be done shortly afterwards by electronic transmission. Unfortunately, the CREST computer system used in the Crown Court does not have this basic facility.

Sanctions

229 I have mentioned the lack of effective sanctions and the need for better incentives to encourage all concerned in the preparation of criminal cases for trial to co-operate where they reasonably can and to get on with it. Orders of costs, wasted costs orders, the drawing of adverse inferences or depriving one or other side of the opportunity of advancing all or part of its case at trial are not, in the main, apt means of encouraging and enforcing compliance with criminal pre-trial procedures. In these respects criminal courts have much less control than civil courts. In civil disputes there is not the same tension between justice and efficiency in the preparation of cases for trial. One of both of the parties may not be willing litigants, but mostly they have a common aim in keeping costs down and thus in efficient and timely preparation for trial. There is a costs sanction available and routinely exercised against, not only the loser of the issue, but also against either party for procedurally culpable conduct causing unnecessary expense. Moreover, it

[251] in his submission in the Review

can be, and is imposed, except against a publicly funded litigant, without regard to his ability to pay.[252]

230 In criminal cases an order for costs against a defendant personally[253] is rarely an option because of his lack of means and because it may be hard to apportion fault as between him and his legal representatives. And there are problems about the fairness of a trial if a defendant is under threat of a sanction of that or other sorts if he, or his representatives misjudge the extent of their obligations to co-operate with pre-trial procedures. An order for costs against the prosecution for procedural default is possible and sometimes imposed. But, though it serves as a mark of the court's disfavour and dents a departmental budget, judges are disinclined in publicly funded defence cases to order what amounts to a transfer of funds from one public body to another. The third possible financial sanction is to make a wasted costs order against the legal representatives on one side or another. But again there are often practical limitations on the court of identifying who is at fault - on the prosecution side, counsel, those instructing him or the police - and on the defence side, counsel, his solicitor or the defendant. And wide use of such cumbrous satellite proceedings would be both an impractical and expensive way of achieving efficient preparation for trial, whether instituted before or after trial. Again, there are considerations of public interest, including the fairness of the trial, in too ready a use of this weapon as a threat and means of enforcing compliance with procedural requirements in criminal proceedings. The same applies to any possible extension of present powers of the courts to draw adverse inferences against one side or the other or to any attempt at importation from the civil process of the notion of 'strike-out', for example, by depriving a defendant from advancing all or part of his defence, or by too ready a use of the court's power to stay a prosecution for abuse of process.

231 Throughout the Review I have anxiously searched here and abroad for just and efficient sanctions and incentives to encourage better preparation for trial. A study of a number of recent and current reviews in other Commonwealth countries and in the USA shows that we are not alone in this search and that, as to sanctions at any rate, it is largely in vain. In a recent report, the Standing Committee of Attorneys General in Australia commented:

> "… the primary aim is to encourage co-operation with pre-trial procedures. There are inherent practical and philosophical difficulties associated with sanctions for non-co-operation".[254]

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[252] Access to Justice Act 1999, s 11 (replacing the former procedure for legally aided parties)

[253] at present only possible on conviction; see Prosecution of Offences Act 1985, s 18(1)

[254] Report of the Standing Committee of Australian Attorneys-General, September 1999, p43; see also *Deliberative Forum on Criminal Trial Reform*, Report of the Standing Committee of Australian Attorneys-General, June 2000, Ch 4, p52 and recommendation 25

232 For the reasons I have given, I have concluded that there is little scope for improving on existing sanctions against the parties or their representatives for failure to prepare efficiently for trial save in two respects.

233 The first turns on adoption of my recommendations for equipping and resourcing both sides to shoulder the primary responsibility for the task, having recourse to a pre-trial hearing only if and when there are matters that they cannot reasonably resolve between them. Unnecessary recourse to or 'call-in' by the court could be met by a direction, as appropriate, that prosecuting counsel or publicly funded defence counsel and/or solicitors should not be paid for the appearance or, as the Bar Council have put it, should not be paid any more for the hearing than they would have been paid without it. And/or the matter could be dealt with by a judicial reprimand which could be recorded and used as part of the monitoring, inspection and assessment process to which public prosecutors and defenders, and defence lawyers franchised to undertake publicly funded defence work are or should be subject.

234 The second is to encourage professional bodies, in the main the Bar Council and the Law Society, to incorporate more stringent and detailed rules in their codes of conduct about preparation for trial. These should be accompanied by clear guidance as to the seriousness with which the court will view professional failures in this respect.

235 At or after the pre-trial assessment, or any necessary and final pre-trial hearing, the parties should be required to certify their readiness for trial. The date for such certification should be prescribed in the appropriate standard timetable or, directed by the trial court. Thereafter, in all cases tried in the Crown Division the parties' representatives should agree a form of case and issues summary for use by the judge in introducing the case to the jury and by the jury as an aide-memoire throughout the trial. I say more about this in Chapter 11, but emphasise here that the sort of document I have in mind should be neutral in its presentation and, in most cases, consist of a brief summary of only a few pages.

Accordingly, I recommend that:

- **In the preparation for trial in all criminal courts, there should be a move away from plea and directions hearings and other forms of pre-trial hearings to co-operation between the parties according to standard or adapted timetables, whenever necessary supplemented by written directions from the court;**
- **there should be national standard timetables and lists of key actions for preparation for trial in each of the**

three Divisions of the new unified Criminal Court, with suitable variations to meet categories of case of different nature and complexity;

- **the Magistrates' Division, when allocating cases to the Crown or District Divisions and, where appropriate, in summary cases at an early administrative hearing, should issue the parties with the appropriate standard timetable and list, including dates for mutual disclosure and a date within a short period after secondary disclosure for 'pre-trial assessment';**
- **the parties, by agreement or on notice to each other, should be at liberty to seek in writing leave from the trial court to vary the standard timetable;**
- **the parties should endeavour to prepare for trial in accordance with the timetable and list of key actions appropriate to the case and to resolve between themselves any issues of law, procedure or evidence that may shape and/or affect the length of the trial and when it can start;**
- **the timetable in each case should set a date for the 'pre-trial assessment' that is, an assessment, by the parties and the court as to the state of readiness for trial;**
- **by the pre-trial assessment date the parties should complete and send to the trial court a check-list showing progress in preparation and as to readiness, for trial, and seeking, if appropriate, written directions;**
- **only if the court or the parties consider it is necessary for the timely and otherwise efficient preparation for, and conduct of, the trial should there be a 'pre-trial hearing', for example where one or other of the parties cannot comply with the timetable or where there are unresolved issues affecting the efficient preparation for or conduct of the trial, or when the case is sufficiently serious or complex to require the guidance of the court;**
- **where there is a pre-trial hearing, and the defendant is in custody and consents, he should not be brought to court, but should participate in it to the extent necessary by video-link with the prison in which he is housed;**
- **a judge or magistrates conducting an oral pre-trial hearing should be empowered to give binding**

directions or rulings subject to subsequent variation or discharge if justice requires it;

- **where a pre-trial hearing is necessitated by one or other or both parties' failure without good cause to comply with the time-table or other directions of the court, or to resolve issues of procedure, law or fact between them, the court should have power:**
  - **to make such order as to payment of a publicly funded defence advocate for his attendance at the hearing as may be appropriate in the circumstances; and/or publicly to reprimand either party's advocate or those instructing them as appropriate; any such public reprimand to be communicated to and taken into account by the professional body of the person reprimanded and, where the person is franchised for publicly funded defence work, by the Legal Services Commission; and/or**
  - **to make such order of costs against one or other or both sides as may be appropriate;**
- **all interlocutory court rulings, orders or directions in criminal courts as presently structured or in a new unified Criminal Court should be expressed in writing as a formal document of the court and served forthwith or shortly afterwards on all parties.**

Listing and docketing

Responsibility for listing

236 Listing is said to be a judicial function. A better description is that it is a judicial responsibility. In the nature of things a listing officer has a better grasp both of the long-term, 'strategic' shape and needs of the list and the day-to-day programming and contingencies. The Resident Judge should maintain a general oversight of the listing at his court, but should not bury himself in the detail. Often his function is to decide or advise when a crisis has arisen on which the listing officer needs help. Of course, every judge has a closer involvement in cases in his own list and those cases assigned to him for future trial, but he must always keep an eye on the potential effects on other cases of his listing decision. Some have suggested that there should be a definition or re-definition of accountability as between the judiciary and listing officers. But I see no pressing need for it and cannot, in any event, feel able, with confidence, to suggest a better system. So much depends, in any event, on personalities and style and on the fluidity of demands on court time.

Close liaison between judges and their listing officer is the key, and, in my experience, it usually works very well.

Fixed trial dates

237 However, I consider that there should be a move to give fixed trial dates to cases of any substance. If case preparation improves this should occasion less risk of 'wasting court time' through cracked or ineffective trials and should enable judges to undertake a greater amount of case management as their contribution to better preparation. There is inevitably a tension between, on the one hand, the certainty, efficiency and convenience to all of a fixed system of listing in appropriate cases and, on the other, the need for flexibility to make optimum use of courts and judges. But the tension is not so evident if in providing greater certainty as to trial dates, it results in greater consideration to all involved in the criminal justice process, not just the courts and the judges.

Docketing

238 Those cases that will inevitably require judicial 'hands-on' management, including a pre-trial hearing, should be assigned at the outset to a particular judge for management and trial. It is a waste of resources for more than one judge to have to read and familiarise himself with issues and matters for pre-trial resolution. And a judge who knows that he is going to try the case is likely to take a closer interest in it and the task that it will pose for him and the parties. Docketing of such cases goes with fixed listing of them and the risks and compensations of the latter to which I referred in the last paragraph.

I recommend that:

- **there should be a move to greater use of fixed trial dates in cases of substance; and**
- **there should be a corresponding move to early allocation of such cases to a judge for case management and trial.**

VICTIMS

239 From time to time in the course of this Report I have mentioned the increasingly recognised role of victims in the criminal justice process. It arises at at least three stages: first, between the time of the alleged offence and the plea of guilty or trial; second, if the case is contested, at the trial; and, third, during the sentencing process. In the event of an appeal there is a fourth stage.

240 In this chapter, I am concerned just with the pre-trial stage, but I should begin with some general remarks. For almost every criminal there is a victim - and often also indirect victims in the form of bereaved, upset or closely involved relatives and friends. Yet, until recently, the focus has been on the criminal, or alleged criminal, leaving the victim, or alleged victim, with only a walk-on part – 'the forgotten party' - in the criminal justice system. 74% of those questioned in the British Crime Survey 2000 "felt" or "were not confident" that the criminal justice system met the needs of victims.

241 However, there has been a gathering momentum in recognition of the importance of victims in the system. It was initiated in the mid-70s by Victim Support, a national charitable organisation, and carried forward by it and, more recently, by JUSTICE, an all-party organisation dedicated to assist victims of miscarriage of justice. But it is only in the last few years that government has turned its mind to the more formal involvement and rights of the victim in all stages of the criminal process. In 1996, after a process of consultation with, among others, Victim Support, the Home Office introduced a non-statutory Victim's Charter[255] and guidance in the form of National Standards of Witness Care covering, among other things, listing, waiting times and witnesses' needs for information and protection. And there is now a proposal for a Victim's Bill of Rights of the sort promulgated in the United States, and for a Victims' Ombudsman.[256]

242 The primary role of Victim Support has been to comfort and support victims in the aftermath of the offences of which they have complained and to advise them in general terms of what any ensuing prosecution may require of them. Victim Support also runs the Witness Service, which is well established in every Crown Court Centre in the country. There, usually in dedicated accommodation within the court-building, trained volunteers offer support and information to witnesses, victims and their families before, during and after hearings. This includes pre-trial familiarisation visits to courts and provision of a leaflet of advice in most languages, *Going to Court*.[257] It is an impressive and valuable service conducted with financial support from government. Magistrates' courts though, as I have said, dealing with about 95% of all criminal prosecutions in the country, have had to depend, until now, on modest local initiatives by the courts themselves. However, a recent increase in government funding has enabled Victim Support to embark on a programme to provide, by early 2002, witness support services at every magistrates' court in the country.

[255] a successor to the Home Office Victim's Charter of 1990, and itself in process of being reviewed, and, according to *Criminal Justice: The Way Ahead*, Cm 5074 (Feb 2001) para 3.99, to be implemented in November 2001

[256] see *The Way Ahead* paras 3.104-3.105

[257] available in every language likely to be required

243 There is also much governmental examination of specific measures to increase the formal involvement of victims in the criminal process. This flows from pilot projects prompted by the 1996 Charter, the Glidewell and the Narey reports into the way in which prosecutions are prepared for trial[258] and the MacPherson report.[259]

244 All this is a belated recognition that, whilst it is for the state to prosecute crime and for victims and others to assist it in doing so, there would be no effective criminal justice system without the ready co-operation of victims in reporting and assisting in the prosecution of offenders.[260] It is in everybody's interest, and the entitlement of the victim, that he should be treated in a civilised manner and with due regard to his special needs at every stage of the process. This is not just a matter of expediency for the efficient prosecution of crime. It is, as JUSTICE has put it,[261] one of 'integrity' in the criminal justice system itself.

245 In addition, there are a number of practical reasons for giving victims, whether or not they are witnesses, more involvement and recognition in the system. They include: first, to inform the court of the effect of the offence on the victim so as to enable it to match the sentence to the seriousness of the offence; second, to inform the court of the victim's vulnerability to further injury from the offender or others so as to alert it to the need for his future protection, whether by sentence or otherwise; third, to equip the court publicly to acknowledge the wrong done to the victim and the need, where appropriate, for treatment; fourth, to enable the victim to have his say especially where a plea of guilty has deprived him of the opportunity of doing so in the trial; and fifth, to enable the court to assess and order compensation.

246 The English criminal justice system is most open to criticism in the information, or lack of it, given to victims and witnesses about the arrangements for hearings and their progress and outcome. By far the greatest number of complaints from lay people in the Review have come from those who have been called to give evidence in criminal trials. Many of them have said "Never again" or words to that effect. This may not be representative of the attitude of all or most victims who have been involved with the courts, since those who have suffered bad treatment are more likely to complain than those who have not. However, there are enough of them to confirm a similar picture emerging from other studies, and with it a serious risk of alienation of the public, victims in particular, as a result of their bad experience of the criminal justice system.

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[258] *Review of the Crown Prosecution Service,* and the *Narey Report*
[259] *The Stephen Lawrence Inquiry*, CM 4262-1, February 1999
[260] as observed by JUSTICE in its 1998 Report *Victims in Criminal Justice*, p 22
[261] ibid pp 5 and 30 - 31

247 The complaints are straightforward enough and are vouched for by many who work in the criminal courts, including police, prosecuting and defending advocates and representatives of Witness Support. They are of: long delays after victims have made witness statements without information as to whether and when a prosecution is to be undertaken or of its progress after commencement; abortive attendances at court because of last minute adjournments or because of late decisions that their evidence is unnecessary or is agreed; failure to inform them of the outcome of the proceedings or to explain it; and failure to inform them of an appeal, when it is to be heard and of its outcome. These shortcomings are more serious where victims need support, particularly in the early stages or where, because of their relationship with the alleged offender or the nature of the offence, they feel vulnerable and in need of protection or, at least, of reassurance.

248 Then there is the treatment of witnesses who, on attending court to give evidence - often their first exposure to such an experience and at some personal and emotional cost - have to wait for long periods, sometimes for over a day, before being called into the witness box. Sometimes too there is bewilderment, in the absence of explanation, at the course a trial may take, for example, an acceptance by the prosecution of a change of plea to a lesser offence or the matter being removed from the jury at the close of the prosecution case or at some other stage.

249 There are, of course, great difficulties in time-tabling the forensic process, however well planned it may be. But all too often these ordeals for witnesses result from a combination of inadequate preparation by the parties and/or case management by the court, and almost always by a failure to keep them sufficiently informed of what is going on. For witnesses who are not victims, it is bad enough; for those who are - those who rightly consider the process to be in part a vindication of their suffering - it must be worse.

250 As I have indicated, efficient preparation for trial has as one of its important objects the reduction of uncertainties in listing and in the planned progress of cases so as to avoid waste of time and money and inconvenience and distress to many, including victims who are witnesses. Such uncertainties result from 'cracked trials' - late pleas of guilty in cases listed for trial and from 'ineffective trials' - trials not proceeding on their listed commencement dates for one last minute reason or another.

251 For the sake of victims and witnesses too there is a need for a significant improvement in the efficient preparation of cases for trial so that the trial process runs more closely to plan than it does now, and a better system of informing them and all others concerned of the state of progress, the outcome

and the reason for it. No single agency has responsibility for the care of victims and witnesses. Traditionally, the police have kept them informed; Police National Guidelines impose the responsibility on the officer in charge of the case, but he is not always best placed to do that once the prosecutor has the conduct of it. Even if, which may be difficult, liaison between the two is good, it is undesirable for the police, or more likely some civilian assistant, to relay information about developments for which the prosecutor may be responsible. Under new and developing practices prompted largely by the Glidewell and Narey Reviews, prosecutors, together with the police in special units, are beginning to share the responsibility. In my view, there should be a clear understanding between them at the start of each case involving a victim, who is to keep him informed, of what and how. At the point when such decisions are made there should be a clear understanding, to be noted on the file, as to whose responsibility it is to communicate the decision to the victim.

252 Beyond a few basics, I doubt whether this division or sharing of responsibility is susceptible to national guidelines or to an overly prescriptive approach, because the circumstances of each case and the concerns of the victim are different. However, there are some decisions of the prosecutor that are or may have such an important effect on the victim that I consider the prosecutor should personally inform him of them, for example, the substitution for the original charge of a lesser one, the acceptance of a plea of guilty to a lesser charge and a dropping of the whole prosecution. I am pleased to see that the police and Crown Prosecution Service are already making arrangements for such a shift of responsibility, and these will be finalised by October 2002. In addition, in every case victims and witnesses should be given at the outset a point of contact and, wherever possible, the name of the person whom they can ask for information or advice. They should also be given an indication of the extent and timing of information that they can expect, so that they do not have unrealistic expectations, and the contact point of a senior person to whom they can complain if they are dissatisfied with the information they receive.

253 There is also a suggestion that once a prosecution has reached the courts, court staff should be responsible for keeping everyone, including victims and witnesses informed of the progress, listing and outcome of the case. This suggestion may become stronger and more realisable as and when the criminal justice system as a whole is properly served with a common system of information technology. A first step could be an automatic telephone 'bulletin board'.

254 I should emphasis that my proposals are directed towards information of, not consultation with, victims, for example as to the charges, discontinuance or as to the level of court for trial. There are a number of reasons why the victim should not be part of a consultative process, all or most of which are acknowledged by Victim Support:

- in many instances, at the pre-trial and trial stages of the process it has yet to be established whether the alleged victim is in truth a victim;
- he would not normally have the necessary knowledge or experience;
- he would be unlikely in most cases to have the necessary objectivity and would expose the criminal justice process to the risk or at least the perception of prosecuting decisions being influenced by the vengefulness of victims, hardly a recipe for fairness or consistency in the enforcement of the law;
- it could create false expectations if his view were not acted upon;
- if it were thought that victims could influence the dropping of prosecutions, it would expose them to intimidation or pressure to urge it in individual cases; and
- it would place a heavy responsibility on them that they might not wish, or be psychologically prepared, to bear.

255 All these and other associated questions have been the subject of many reviews, national and local initiatives and pilot studies over the last few years. This Review is the broadest, but only one, of a number of current searches for improvement of the system.

INFORMATION TECHNOLOGY

Case management

256 Professor Richard Susskind has identified[262] four different senses in which the phrase 'Case Management' is used to describe the way information and communications technology could transform the way cases are prepared for trial:

- management information systems – to monitor the work and performance of the courts;
- case administration systems – to support and automate the back office, administrative work of court staff;
- judicial case management – comprising case tracking, case planning, telephone and video conferencing and document management; judicial case management support systems - systems used by court staff in support of judges who are involved with case management; and

[262] Richard Susskind, *Transforming the Law* (OUP 2000) p 239

- non-judicial case management – to help court staff progress cases which do not, in the event, proceed to trial.

257 In Chapter 8, I have recommended the introduction of a single electronic case file with information accessible to each of the main criminal justice agencies. The implementation of an integrated information technology system of this kind would radically improve case management in the first two of these senses, by allowing the prosecution, defence and the court to communicate online, extracting information from and adding information to, the same body of data. There are, however, also very significant improvements which can be made to the way the courts assist the judiciary once they have the benefit of support which modern technology can offer. There are at least four ways in which the court could use these technologies:

- case tracking systems – to produce daily reminders, progress reports, lists of outstanding tasks and notices of who has responsibility for further actions, thus supporting judges in supervising, monitoring and controlling their cases from start to finish;
- case planning systems – PC-based project management software to enable judges to generate their own plans for complex cases, depicting timescales, key events and activities;
- telephone and video conferencing – enabling judges to monitor the progress of cases and to keep in direct contact with parties' legal representatives where formal hearings with parties physically present are unnecessary; and
- document retrieval systems – allowing judges access to documents to cases for which they are responsible and to retrieve them.

258 Once these functions are available (and, as I have noted in Chapter 8 this is not yet the case even in our civil courts), the way would be clear for a step change in the way cases are organised, scheduled and managed by the criminal courts. A simple example will suffice to illustrate this point. At present, if a judge (for example a Resident judge) wishes to survey progress on a group of cases listed for trial on a particular day, he (or a court clerk acting on his behalf) would first have to locate the relevant paper files, and then seek the assistance of court staff in making enquiries by e-mail, fax or telephone of those involved. To undertake such an exercise for a batch of twenty cases might take a whole morning, and might result in little more than a list of unanswered questions. But in a world in which all case information could be available to the judge online via a central electronic file, the judge could survey each case himself in a matter of minutes or seconds and could concentrate on prompting or directing any necessary action rather than merely seeking to find out what is going on.

The virtual courtroom

259 Technology also has the potential to transform processes by which judicial decisions are taken at each stage in of a criminal case. Live video links can provide real-time, two-way transmission of images and sound between two or more locations. Parliament has recently provided for the use of video-link participation by defendants in custody in pre-trial hearings,[263] and by vulnerable or intimidated witnesses, in trials.[264] As to the former, pilot courts were established in 1998/99 in magistrates' courts in Bristol, Swindon and, Manchester, and at Manchester Crown Court. An evaluation[265] of the pilots showed that the introduction of live video-links had been a considerable success and was generally popular with the majority of remanded defendants. However, many expressed concern about the confidentiality of parallel arrangements made for telephone and video consultations with their representatives. Some lawyers objected in principle to the use of the link for bail applications. Others felt that their clients' chance of being granted bail was adversely affected when they were not physically present at the court. But this was not borne out by the evaluation data,[266] which showed no difference in the proportion of bail applications granted before and during the pilot. As to the cost of national provision of these facilities, it should be borne in mind that the present costs of transporting prisoners between prisons and courts are substantial (and rise exponentially with the security classification of the prisoner). In addition, the one-off capital cost of such links would quickly be balanced by savings of time and money, not only in transportation costs but also in solicitors' and counsels' travelling time, and court time in waiting for prison vans. Routine use of video-links for most pre-trial hearings, including the taking of pleas and applications for bail, with the consent of the defendant, would be welcomed by the Prison Service, defence lawyers and many defendants for their different reasons. Naturally, defendants would have to have ready and secure video-link or telephone communication with their lawyers before, during and after the hearings and otherwise to safeguard their position. The evaluation concluded that the favourable outcome of the pilots clearly justified the extension of these facilities. And the Government announced in its policy paper, *The Way Ahead*, [267] that every prison handling remand prisoners will have a video link to a magistrates' court by March 2002.

[263] Crime and Disorder Act 1998, s57
[264] Youth Justice and Criminal Evidence Act 1999, Part II
[265] Plotnikoff and Woolfson *Video Link Pilot Evaluation* (Home Office 1999) and *Evaluation of Information Video Link Pilot Project at Manchester Crown Court,* (Court Service and HM Prison Service, 2000)
[266] see *Video Link Pilot Evaluation*
[267] Cmnd 5074 p 107

260 However, the Government's commitment relates only to magistrates' courts. In my view, and for the reasons I have given, there is an equally compelling case for extending this facility to all pre-trial hearings in the Crown Court, and/or in the Crown and District Divisions of the new unified Criminal Court that I have recommended. In addition, as I have stated, I would like the links to become more than a resource for court hearings. They should also be available to enable representatives to speak to their clients and take instructions during the course of the preparation of the case. This could significantly improve the speed of preparation.

261 One of the problems encountered during the pilot exercises concerned cases with co-defendants. The number of co-defendants who can be accommodated with the present video-link equipment is limited by the camera field of view at both the courthouse and in the prison. This is because the single telecom link requires all co-defendants to be present in the same room in the prison. In addition, the use of point to point fixed links means that there are inevitable limitations on the number of prisons which can be linked up to each court, so that there might still have to be movement of prisoners between prisons, if not from prisons to court, as use of video links became more widespread. With the increasing use of special lines,[268] more prisons should be able to link up with courts; and the substitution of internet technologies for fixed telecom links would clearly improve and accelerate matters considerably Links could then be combined from a number of sources simultaneously, provided adequate levels of security could be assured. As Professor Susskind has pointed out,[269] techniques to ensure that web transmissions can be secure, confidential and capable of an authentication are already in prospect and will lead to an enormous increase in telecommunications capacity. The courts should be ready to take early advantage of these technologies.

I recommend that the present provision for the use of video-link with prisons in pre-trial hearings in magistrates' courts should be extended to all such hearings in all criminal courts and, as technology develops, consideration should be given to the use of web technologies for them.

Time limits

Over-all time limits

262 Although there are no over-all time limits governing prosecutions in indictable cases for England and Wales, the courts have jurisdiction to stay

[268] ISDN and ADSL
[269] *Transforming the Law* (OUP 2000) p 127

unduly delayed proceedings where they amount to an abuse of process, a jurisdiction now underlined by a defendant's right under Articles 5(3) and 6(1) of the European Convention of Human Rights to trial within a reasonable time. There is a six months' limitation on the prosecution of summary offences in magistrates' courts begun by information or complaint, running from the date of the alleged offence to the laying of the information or making of the complaint, a constraint which, at that level seems to operate reasonably well.[270]

263 Experience in other jurisdictions suggests that rigid or vigorously applied over-all time limits can be counterproductive. In Scotland, for example, a jury trial must normally proceed within 110 days of committal if the accused is in custody (subject to the court's discretionary power to extend) and within a year of commencement of proceedings, if on bail. On the expiry of either deadline, the prosecution is stayed and the defendant is released from custody or his bail obligation as the case may be. However, the availability of these time limits does not, in general, contribute to the aim of efficient and speedy preparation for trial. To comply with them, procurators fiscal frequently have to list the cases for trial even when they are not, or may not be, ready and then seek repeated adjournments while the parties continue to prepare for trial. Not only does such necessity defeat the purpose of the time limits, but it also causes much waste of time and other inconvenience to defendants, witnesses, victims and all others involved in the process. In Canada a decision of the Supreme Court,[271] interpreting the constitutional right of defendants charged with serious offences to trial within a reasonable time, led to so many motions to stay, that the prosecution dropped thousands of cases awaiting trial. The resultant public outcry contributed eventually to the legislature reclassifying a broad range of offences so as to take them outside that relatively loose time bar.

264 Similar experiences in other jurisdictions suggest that the Secretary of State has been well advised in not introducing over-all time limits here.[272] Compliance with arbitrary and rigid time limits is likely to give only an illusion of speedy preparation for trial, hiding the reality of injustice in substantive and procedural compromises that they may impose on the criminal justice process. At their worst, they may prevent conviction of the guilty whilst doing little to speed the trial of both the guilty and innocent. Neither is conducive to public confidence in the system. In my view, the provisions for bail, custody time limits and power of the courts to stay cases where delay amounts to an abuse of process are adequate legal safeguards against undue delay in bringing cases to trial. Accordingly, I do not recommend the introduction of over-all time limits for the conduct of

[270] Magistrates' Courts Act 1980, s 127
[271] *R v Askov* (1990) 79 CR (3rd) 273, 56 CCC (3d) 449 (SCC)
[272] as he has power to do under the Prosecution of Offences Act 1985, s 22(1)(a)

prosecutions of indictable offences or for variation of the six months' limitation on summary prosecutions in Magistrates' Courts brought by information or complaint.

Custody time limits

265 There has been little comment in the Review about the value and broad effect of the custody time limits. But because of my recommendation for the establishment of a unified Criminal Court, and a number of problems in their practical application, I refer to them in a little more detail than might otherwise be thought necessary. In summary-only and 'either-way' cases, the maximum custody period from first appearance to trial or mode of trial hearing, as the case may be, is 56 days, and, for 'either-way' cases, to trial or committal, 70 days. In the Crown Court the maximum custody period is 112 days from committal and 182 (less any time spent in custody while in the magistrates' court) from sending or transfer,[273] to start of trial.

266 Under a unified court structure, or even without it, if my recommendation for abolition of committals in either-way offences is adopted, there would be no need for staged custody time limits pegged to the times of allocation and committal. All cases should have a single maximum custody period from first appearance to start of trial. I have received no submissions in the Review to persuade me that the present maxima from first hearing to trial of 56 days in summary cases or 182 days in those tried on indictment should change. And, for those cases allocated to the District Division, 182 days would also appear to be suitable.

Accordingly, I recommend that the present maximum custody periods should continue, save that, in the event of abolition of committal proceedings for 'either-way' offences and/or of the establishment of a unified Criminal Court, the periods should be 56 days for cases tried summarily (whether summary-only or 'either-way') and 182 for those tried otherwise.

Extension of custody time limit

267 A court may extend the custody time limit if it is satisfied that the need for it is due to "some … good and sufficient cause" and "that the prosecution has acted with all due diligence and expedition".[274] There has been much jurisprudence on these two criteria, focusing on the need to establish both of

[273] Crime and Disorder Act 1998, ss 51 and 52;and Criminal Justice Act 1987, ss 4 and 5
[274] Prosecution of Offences Act 1985, s 22(3)

them and on the application of the first, in particular, that inability to list the case because of lack of a judge or a court is not normally "a good and sufficient cause".[275] ACPO have criticised the outcome that, despite due diligence on the part of the police and prosecutor, an inability on the part of the court system, for whatever reason, to provide a judge or a court could nevertheless result in refusal of an extension. I can understand the police frustration about this. On first impression, it seemed to me that the observation of Lloyd LJ in *R v Governor of Winchester Prison, ex p Roddie,* in relation to the duty of the prosecution to proceed with all due expedition, that Parliament having willed the speedy trial of defendants in custody "must also will the means", might also apply to the provision of a judge or a courtroom to try the case.[276] However, such or any other causes have, in the words of the statute, to be "sufficient" as well as "good", which is its way of ensuring that that they are not used to subvert its purpose of speedy trial for those in custody. Courts must examine such claims rigorously and, in the end, decide each on its own facts to see whether it is both "good" and "sufficient". It follows that, depending on the circumstances, unavailability of a judge or a courtroom may be held to justify an extension. In that state of the law, I see no justification for recommending amendment of the 1985 Act in this respect.

268 The consequence of expiry of the custody time limit where, because of a slip, the prosecution has not before then sought an extension, can be serious. A defendant is only held in custody where there are substantial grounds for believing that he would abscond, or commit an offence while on bail or obstruct the course of justice. But the courts can only extend the limit on application made before its expiry.[277] And even where a magistrates' court or the Crown Court have considered and wrongly refused an extension before the expiry of the period, their decision cannot be corrected on application to the Divisional Court after its expiry.[278] This is aggravated by the anomaly that a prosecution appeal to the Crown Court from a magistrates' court's refusal to extend the time limit will not be deemed to expire until the appeal has been determined. Yet, in a prosecution appeal from the Crown Court to the Divisional Court, the time limit takes effect despite the pending proceedings. Thus, as a result of a procedural slip an accused person may be let free to wreak havoc of one or other of those sorts. Equally, where one or other court has wrongly granted an extension, the defendant is without remedy unless he can get his case before the Divisional Court within the period. The right of appeal in either case is often academic by the time the appeal is listed for hearing. An application may be made "at any time before the expiry of a time limit", but a further application within the period on essentially the same basis would ordinarily be an abuse of process. It has been held that, where the court has refused an extension because of "a fundamental error of fact", it would be

[275] for a review of the authorities and general statement of the law, see *R v Manchester Crown Court, ex p McDonald* [1999] 1 Cr App R 409, DC, per Bingham LCJ, giving the judgment of the Court
[276] ibid at 415D-416B
[277] R *v Sheffield JJ, ex p Turner* [1991] 2 QB 472, 93 Cr App R 180, DC
[278] *R v Croydon Crown Court, ex p Comnrs Of Customs and Excise* [1997] 8 Archbold News 1, DC

permissible to re-apply to the same court on the true facts.[279] However, that is a very restricted basis of challenge and does not overcome the absence in most cases of an effective remedy by way of appeal.

269 In my view, some provision should be made for enabling a criminal court at any level to consider and grant an extension outside the period and for an effective right of appeal outside the period against a refusal within the period. Because of the fundamental nature of the presumption in favour of a defendant's liberty while awaiting trial, any relaxation of that sort would have to be tightly circumscribed. For example, there could be a limit on the further period during which the matter could be raised. But the central criterion, I suggest, should be that a first instance court should only exercise the power to extend after expiry of the time limit where it is satisfied that there is a compelling public interest for doing so.

270 It has been suggested[280] that many of the difficulties of overrunning the custody time limits in the Crown Court could be overcome by holding an early pre-trial hearing at which a date is set for trial before expiry of the limit or, if that is not practicable, at which a direction is given that it should be tried within a "window of time" before expiry and re-listed for directions in good time if there is any problem about it.[281] That is undoubtedly one way of doing it, but potentially wasteful in the number of pre-trial or mentions hearings which it may require. An early pre-trial hearing, as I have said, is rarely good use of the court's or the parties' time; in many cases, mutual disclosure will not have taken place and the likely shape and length of the trial cannot be reliably estimated. What is needed is an automatic system by which the court and the prosecution register from the outset the relevant maximum custody period and which they can set as an alert as time moves on. In my view, a better practical and more efficient safeguard against the risk of the prosecution overlooking the imminence of expiry of custody time limits would be greater use by courts of information technology in their case management systems. Both the courts and the prosecutors could have built into their case files in custody cases 'landmark' dates to trigger the need for timely applications for extension if appropriate. Such 'landmarks' should also be of assistance in identifying priorities for listing of cases for trial.

I recommend:

- **amendment of section 22 of the Prosecution of Offences Act 1985 to enable a court to consider and grant an extension of the custody time limit after its expiry, but only if such power is closely**

[279] *R v Bradford Crown Court, ex p Crossing* [2000] 1 Cr App R 463, DC
[280] see the 2001 edition of Archbold, para 1-270a
[281] *R v Sheffield Crown Court, ex p Headily* [2000] 2 Cr App R 1, DC; and *R v Worcester Crown Court, ex p Norman* [2000] 2 Cr App R 33, DC

circumscribed, including a provision that the court should only grant an extension where it is satisfied that there is a compelling public interest in doing so; and

- **the provision of an effective right of appeal outside the period against the refusal of an extension within the period.**

A CODE OF CRIMINAL PROCEDURE

271 Fairness, efficiency and effectiveness of the criminal justice system demand that its procedures should be simple, accessible and, so far as practicable, the same for every level and type of criminal jurisdiction. There are many features of criminal procedure that are common to summary proceedings and those on indictment, yet at present they are separately provided for in each jurisdiction and in a multiplicity of instruments and, often, in quite different language. Such a mix of different provisions providing for common procedural needs is an impediment to understanding by courts, legal practitioners, parties and others of the workings of the courts, and thus to the accessibility of the law. A unitary court, whilst not essential to the establishment of a common code, would ease its introduction and the task of all who have recourse or are exposed to the criminal process.

272 There has been an enormous increase in the growth in and pace of change to our substantive and procedural criminal law in recent years. Scarcely a year passes without one, or some times two, pieces of criminal justice legislation, introducing in a disjointed way fundamental changes to the work of the criminal courts. There were Criminal Justice Acts in 1982, 1987, 1988, 1991 and 1993. They were followed by the Criminal Justice and Public Order Act 1994, the Criminal Procedure and Investigations Act 1996 and the Crime and Disorder Act 1998. Most of these enactments made fundamental changes to the law, and they represent only a proportion of the legislative unrest of recent years. Such legislation is usually accompanied by secondary legislation. There are also common-law rules, judicial practice directions and statutory and non-statutory codes of practice. The Law Commission, in a survey for this Review in early 2000, found: 207 Acts of Parliament devoted to criminal procedure and/or evidence, the earliest enacted in 1795; 64 pieces of secondary legislation containing rules that differed according to whether they governed summary proceedings or those on indictment - 271 different sources of law, procedure and evidence, not including case law or guidance from the Lord Chief Justice or the Attorney General. Few of these sources, standing on their own, represent the whole law or the current law on any particular aspect, many of them being subject to piecemeal amendment, often by several more recent instruments. In short, there is no definitive, simple and ordered

statement of the law governing either the separate procedures of the two jurisdictions, still less the procedures common to both.

273 Finding the right source or sources can be a time-taking and confusing task for judges and experienced criminal law practitioners. And, having found them, the content is often impenetrable and sometimes leads to conflicting decisions. What can it be like for lay magistrates, dependent on the advice of their often over-pressed court legal adviser in the middle of a busy list, still more for the often unrepresented defendant in the magistrates' courts, equally dependent on help from the court staff or even the prosecutor's goodwill? Complexity and uncertainty such as this increases cost. Little attention is paid to it because it is hidden. It causes expensive delays and mistakes in the legal process at all levels; it spreads beyond the courtroom itself in the training and - with each new piece of legislation – re-training in one form or another of many involved in the criminal justice process. There are significant costs to all this – in the form of injustice and loss of public confidence and a financial cost to the public who have to pay the bill. For a characteristically entertaining, but also depressing, account of the mess we are in, I commend Professor John Spencer's recent paper*, The Case for a Code of Criminal Procedure*.[282]

274 What is needed is, not a consolidation of all relevant current provisions, but a concise and simply expressed statement of the current statutory and common law procedural rules and the product of the present overlay of practice directions, codes of guidance and the like. It should be in a single instrument and laid out in such a form that it, the Code, can be readily amended without constant recourse to primary legislation and without changing the 'geography' or the familiar paragraph and section numbers governing each topic. There is nothing new in an instrument formulating, as distinct from merely consolidating, the law from time to time, and doing so within a constant framework. In the procedural sphere Civil law countries took as an early model the Napoleonic Code d'Instruction Criminelle of 1808,[283] drawing as the French did, on common as well as civil law traditions. The United States of America have developed codification of primary and secondary legislation and jurisprudence into a fine art in both state and federal jurisdictions. And, as Lord Bingham memorably said in a speech some three years' ago:

> "For 25 Canadian dollars Canadian citizens can buy a small paperback which contains a comprehensive and comprehensible statement of everything he, and the policeman, and the judge, need to know about the substantive

[282] presented to a meeting of the Statute Law Society in October 1999 , now published in [2000] Crim LR 519
[283] see now the French *Code de Procedure Penale*, which dates from 1958

criminal law, evidence, procedural and sentencing in Canada."[284]

275 In the more modest form of statutory consolidation, Commonwealth countries have done much the same for two or more centuries. There is a good practical example of the latter close at hand in Scotland's consolidation, starting in 1975, of its statutory laws of criminal procedure.[285]

276 As Professor Spencer has suggested,[286] we should proceed in two stages. First, there should be an exercise in consolidation of primary and secondary legislation coupled, possibly, with some codification of the more important and uncontroversial common law rules. This would be a valuable exercise in ground clearing, in identifying the inconsistencies and the anomalies and in searching for and identifying some broad and overriding principles. The Law Commission would probably be best suited for the task of preparing a draft Bill, the passage of which into legislation could be swift and uncontroversial, as in Scotland.

277 A start could then be made on codification, an exercise of both systematic restatement and reform, with the aim of producing a single corpus of rules for a unified Criminal Court. That instrument should begin with a clear statement of purpose and general rules of application and interpretation, as successfully pioneered in the Civil Justice Rules flowing from Lord Woolf's reforms of the civil law. It should combine the various sources into a concise summary of rules, reducing them so far as possible into a discipline common to all levels of jurisdiction, using the same language and prescribing the same forms. It should make separate provision only insofar as necessary to allow for procedural differences at each level flowing from the court's composition and nature and volume of its work. It should be capable of ready and orderly amendment, by secondary legislation along the lines of that enabling the Lord Chancellor to amend the Civil Procedure Rules, subject to the negative or positive resolution procedure.[287] The boundary between procedure and substantive law is often ill-defined and there will no doubt continue to be changes of important principle that may require primary legislation. In that event, if the integrity of a new convenient and concise code of procedure drawing on all relevant sources is to be maintained, some method would need to be devised for convenient and orderly amendment of it. I emphasise that I am talking about codification of all procedural sources, that is, statutory, case law, custom and judicial practice directions and other guidance.

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[284] delivered at a dinner for HM Judges at the Mansion House, London on 22nd July 1998; now published in his selected essays and speeches, *The Business of Judging* (OUP, 2000), p 295, under the heading: *A Criminal Code: Must We Wait For Ever?*

[285] Criminal Procedure (Scotland) Act 1975, itself included in further consolidation in the Criminal Procedure (Scotland) Act 1995;

[286] *The Case for a Code of Criminal Procedure* pp 529-531

[287] see Civil Procedure Act 1997, s 4

278 Codification of procedure would, however, be a substantial task and would need to be carried out by a body with a specific remit and particular expertise. As the Law Commission have observed,[288] some matters of procedure involve questions of general principle requiring primary or secondary legislation on which it could advise, if asked, for example, questions of bail, disclosure, joinder and rules of evidence. But the bulk of the work, whether of principle or practicality, in proposing and formulating provisions of the Code and, subsequently, their amendment would have to be consigned to a separate, standing body specially constituted for the purpose, such as a statutory rules committee. It should be closer in form and function to the Civil Procedure Rules Committee[289] the function of which is to make rules subject to the Lord Chancellor allowing them, rather than to the much smaller Crown Court and Magistrates' Courts' Rules Committees which do not meet as committees and which, in the main, simply react in correspondence to drafts prepared by the Home Office and Lord Chancellor's Department.[290] Its initial role would be to draft the code and thereafter to maintain it, taking into account new and projected legislation and draft Bills produced by the Law Commission. It should have a power to propose change as well as to advise on changes proposed by others, or likely to be made necessary by legislation, case law or other developments. There should be a complementary duty on government to seek the Committee's advice at an early stage on all proposed procedural innovation or change.

279 I suggest that the body entrusted with this important task should be statutory and have a status similar to that of the Civil Procedure Rules Committee. It should be called **The Criminal Procedure Rules Committee**. In my view, it should be chaired by the Lord Chief Justice and should include judges from each level of the Criminal Court, including the Vice President of the Court of Appeal, (Criminal Division), the Senior Presiding Judge, at least two High Court Judges and two Circuit Judges sitting in crime, together with an appropriate number of District Judges, magistrates and justices' clerks. It should also contain a number of experienced criminal practitioners from both branches of the profession, and at least one academic specialising in the field, together with appropriate representatives of voluntary organisations with a direct interest in the work of the criminal courts. And it should be supported by a full-time staff of lawyers and administrators with similar experience.

280 In Chapter 8 I recommended the creation of a statutory Criminal Justice Council to act as a standing advisory body to the Government on the criminal justice system and to provide general oversight of the programme and structures for codification of the criminal law. I believe that such a body

[288] in a submission in the Review
[289] Civil Procedure Act 1997, s 2
[290] Supreme Court Act 1981, s 86; Magistrates' Courts Act 1980, ss 144 and 145

would have an important role in advising on and co-ordinating the process of change flowing from this Review but also more generally in its role of keeping the criminal justice system under review. For these purposes, I believe that the Council should have over-all oversight of the work of the Criminal Procedure Rules Committee.

I recommend that:

- **the law of criminal procedure should be codified, but in two stages;**
  - **first, the Law Commission should be requested to draft legislation consolidating existing primary and secondary legislation coupled, possibly, with some codification of the more important and uncontroversial common law rules;**
  - **second, a statutory Criminal Procedure Rules Committee should be established to draft a single procedural code for a unified Criminal Court, restating and reforming as necessary statute and common law, custom, judicial practice directions and other guidance;**
- **the code, which should be expressed concisely and in simple English and Welsh, should provide, so far as practicable, a common set of rules for all levels of jurisdiction, and different rules only to the extent that they are necessary for different forensic processes;**
- **the draft code should be enacted in primary and subsidiary legislation, and the Committee should, thereafter maintain it, proposing amendments where necessary for the Lord Chancellor's approval and initiation of amendment by secondary legislation subject to negative or positive resolution as may be appropriate;**
- **in all its activities, the Committee should be under the general oversight of the Criminal Justice Council;**
- **the Government should be under a statutory duty to refer to the Committee all proposals for amendment of the law of criminal procedure;**
- **the Criminal Procedure Rules Committee should be chaired by the Lord Chief Justice and its membership should also include: the Vice-President of the Court of Appeal (Criminal Division), the Senior Presiding Judge, at least two High Court Judges and two Circuit Judges sitting in crime, together with an appropriate number of District Judges, magistrates and justices'**

clerks, a number of experienced criminal practitioners from both branches of the profession and at least one academic specialising in the field, together with appropriate representatives of voluntary organisations with a direct interest in the work of the criminal courts; and

- **the Committee should be supported by a full-time staff of lawyers and administrators experienced in the work of the criminal courts.**