

CHAPTER 11

THE TRIAL: PROCEDURES AND EVIDENCE

INTRODUCTION

- 1 Trial by ordeal, common throughout Europe in the Middle Ages, gave way in England to an accusatorial system based on trial by jury of a citizen's complaint, and in much of Europe to an inquisition by some trusted person. Eventually the two systems developed respectively into our system of trial by judge and jury, with a private or public prosecutor, and the continental inquisition in which, in its early stages at least, a judge acted also as prosecutor.
- 2 The shaping of the accusatorial process by jury trial as it developed towards its present form over the centuries is brought home by the realisation that until the middle of the eighteenth century almost all criminal cases were tried before a jury, and guilty pleas and summary trials as we know them today were rare. The trial, the setting for a public confrontation between accuser and accused and the court's first involvement in the matter, was, until well into the nineteenth century, often a very summary affair. In Europe on the other hand, the judiciary, in their inquisitorial role, spent much time before the formal trial process, privately interrogating witnesses and the defendant and building up a case file (*dossier*).
- 3 The contrast between our accusatorial system and the continental system has survived in large part until today, but as Professor John Spencer has put it:
“the borrowings between the two have been so extensive that it is no longer possible to classify any of the criminal justice

systems in Western Europe as wholly accusatorial or wholly inquisitorial”.¹

- 4 Napoleon’s Code d’Instruction Criminelle of 1808,² which formed the basis of or influenced many European countries’ codes of criminal procedure, introduced a mixed system of a juge d’instruction who investigated the matter in private followed by a public trial before different judges sitting, in serious cases, with a jury. However, the role of the juge d’instruction has begun to wane or has disappeared in a number of countries; and juries, where they are part of the process, in general bear little resemblance in composition or role to those of the English jury.
- 5 Equally, English law, with the advent in the 19th century of local police forces and a Director of Public Prosecutions and, in the late 20th century of a centralised service of full-time prosecutors in the form of the Crown Prosecution Service,³ has gradually focused courts’ attention more and more on the manner of investigation and drawn them into pre-trial procedures. The result has been a longer pre-trial and trial process in jury cases, widespread use of pleas of guilty as a route to conviction and, since the mid 19th century, a remorseless increase in summary work to its present level of about 95% of all criminal cases.
- 6 The point of this short historical comparison is to draw attention to the relationship between the composition of the tribunal and its procedural and evidential rules and practices. Many aspects of a system developed over the centuries to introduce safeguards against the forensically primitive jury trials and harsh penal regimes of the time may not fit, or be necessary for, modern trials, whether by judge or jury or in some other form.⁴
- 7 A notable feature of the Review has been the widespread acceptance of the basic structure of the English criminal trial. It is shaped by the twin principles that the prosecution, as the complainant, has the task of making the tribunal sure of guilt and that the defendant has the choice of answering the prosecution case or remaining silent. The trial process is a contest between two parties, though, in some respects, it is no longer entirely adversarial. In it, the parties deploy their respective cases before a tribunal the role of which is primarily to listen, intervene only when necessary to ensure a fair and efficient trial and, at the end, to decide the issue of guilt. It is a continuous and public process in which the prosecution orally explains its case and still relies mainly on oral evidence to support it. The defence tests and challenges

¹ In preparing this outline analysis, I have drawn heavily on the assistance of Professor John Spencer.

² replaced in 1958 by the Code de Procedure Penale, which, much modified is still in force

³ of which the Director of Public Prosecutions became head

⁴ see Report of the Philips Royal Commission, para 1.15, citing Radzinowicz, *History of English Criminal Law*, Vol 1, App 3, pp 699 - 726

the prosecution case by cross-examining prosecution witnesses as appropriate and/or by submissions of law or as to the inadequacy of the evidence. If the defendant wishes, he may in turn give oral evidence and call witnesses in his support. Thus, our system of trial is dominated by the principle of orality, namely that evidence as to matters in issue should normally be given by oral testimony of witnesses in court, speaking of their own direct knowledge.

- 8 I have to record that, on the topics of trial procedure and evidence, I have received few proposals for fundamental reform in either the Crown Court or magistrates' courts. The general theme, particularly from judges, magistrates, the Bar and solicitors, is that, while there is scope for some improvement, the trial process is basically sound and should not be disturbed – often expressed in the hackneyed phrase “if it ain't broke, don't fix it”.
- 9 Others were not so relaxed about the system. The Association of Chief Police Officers, in a comprehensive and powerful submission, set out a number of fundamental criticisms, the underlying theme of which was that pre-trial and trial procedures and rules of evidence are artificially and unfairly slanted in favour of defendants. In their view: the adversarial procedure relegates the court to a reactive role when it should have far greater direction and control of the way in which the issues and the evidence are put before it; fact-finders are wrongly denied access to material relevant to their findings of fact; procedural law – ‘due process’ – dominates substantive law to the extent of creating, rather than preventing, injustice, resulting in a loss of public confidence in the courts' contribution to the control of crime; the ‘adversarial dialectic’ and the ‘principle of orality’ have been elevated to ends in themselves rather than means to get at the truth and also, as a result, discourage modern and more efficient ways of putting evidence before the courts; and the criminal justice system over-all is not equipped to bring to trial and or try effectively those engaged in highly sophisticated and organised crime.
- 10 The police are not alone in criticising the system. Many distinguished academics with a close working knowledge of it have, in various studies, papers and articles in recent years been powerful advocates for procedural reform. Also, some judges of great experience in this field are impatient for principled reform of the trial process. Both complain of the piecemeal and muddled nature of our rules of procedure and evidence and the lack of an over-all philosophy in our consideration of the need for, and shape of, possible reform.
- 11 The fundamentals of the trial process are the same for trial by judge and jury as they are for the magistrates' courts. Yet, when most people, lawyers included, talk of trial procedures they think of trial by judge and jury. That is forgivable since, as I have mentioned, that is how most trials used to be. With the burgeoning of summary jurisdiction from the mid-19th century on, it was

no doubt instinctive to borrow and adapt for its use much of the structure and procedures of trial by judge and jury. With Parliament's corresponding increase in provision for the trial of offences 'either-way' that I have described in Chapter 5, it was important to retain as much as possible of that commonality of procedures and rules of evidence. Subject to the necessary differences between trial with and without a jury, the aim must have been to stick to one concept of a fair trial whatever the composition of the tribunal conducting it. The result is a lumping together of the two jurisdictions when discussing criminal procedures and evidence, though usually in the context of trial by judge and jury because that's where most of the problems arise. In magistrates' courts, in the nature of things, trials are generally shorter, faster and simpler than they are in the Crown Court. I have, therefore, some sympathy for the Runciman Royal Commission for its focus on the trial procedures of the Crown Court and apparent disregard - for which it has been criticised - of those in the magistrates' courts. It is an imbalance I have sought, not always successfully, to avoid throughout the Review.

- 12 I have attempted to identify what is not working well and what major candidates there may be for change. In doing so, I have taken into account, not only the many submissions in the Review and academic and judicial writings on the subject, but also a large number of past and present studies and reviews of procedure and evidence in this and other common law jurisdictions. In all of this, it is important to keep in mind that different forms of tribunal may administer justice with efficiency in different ways. This has particular significance to my proposal for a unified Criminal Court consisting of various forms of tribunal, namely: judge and jury, judge alone, judge and lay members (in serious fraud cases), judge and magistrates (District Division), and magistrates on their own.
- 13 In terms of studies and reviews, this is well-worn and relatively recent trodden ground. The Philips Royal Commission, which reported in 1981, was directed by its terms of reference to examine pre-trial procedure. However, as it observed,⁵ "it is the nature of the trial itself which largely determines the pre-trial procedure". Lord Roskill's Committee's Report in 1986, which, though focused on fraud trials, said much that was of application to trial generally. And the Runciman Royal Commission, appointed in the wake of mounting public concern over a number of high profile miscarriages of justice, was charged with a wide-ranging review of the manner and supervision of police investigations, the role of the prosecutor, expert evidence, pre-trial and trial procedures, evidence, the role of the court and other machinery in correcting miscarriages of justice. In its Report in 1993 it made a large number of recommendations, some of which were adopted and some not.

⁵ *ibid* para 1.6

TRIAL BY JUDGE AND JURY

General

- 14 I start with trial by judge and jury because, as I have said, that is where most of our features of trial have their origin and in which, because of the partnership of judge and jury there are particular problems. Some of these are to be found in greater or less degree, according to the composition of tribunal, in the magistrates' courts. I return to them and other forms of tribunal below, but briefly.⁶ I see the problem, not so much as speeding up the trial once it has started; much of the scope for saving of trial time lies in efficient preparation for it. If, in advance, the issues of fact have been identified, the issues of law and admissibility of evidence, have, so far as practicable, been resolved and the evidence of both sides has been pared down to deal only with the issues, the stage should be set for an orderly and expeditious trial. Putting aside unforeseen contingencies that can delay or interrupt any trial, the manner in which the case proceeds is then in the hands of the parties, their advocates and the judge. If the advocates are properly prepared and competent and the judge intervenes suitably to move the case on when they are prolix, repetitious or moving away from the issues, the case should make reasonable progress to its conclusion within present procedural constraints. For the moment, I want to look at the effect of the procedures on the fairness and simplicity of the process and, on jurors and other outsiders to it, as to its comprehensibility. I do so by following the passage of a trial from its beginning to its end.

The start of a jury trial

- 15 I wrote in Chapter 5 of the need to give potential jurors advance and adequate information in writing of what to expect before attending court to sit on a jury. I also referred to the need for more informative guidance on their arrival than the instruction video and talk from the jury usher that is now provided. But not all persons summoned for jury service have the inclination or mental rigour to do their homework before the first day of attendance. Some of them may be late on the first day because of difficulties in finding their way around and miss the video and/or introductory talk. Some may be distracted by the disruption of their work or domestic obligations. Many will be nervous about what is expected of them and bemused by the unfamiliar court environment. Before they have had time to become acclimatised, they are taken to a courtroom with strangely dressed judge and advocates and, often, a full public gallery. Almost immediately they are thrust into the limelight, as they are

⁶ see paras 57 - 67

individually called forward into the witness box and asked to stand and swear the juror's oath.

- 16 Within a short time of all that novelty and after a few explanatory words from the judge, they are expected to listen, take in and remember from the prosecuting advocate's speech what the case is all about. Conventionally, such an opening is a fairly - sometimes a very - detailed exposition of the constituents of the charge or charges, the issues to the extent that the defence may have indicated them and the proposed prosecution evidence. They may be provided during the opening with copies of documentary exhibits, schedules, photographs or plans as required. In large and complex cases, the judge may give juries a more extended explanation of what they are in for, and the prosecution may provide them at the outset with more elaborate documentary aides-memoires. But, in all cases the jury's introduction to the case is essentially oral, a telling of a story by the prosecuting advocate from the prosecution's point of view.
- 17 Whilst jurors are told by judges that they may take notes and are provided with the materials to do so, the pace of the prosecution advocate's opening and their own unfamiliarity with such a technique may not encourage it. Yet, somehow, these strangers to the forensic process are expected to absorb, unaided, in the main, by a written summary or reference to key issues and allegations and counter-allegations relating to them, the prosecution advocate's framework of what is to follow. The reality is, of course, that most of them cannot, and cannot reasonably be expected to, retain all that detail. The system's answer to that is repetition, and the promise of it. Often a judge, in his short introductory remarks before the prosecuting advocate's opening, tries to reassure a jury by telling them that they need not worry about taking in and remembering all the detail straightaway because they will hear it all again many times - in the evidence in chief and cross-examination of witnesses, in the advocates' closing speeches and in his summing-up at the end of the case. And, as in the case of students preparing for examinations or actors learning their lines, sheer repetition, no doubt, eventually fixes the memory of at least some of them.
- 18 To anyone other than lawyers steeped in the procedural traditions of the criminal courts, this must seem a strange way to expect jurors, upon whose understanding and judgment so much depends, to do justice in the case. When they embark upon it they are given no objective and convenient outline in oral or written form of its essentials, the nature of the allegation, what facts have to be proved, what facts are in issue and what questions they are there to decide. And, mostly they have little in the way of a written aide-memoire to which they can have recourse as the case unfolds to relate the evidence to such questions. Any experienced court observer has only to note the exhaustion, and sometimes the distress, of jurors as a case of some length or complexity moves towards its end and the enormity and complications of their

decision-making task is belatedly brought home to them. Trevor Grove, in his informative and entertaining book, *"The Juryman's Tale"*, quotes an American Judge who said that it was like "telling jurors to watch a baseball game and decide who won without telling them what the rules are until the end of the game".

- 19 Depending on the case, on the nature, volume and detail of the evidence and on the aptitude of individual jurors to absorb it, the repetitive nature of the process may be helpful or become tedious in the extreme. But it is commonplace for juries, having retired to consider their verdict, to return to court to ask the judge to be reminded of what a witness has said and, often, for a copy of his written witness statement. In most instances they know that there is such a statement because the advocates and the judge were plainly following their copies of it as he gave his evidence, the witness may have referred to it, or the advocates may have cross-examined and re-examined him by reference to it. All the leading players in the courtroom have a copy, but not the jury. If no point was taken on the statement, they are left to their recollection and the reminders of the advocates and the judge of what the witness said. If a point was taken about the difference between his evidence and the statement, they are dependent on what the advocates and the judge have told them of the contents of the statement as it compares with the witness's oral evidence. Either way, they are not allowed to see the document.
- 20 What more natural request - in any setting but that of a criminal court - than to have access to a witness's written statement made shortly after the event, when considering his oral evidence long after it? Putting aside for a moment the rule that such a statement or part of it is not admissible evidence, save by reference if a witness confirms it in cross-examination, the main rationale for not allowing juries to see it, is that, even with a proper warning and further reminder by the judge of the witness's oral evidence, they would be likely to give the statement more weight than their recollection of what he said. There is a similar problem in the case of evidence in chief of young children recorded on video-tape, even if, when the jury are permitted to view it for a second time, it is accompanied by a reminder of the cross-examination and re-examination.⁷ So, what more could and should be done at the start of and throughout trial to assist the jury's understanding of the trial process, the case in hand, what they are there to decide and to assist them in their task?
- 21 First, there is the indictment (or charge as I have recommended it should be called in future). To the extent that it does not happen already, each juror should routinely be provided in all cases with a copy of the charge or charges at the outset. I say "all cases" because under my proposal for allocation of work in a new unified Criminal Court, all cases tried by judge and jury are

⁷ *R v Rawlings and Broadbent* [1995] 2 Cr App R 222, CA; *R v M (J)* [1996] 2 Cr App R 56, CA

likely to be of some substance. In Scotland, each potential juror is handed a copy of the indictment as he enters the jury box.

22 Second, I am strongly of the view that the time has come for the judge to give the jury at the start of all cases a fuller introduction to their task as jurors than is presently conventional, including: the structure and practical features of a trial as it may affect them, a word or two about their own manner of working, for example note-taking, early selection of a foreman and his role, asking questions, time and manner of deliberation etc. He should also give them an objective summary of the case and the questions they are there to decide, supported with a written aide-memoire. I have referred to this in Chapter 10 as a “case and issues summary”. The parties’ advocates should prepare and agree the summary in draft before the trial (and be paid for doing so) for the judge’s approval and use by him, them and the jury throughout the trial. The summary should identify:

- the nature of the charges;
- as part of a brief narrative, the evidence agreed, reflecting the admissions of either side at the appropriate point in the story (not leaving them to be read or provided in written form to the jury then or at some later stage simply as a list of admissions);
- also as part of the narrative, the matters of fact in issue; and
- with no, or minimal, reference to the law, a list of the likely questions for their decision.⁸

23 There is little new in the proposal of a short introduction by the judge to the jury of the case and the issues they are there to decide. Some judges in England and Wales do it. Scottish judges often do it by reference to the narrative indictment which is customary in their jurisdiction. And the practice is well established in the United States. As I have seen, it serves as an impressive and effective objective introduction to the jury of the task ahead of them. If and to the extent that the issues narrow or widen in the course of the trial, the case and issues summary should be amended and fresh copies provided to the judge and jury as an update of the matters on which they have to focus. At the end of the trial, it should also serve as a common point of reference for the judge and advocates when considering any matters of difficulty before speeches, and also for the jury during speeches and the summing-up. Now that most judges and practitioners use word processors as a normal working tool, creating and maintaining such a running and useful aide-memoire is not the burden it might have been only a few years ago.

⁸ see paras 43 – 45 below

- 24 I know that many criminal practitioners may not initially welcome this proposal, one that requires the advocates on both sides to co-operate in providing a basic document for the use of the judge and the jury as well as themselves. They may believe that it would be impracticable in the hurly-burly of their life, preparing cases for trial - often in the cracks of the day while engaged in the trial of other cases. However, equally busy civil and family practitioners have become accustomed to the discipline of advance and concise identification for the courts of the issues and as part of their own preparation for trial, in documents setting out the agreed facts, those in dispute and the issues for determination. I recognise that in those jurisdictions such documents are primarily skeleton arguments rather than a common aide-memoire. I recognise too that in criminal cases there are special considerations of the liberty of the subject and the safeguards of the prosecution's heavy burden of proof and the defendant's right of silence. But I am not proposing routine exchange and provision to the court of skeleton arguments or pleadings, simply a neutral and summary document derived from the sort of analyses that competent advocates on both sides would, in any event, need as part of their own preparation for trials of substance, which, under my proposals, would in future be the sole or main candidates for trial by judge and jury. I should note that in serious and complex frauds there is already provision for the judge to direct both sides to provide the court and each other with a 'case statement' setting the sort of matters that I have in mind for this purpose.⁹ If there are improvements in the manner of preparation for trial, as I have recommended in Chapter 10, the task should not be too onerous and would serve as a valuable checklist for all in the course of the trial.

I recommend that in all cases tried by judge and jury:

- **each juror should be provided at the start of the trial with a copy of the charge or charges;**
- **the judge at the start of the trial should address the jury, introducing them generally to their task as jurors and giving them an objective outline of the case and the questions they are there to decide;**
- **the judge should supplement his opening address with, and provide a copy to each juror of, a written case and issues summary prepared by the parties' advocates and approved by him;**
- **the judge, in the course of his introductory address, and the case and issues summary, should identify:**
 - **the nature of the charges;**

⁹ Criminal Justice Act 1987, s 9(4) and (5)

- ***as part of a brief narrative*, the evidence agreed, reflecting the admissions of either side at the appropriate point in the story;**
- ***also as part of the narrative*, the matters of fact in issue; and**
- **with no, or minimal, reference to the law, a list of likely questions for their decision; and**
- **if and to the extent that the issues narrow or widen in the course of the trial, the case and issues summary should be amended and fresh copies provided to the judge and jury.**

Time estimates

- 25 Under the present plea and directions system, trial advocates are required to inform the court of their estimates of the likely length of the trial and to keep it informed of any variation in it. Normally, the judge asks them about it on the first day of trial. In cases of any length it has long been good practice for the prosecuting advocate to prepare in good time before trial a provisional list of the order in which he will call prosecution witnesses. This enables arrangements to be made, so far as possible, for staging their attendance at court and, by supplying a copy to the defence and the court, advance indication of the order of subject matter of the evidence. Normally the prosecuting advocate does not attempt to estimate, other than by reference to the number of witnesses to be warned for each day, how long each will take, and the court does not require it. The same applies with the defence.
- 26 I am generally against any attempt to introduce rigid time limits for various stages of a criminal trial. However, in cases that have required careful and detailed preparation, a joint estimate of how long the principal witnesses would take to give their evidence assists in the more accurate staging of their evidence and should introduce a useful discipline for advocates in their respective questioning of them. There is provision for this in the judge's questionnaire for use in the plea and directions hearing, though there are indications that advocates could give it more careful consideration than the time taken at trial suggests they do. Such a system seems to work better in children's cases in the Family Courts where, pursuant to guidance given by the President,¹⁰ advocates on both or all sides at the pre-trial review submit a schedule to the court indicating how long each will spend with each witness. Of course, such estimates are likely to be rough and ready approximations; much will depend on the manner and content of the witnesses' response to

¹⁰ MD & TD (*Children's Cases: Time Estimates*) [1994] 2 FCR 94

questions and where the questioning leads. But they are useful as a rough guide to planning and some reminder to the advocates, where practicable and consistent with the proper conduct of their cases, to try to keep to them.

I recommend that advocates should regard it as of the highest importance to attempt accurate estimates of the likely length of their principal witnesses' evidence, including a review of them as the issues become clearer in the course of preparation for trial.

Opening speeches

- 27 Refinement of the issues, confinement of the proposed evidence to the issues and an introduction from the judge, coupled with a case and issues summary, as I have recommended, should reduce the need in many cases for a long opening prosecution speech. In Scotland, they manage to do without a prosecution speech altogether. I write this with pangs of nostalgia because there are few pleasures at the criminal bar greater than opening an enthralling prosecution case to a jury. But the time and best use for advocacy is later as the evidence begins to unfold. I do not go so far as the Runciman Royal Commission in suggesting a presumptive time limit for the prosecution advocate's opening unless the judge has given leave for longer.¹¹ But I do endorse its general recommendation against overloading the jury in the opening with the detail of the proposed evidence or of the law unless it is essential to their understanding of the task ahead.¹²
- 28 I have always been puzzled at the lack of any formal provision for a short opening defence speech at the beginning of a criminal trial and at the general reluctance of defence advocates to make one, even when the judge informally invites them to do so. No doubt there are tactical reasons for the latter where the defence is weak or uncertain or dependent on the appearance or performance of critical prosecution witnesses. But in many cases it would be of strategic advantage to the defendant as well as of assistance to the jury for his advocate to balance the prosecution's opening by underlining the nature of his defence at that stage.

I endorse the Runciman Royal Commission's recommendation¹³ that a defence advocate should be entitled to make a short opening speech to the jury

¹¹ Chapter 8, para 8, recommending a presumptive time limit of 15 minutes

¹² Chapter 8, paras 8 and 9

¹³ Chapter 8, para 10

immediately after that of the prosecution advocate, but normally of no more than a few minutes.

Evidence in chief

The art of examination in chief

- 29 Getting the witness to give a clear, orderly and relevant account, but in his own words - and its contribution to the pace of a trial – are often underestimated. Two major causes of delay in the progress of trials under our present system are the manner in which witnesses are required to give their evidence in chief and the interruption of it by technical and often arid disputes as to its admissibility. As to the manner of giving evidence, it can be an extremely slow and difficult business to elicit from a witness an orderly, comprehensive and accurate account of the matter on which he is there to give evidence. The advocate examining him is not permitted to lead him – ask him questions that suggest the answers. And, unless the witness is a police officer or other experienced witness, he may be nervous, or he may lack the ability to give a clear account, or he may not remember all or some of the important detail. Sometimes the opposing advocate may assist on those parts of the evidence not in dispute by indicating to the judge that he does not object to the witness being led. Sometimes, in the hope that the witness may not come up to proof, he may not assist in that way.
- 30 As if those impediments to presenting a brisk and clear account to the court are not enough, the verbal gymnastics involved in seeking to overcome them often lead to distracting and off-putting interruptions to the witness. The advocate examining him will be alert to prevent him from breaching the rules of evidence, mostly the rule against hearsay, before his opponent rises to his feet to object. There are thus constant breaks in the flow of the story while the witness is warned - to his bewilderment and that of the jury - why he cannot give his account as he would in any other setting. In that way, as Professor IH Dennis has recently written, the adversarial nature of the process can also distort the witness's account from that which he would have given, if left to himself:¹⁴

“... witnesses will not generally be questioned by anyone involved in the proceedings in a spirit of free impartial inquiry. Partisan, controlled questioning is the norm, and free report by the witness is the exception. This point helps to explain why some witnesses find the process of testifying at best bewildering, because they are unable to tell their story in their own way, or at worst traumatic, because of ‘robust’

¹⁴ *The Law of Evidence* (Sweet and Maxwell, 1999), p 428

cross-examination which may have the effect of making them feel that they themselves are on trial”.

- 31 There are frequent skirmishes, signalled or played out in the jury’s presence as to the form of the examining advocate’s questions or as to whether and in what form the witness may be allowed to refresh his memory from written material. These are unedifying and, in my view, disfiguring aspects of our trial process. They are prompted in the main by archaic and inappropriate rules of evidence, giving unrealistic primacy to the oral over the written word and causing confusion and anomaly where common sense suggests another course. The rules make the truthful witness’s evidence a test of his memory rather than ensure its truthfulness and accuracy, and they do little to expose the dishonest witness’s lies. In my view, something should be done to enable a witness’s evidence in chief to be put before a tribunal more cleanly than is now the case. I have in mind general reform of the rule against hearsay and, in particular, widening the category of documents from which he may refresh his memory while giving evidence or, possibly, by allowing an earlier written statement or audio or video-recorded record of questioning to stand as his evidence in chief. I discuss these possibilities in more detail under the heading of Evidence below.¹⁵

The use of information technology

- 32 Information technology, in various forms, could be of great value in simplifying and making more effective the presentation of evidence. Just as there could be a single electronic case file for the use of all involved agencies and parties in preparation for trial, so also, in cases meriting it, there could be a single electronic trial file to which all involved in court, including the judge and jury, could have access on screen.¹⁶ This could enable documents to be presented on screen, whether as electronic text or a scanned image, the use of photographic three dimensional images of exhibits, and computer generated drawings, simulations and animations.
- 33 There are, of course, risks associated with the use of these new technologies before a jury. A well prepared computer animation could be a very powerful exhibit, and overshadow other evidence in the minds of jurors.¹⁷ And the use of information technology may not be appropriate or necessary in the presentation of evidence in many cases. But in the right cases its potential for assisting the jury should not be underestimated. Also, if evidence is being

¹⁵ see paras 81 - 94

¹⁶ this technique was used with considerable success in the Lockerbie Trial; see the Lockerbie Trial Media Pack (Scottish Court Service, 2000)

¹⁷ Siemer, Deanne C, *Tangible Evidence, How to use exhibits at deposition and trial*, third edition (Nita, 1996)

presented on screen to the jury, arrangements should be made so that those in the public gallery and press box are also able to see it.

I recommend that screens and projection equipment should be more widely available to enable electronic presentation of evidence in appropriate cases.

Cross-examination

- 34 The Runciman Royal Commission was concerned about prolongation of trials and unfairness to witnesses by the incompetence or overbearing behaviour of advocates, and about the failure on occasion of judges to control such conduct. In the intervening eight years the Bar and solicitors have done much, by way of continuation training and the promulgation of codes of conduct,¹⁸ to improve the general quality of advocacy. With encouragement from the Court of Appeal, (Criminal Division), and greater emphasis in training, judges and magistrates are now more alert than formerly to their power and duty to intervene to prevent repetitious or otherwise unnecessary evidence and to control prolix, irrelevant or oppressive questioning of witnesses. There is still room for improvement in advocates' conduct of trials, particularly at the junior and inexperienced end of the professions, resulting all too often in costly appeals with little benefit to the defendant/appellant or to justice. And there are still the odd cases when a judge has not acted as firmly as he might have done to prevent incompetence or misconduct. Often the decision when to intervene is a difficult one, and it is not aided by the developing tension between Article 6, in its focus on due process, and the safety of the conviction. There may also be a difficulty for a judge in a long trial to assess the impact of individual rulings on the fairness of the trial over-all. These are, in the end, matters of judgment in individual cases, some of which can be troublesome to the Court of Appeal when the matter reaches them. I do not believe that legislation of the sort urged by the Runciman Royal Commission¹⁹ is necessary as an encouragement to judges to be robust in their control of proceedings or a practical aid in keeping them within proper bounds. But the Court of Appeal should support them.

¹⁸ see Code of Conduct of The Bar of England and Wales, 31st July 2000, Part 7, para 708, and *The Guide To The Professional Conduct Of Solicitors*, Part V, eighth edition (Law Society Publishing, 1999) as updated periodically in the professional standards bulletins of the Law Society

¹⁹ Report, Chapter 8, para 13

The defence case

- 35 If, as I have recommended, the judge at the outset of the case introduces the jury to the issues they have to decide with the assistance of a case and issues summary, and if the defence advocate has made a short opening speech after the prosecution opening, there should normally be no need for the defence to open the case at the close of the prosecution case. However, whether or not the defence advocate has made an earlier short opening speech, he should be entitled to make one at this stage, and I do not see why that entitlement should continue to depend on whether he is intending to call a witness as to fact other than the defendant. That limitation was introduced in 1898²⁰ to curb what had formerly been an unlimited right to a defence opening granted in 1865²¹ when a defendant was not entitled to give evidence on his own behalf.

I recommend that:

- **a defence advocate who makes a short opening speech immediately after the prosecution opening should not thereby forfeit his right to make an opening speech at the beginning of the defence case; and**
- **a defence advocate's entitlement to make an opening speech at the start of the defence case should no longer depend on whether he intends to call a witness as to fact other than the defendant.**

Judges' power to call witnesses

- 36 The power of judges to call witnesses undoubtedly exists, though the established weight of authority – most of it before the Runciman Royal Commission Report in 1993²² - is that it should be used sparingly and only to achieve the ends of justice and fairness. Certainly, a judge should not undertake the role of the prosecutor, for example by calling further prosecution witnesses in order to pursue a case that the prosecuting advocate has decided it is not proper to pursue.²³ However, he may cause to be called, or himself call, a witness not called by the prosecution or defence, and without the consent of either, if he considers it necessary in the interests of justice. The Runciman Royal Commission urged judges, in appropriate cases, to make more use of this power or to suspend a trial to enable further investigations to take place.²⁴ So far as I can tell, judges here continued to be

²⁰ Criminal Evidence Act 1898, s 2

²¹ Criminal Procedure Act 1865, s 2

²² see the authorities set out in paras 4-345 and 4-346 in Archbold, (2001 edition)

²³ *R v Grafton* (1993) 96 Cr App R 156, CA

²⁴ Chapter 8, para 18

sparing in their use of such powers. The arrival in the intervening years of a system of mutual advance disclosure, earlier identification of issues and greater involvement of judges in overseeing the preparation of cases for trial should have equipped them better to identify in the course of trial whether justice requires the calling of a witness whom neither side has considered or wishes to call. Nevertheless, so long as we retain our essentially adversarial system, I consider that judges should use this power only in exceptional cases, where justice demands it. Even then they should be cautious about its use because one or other side may have very good reasons, that they cannot divulge, consistent with justice and in the interests of a fair trial, for not calling the witness themselves. There is also a danger, where the witness is thought to be possibly adverse to the defence case, in the judge assuming what might be perceived as the role of an auxiliary prosecutor. In the main, judges should be able to rely, on the one hand, on the competence and sense of public duty of the prosecutor to protect the public interest and, on the other, on the defence advocate to know what is in the best interest of the defendant.

Taking stock

- 37 It is vital that the judge and the advocates, in the absence of the jury, should take stock of the case at the close of all the evidence and before speeches and the summing-up. This should take two forms. First, this is the time for the judge and advocates finally to review the case and issues summary and, if necessary, to amend it for the jury. The case may have taken a different turn as the evidence unfolded or as unexpected legal points emerged, removing some factual issues or introducing new ones. Second, if there appear to the judge or the advocates any points of difficulty as to the manner in which he should apply the law or as to his treatment of the evidence in his directions and summing-up to the jury, he and they should discuss and, if possible, resolve, them. Similarly, if he intends to supplement his oral directions and/or the case and issues summary with a written list of directions or questions, he should also show that to the advocates for comment at this stage. It is vital that they should be able to fashion their speeches knowing how he is going to put the matter to the jury. It is also a useful exercise for judge and advocates together to remove in advance any misunderstanding and, so far as possible, scope for error. There is nothing new about such an exercise. Over the last ten or so years the Court of Appeal has urged it in case after case, many of them reported and mentioned in successive editions of Archbold.²⁵ But the Court of Appeal is still frequently troubled with errors resulting from failure to take this basic and common sense precaution. In my view, it is of such importance that it should be considered for inclusion in the Criminal Procedure Code that I have recommended and, in the meantime, for consideration by the Lord Chief Justice in a special practice direction.

²⁵ see paras 4-355 and 4-356 in the 2001 edition

I recommend that:

- **at the close of evidence and before speeches, the judge and advocates, in the absence of the jury, should finally review the case and issues summary and, if necessary, amend it for the jury; and**
- **such a procedure, along with those already established by the Court of Appeal for review of evidential and legal issues at this stage of a trial, should be considered for express inclusion in the Criminal Procedure Code that I have recommended and, in the meantime, by the Lord Chief Justice for a special practice direction.**

38 There is another and connected matter that I consider needs urgent clarification. A prosecuting advocate has a positive duty, before or after the judge sums up the case to the jury, to draw to his attention any prospective or actual errors of law. He is also obliged to ensure that the judge's directions and summing-up contain all the essential ingredients. However, there appears to be some uncertainty, both as a matter of law and professional conduct rules, as to the corresponding duty of the defence advocate. It stems from an obiter observation of James LJ in *R v Cocks* in 1976²⁶ that "a defending counsel owes a duty to his client and it is not his duty to correct the judge if a judge has gone wrong". Robert Goff LJ (as he then was), when presiding in the Court of Appeal in a subsequent case not calling for decision on the proposition, was clearly uneasy about it.²⁷ It is said²⁸ that the Code of Conduct of the Bar of England and Wales does not specifically deal with the matter in that it merely states counsel's general duty to inform the court of all relevant decisions and legislative provisions of which he is aware, whether favourable or not to his case, and to inform the court of any procedural irregularity during the hearing, and not reserve it for appeal.²⁹ The relevant provisions of the Code in force at the time of the Runciman Royal Commission were the same or similar, and the Commission found them unsatisfactory as to the extent of defence counsel's duty. It recommended clarification to require him to intervene where the judge had plainly overlooked or misinterpreted a legal matter.³⁰

39 In my view, if and to the extent that the law and professional codes of conduct do not require a defending as well as a prosecuting advocate to seek to correct any error of law, or for that matter, of material fact, of the judge of which he

²⁶ 63 Cr App R 79, CA at 82

²⁷ *R v Edwards (NW)* (1983) 77 Cr App R 5, CA, at 8

²⁸ see para 4-373 of Archbold (Sweet and Maxwell, 2001)

²⁹ see now 7th edition of the Code, July 2000, Part VII, para 708 (c) and (d)

³⁰ Chapter 8, para 24

becomes aware, both the law and the codes should be changed to require it. A defendant's right to a fair trial, including the twin requirements that the prosecution must prove his guilt and that he can remain silent, do not entitle him to ignore the error hoping for a better chance of acquittal or in the hope, if there is a conviction, of getting it quashed in the Court of Appeal. As Professor Sir John Smith has commented:

“... counsel owes a duty to the court. Should not that duty extend to the correction of an obvious slip on the part of the judge? By doing so, he ensures that his client gets a fair trial instead of an unfair one. A client aware of the possible tactic of silence might not like it; but his right is to a fair trial and, if gets that, he should have no complaint.”³¹

I recommend that if, and to the extent that, the law and professional codes of conduct do not require a defending, as well as a prosecuting, advocate to seek to correct a judge's error of law or of material fact of which he becomes aware, both the law and the codes should be changed to require it.

Closing speeches

- 40 I do not, as the Runciman Royal Commission did,³² recommend any normal limit of time on closing speeches and/or consideration by the judge of costs sanctions against advocates who, he considers, have unjustifiably exceeded it. I believe that it would be wrong and, in any event, impracticable to attempt such prescription. It would be wrong to subject advocates at so critical a stage of the case to the additional strain and, in many cases, distracting pressure of an arbitrary time limit. I also believe that it would be capable of seriously prejudicing one or other party in any but the most simple cases. And, if strictly enforced it could be vulnerable to an Article 6 challenge. As to practicability, cases vary enormously in the time that advocates may require to open or close them to a tribunal. To attempt a norm (the Royal Commission suggested 30 minutes) is about as unhelpful as fixing on an average. Whatever reduction in the length of closing speeches such a norm might achieve could be lost in many cases in submissions as to the need to exceed it and/or as to the appropriateness of a costs sanction for exceeding it. However, the absence of formal time limits does not mean that judges are or should be without power to intervene to control prolixity, for example, where the advocate is repetitious or advancing irrelevant arguments. As always in such circumstances, the Court of Appeal should support them.

³¹ see his commentary on *R v Holden* [1991] Crim LR 478, at 480

³² Chapter 8, para 19

Judge's directions on law and summing-up

- 41 I have considered how the judge's directions to the jury on the law and his summing-up of the evidence could better assist juries in their task and, thereby, improve the quality of their decisions. As I have said, I believe that, under our present procedures and rules of evidence, we expect too much of juries, particularly in longer and more complicated cases.³³ If my recommendation for a case and issues summary is adopted, future juries will have a head start on their present day predecessors. When the judge at last turns towards them to begin his summing-up, they will have those, by then, familiar aides-memoire before them. The judge can use them as the framework for his directions and reminder of the issues and evidence on both sides material to them. If the case and issues summary has been updated, he may not need to consider providing them with any further written list of questions. But he should do so if the summary needs supplementing and they are so numerous and/or complicated as would suggest a need for them. As now, the judge should use such of those documents provided to the jury as an integral part of his summing-up, referring to the points in them, one by one, as he deals with them orally³⁴ - much in the way that other public speakers use a power-point machine to illustrate and pace their delivery at a speed that the audience can follow. I have already mentioned the way in which modern information technology could enable some categories of evidence to be more effectively presented to a jury by electronic rather than by conventional means. Judges also should make use of it where appropriate, provided that they keep it simple.³⁵
- 42 The case law is well established as to judges' incorporation into their summings-up of written or other visual aids, and I believe is generally followed. However, to mark the importance of the new case and issues summary, I believe that consideration should be given to including it in the Code of Criminal Procedure that I have recommended and, in the meantime, in a direction of the Lord Chief Justice.

I recommend that:

- **consideration should be given to including in the Code of Criminal Procedure that I have recommended and, in the meantime in a practice direction of the Lord Chief Justice, a requirement**

³³ paras 15 – 19 above

³⁴ *R v McKechnie, and others* (1992) 94 Cr App R, 51, CA;

³⁵ See Her Honour Judge Mary Ann Yeates, *Using PowerPoint In Charging Juries* (Conference paper at Technology for Justice 2000 in Melbourne)

that a judge should use a case and issues summary and any other written or visual aid provided to a jury, as an integral part of his summing-up, referring to the points in them, one by one, as he deals with them orally; and

- courts should equip judges with, and in cases meriting it they should consider using, other visual aids to their summings-up, such as PowerPoint and evolving forms of presentational soft-ware.**

43 So much for the means of presentation of the directions and summing-up. What about the content? At present it has four main elements: first, a broad identification of the issues; second, directions of law of a general nature and as to the elements of the charges; third, how the matters of law bear on the issues; and fourth, an account of the material evidence on both sides bearing on the issues, including guidance on any inference that the jury may draw from them.

44 Under the scheme I propose. the judge would still start with a broad identification of the issues, referring the jury, as I have said, to the case and issues summary and any supplemental written list of questions for them to answer. Under the present system he would then normally tell them about the law, apply it to the issues and then turn to the facts. This is often a long and burdensome journey for judge and jury alike. In my view, there is a better way for both of them, and one that is true to their partnership in the trial of crime. The judge should no longer direct the jury on the law or sum-up evidence in the detail that he now does. In one sense, as Professor Edward Griew, a distinguished academic criminal lawyer pointed out some years ago, the law is nothing to do with the jury— “It should be the function of the judge to protect the jury from the law rather than to direct them on it”.³⁶ And, save in particularly complex or long cases, or where the evidence has not been put before them in a manageable way, he should not need to remind the jury in great detail of the evidence. Scotland, with its narrative indictment and no prosecution opening seems to manage well enough without the comprehensive judicial survey of the evidence that is commonplace here. And most jurisdictions in the United States combine the judge’s fairly extensive introduction of the case to the jury at its start with little or no mention of the evidence in his ‘charge’ to them at the end. Whilst the American system is not without its critics, its jury system retains a central role in the administration of justice in both Federal and State courts and in both criminal and civil jurisdictions.

³⁶ Professor Edward Griew, *Summing Up the Law* [1989] Crim LR 768, at 779

45 As to directions of law, our present system is to burden the jury with often highly technical and detailed propositions of law – lots of them. Many are prolix and complicated, often subject to qualifications and in some instances barely comprehensible to criminal practitioners never mind those who may never have heard them before. They have become worse in all of these respects over recent years, in part as a piecemeal response to rulings of the Court of Appeal refining and qualifying the law on which the earlier forms of direction were based. Not surprisingly, judges need a crib for these directions when preparing their summings-up; and one is provided for them by the Judicial Studies Board in the form of a Bench Book containing specimen directions. The start of most summings-up consists in the judge reading or rehearsing adapted versions of the appropriate specimen directions to the jury, who are expected to take them all in and retain them in their mind for their later deliberations. Many judges and practitioners accept the system because that is how they have always known it, though they recognise it has become vastly more complicated for them and the jury than it was. For many others the process is, frankly, an embarrassment in its complexity and in its unreality as an aid to jurors in returning a just verdict. To return to Professor Griew and the passage from which the above quotation came:

“... a more radical simplification of the summing up should be achieved by freeing it of any implications of the theory that the jury are concerned with the law as well as the facts. It should be the function of the judge to protect the jury from the law rather than to direct them on it. The judge does in practice typically tell the jury that the law is for him and facts are for them. This should become more profoundly true than it now is. A brief statement of the law will be unavoidable if the case is to be intelligible. But what is said should not be by way of formal instruction. When it comes to instructing the jury on their task, the job of the judge should be to filter out the law. He should simply identify for the jury the facts which, if found by them, will render the defendant guilty according to the law of the offence charged and of any available defence”.

46 As to the facts, like the Runciman Royal Commission,³⁷ I consider that judges should continue to remind the jury of the issues and, save in the most simple cases,³⁸ the evidence relevant to them, and should always give the jury an adequate account of the defence. But they should do it in more summary form than is now common; and, again, the Court of Appeal should support them. Whilst each case calls for its own treatment, they should, in the main, refer only to evidence which bears on the issues.

³⁷ Chapter 8, paras 20 and 21

³⁸ see eg *R v Wilson* [1991] Crim LR 838

- 47 Such an approach should remove or significantly reduce the scope for judicial comment in summings-up; though judges now rarely deserve Serjeant Sullivan's barb at the end of an Old Bailey trial that the jury should be asked whether they found for the defendant or his Lordship.³⁹ And it would significantly reduce the scope for time-consuming appeals to the Court of Appeal which routinely include complaints, rightly or wrongly, that the trial judge has summed-up the evidence unfairly or commented on it in a manner unduly prejudicial to the defendant.
- 48 The scheme that I have proposed should mean that, when the judge begins to address the jury, they should already be familiar, in an organised way, with the essential issues and evidence relevant to them and will have at their finger tips a convenient aide-memoire in the form of the case and issues summary. Thus aided, the judge should find it easier to achieve Lord Hailsham LC's memorably described model of:
- “a succinct but accurate summary of the issues of fact as to which a decision is required, a correct but concise summary of the evidence and arguments on both sides and a correct statement of the inferences which the jury are entitled to draw from their particular conclusions about the primary facts”.⁴⁰
- 49 I believe that simplification of the way in which judges direct and sum up to juries is essential for the future well-being of our system of trial by judge and jury. I recognise, however, that the task of extricating us from our present tradition would be formidable. The Court of Appeal bears ultimate responsibility for the elaborate and complex structure now enshrined in the Judicial Studies Board's specimen directions. What is needed is a fundamental, and practical review of the structure and necessary content of a summing-up with a view to shedding rather than incorporating the law and to framing simple factual questions that take it into account. Perhaps a body drawn from the judiciary and the Judicial Studies Board could be given a blank sheet of paper and charged with the task.
- 50 Under the simpler scheme that I have in mind, the judge's prime function would be to put a series of written factual questions to the jury, the answers to which could logically lead only to a verdict of guilty or not guilty. The questions would correspond with those in the up-dated case and issues summary, supplemented as necessary in a separate written list prepared for the purpose. Each question would be tailored to the law as the judge knows it to be and to the issues and evidence in the case. One likely objection to that course would be the time taken in preparing the written questions and inviting the advocates' comments on them. But much of the work would have

³⁹ *The Last Serjeant*, 1952, p 288

⁴⁰ *R v Lawrence* [1982] AC 510, HL, at 519

been done in the preparation of the case and issues summary. And, in any event, it is an exercise that in one form or another provides the bones of a conventional summing-up and also of lists of written questions for the jury that are now commonplace in cases of any complexity. And there should be significant savings of time in shorter summings-up, swifter verdicts and the avoidance of lengthy consideration by the Court of Appeal of challenges to the minutiae of judges' directions of law and treatment of the evidence and the merits. If the procedure that I have so far recommended finds favour, there are then two options for the next stage of the trial, the jury's verdict.

- 51 The first option is the easy one, namely leave the jury to answer the questions with a single answer as now - a verdict of guilty or not guilty - based on a reasonable belief that the new procedure would be more helpful than the present in assisting them to reach a just verdict.
- 52 The second is the logical one, though it has considerable 'political' difficulties and problems of expediency, both of them going to the root of our traditions of trial by judge and jury. The judge could, if he considers it appropriate, require the jury publicly to answer each question. The verdict, which he would require them to declare would flow logically from their answers to his questions. There would be nothing novel about the machinery, save in its modern day application to criminal cases. That is how it operates in some civil cases tried by a judge and jury where the judge gives judgment in the light of the jury's individual findings of fact.⁴¹ It is still possible in criminal cases in the form of a 'special verdict', though a judge has no power to compel a jury to find a special verdict, and the procedure has been barely used since the 19th century. It may be a 'rusty' weapon, as Dr Glanville Williams has described it,⁴² but perhaps it is time to polish it up and use it again. In my view, as I have said in Chapter 5,⁴³ the time has come for judges, where they consider it appropriate, to require juries to identify their process of reasoning by seeking from them answers to specific questions fashioned to the particular circumstances of the case. And I see no reason why the jury should not be required to return a special verdict or verdicts if directed by the judge, whatever the present state of the law about that.⁴⁴
- 53 A return to special verdicts where appropriate would have a number of important advantages. First, it would be a convenient way of producing a publicly reasoned verdict whilst also removing some of the Article 6 restlessness about the present form of jury verdicts. Second, it would

⁴¹ eg claims of false imprisonment or malicious prosecution

⁴² Williams, G *The Proof of Guilt: a study of the English criminal trial* (Hamlyn lecture series, No 7 1963), p201, and see eg *R v Hendrick* (1921) 15 CrApp R 149, CCA; and *R v Bourne* (1952) 36 Cr App R 125, CA "special verdicts ought to be found only in the most exceptional cases"

⁴³ para 97

⁴⁴ see eg *R v Allude* (1837) 8 C & P 136

significantly reduce the ability of a jury to return a perverse verdict, whether of not guilty or guilty. Third, it would be a more honest and open system of justice. Fourth, it should induce a more structured debate in the jury room, thus reducing the chance of prejudice influencing the outcome. Fifth, it could identify the impact on the verdict of “controversially admissible” evidence admitted in the trial. And sixth, it would lead to better informed decisions in the Court of Appeal.

- 54 Despite all those advantages, I can foresee great opposition by the many and fervent supporters of the jury system to a public particularisation of a jury’s verdict in that way. As I have said, it would go some way to removing from the jury its ability, which many cherish, to enter a perverse verdict. Though a determined and sufficiently conspiratorial jury could still manage it in their answers to one or more of the individual questions of fact. There is also the objection of expediency, likely to be articulated by many experienced criminal judges and practitioners, that it would be harder to secure unanimous verdicts because different jurors are likely to take different views on different questions, whereas, under the present system, all or an acceptable majority can agree on the final verdict. (I have referred in Chapter 5 to the rule that judges must direct juries that they can only convict if they agree on every ingredient necessary to constitute the offence charged.⁴⁵) But the premise of that objection is that the jury system may not be working as it should do and that requiring juries to particularise their verdicts would reveal that.
- 55 I find both those arguments unattractive in their lack of logic and their apparent determination to preserve an ancient institution without matching its performance to modern needs. My conclusion, which I have already expressed in more general terms in Chapter 5,⁴⁶ is that a judge, where he considers it appropriate, should be able to require a jury to justify their verdict by answering publicly each of his questions.

I recommend that:

- **so far as possible, the judge should not direct the jury on the law, save by implication in the questions of fact that he puts to them for decision;**
- **the judge should continue to remind the jury of the issues and, save in the most simple cases, the evidence relevant to them, and should always give the jury an adequate account of the defence; but he should do it in more summary form than is now common;**

⁴⁵ see *R v Brown (K)* (1984) 79 Cr App R 115, CA and the voluminous and confusing jurisprudence it has engendered, noted in Archbold, (2001 ed) paras 4-391 – 4-393

⁴⁶ para 97

- the judge should devise and put to the jury a series of written factual questions, the answers to which could logically lead only to a verdict of guilty or not guilty; the questions should correspond with those in the updated case and issues summary, supplemented as necessary in a separate written list prepared for the purpose; and each question should be tailored to the law as the judge knows it to be and to the issues and evidence in the case; and
- the judge, where he considers it appropriate, should be permitted to require a jury to answer publicly each of his questions and to declare a verdict in accordance with those answers.

Trial by Judge alone

- 56 Trial by judge alone would have much of the structure but, necessarily, many differences in procedure and evidence from that of trial by judge and jury. The role of the judge should not be considered as if it were something in isolation. Without a jury it becomes more than that of an umpire and distiller of law and facts for a separate fact finding body; he is also the fact-finder. He is inevitably more interventionist, testing and probing the issues of law and fact as they are canvassed before him. There is a greater dialectic between him and the advocates. And there is less of a role or need for procedural and evidential constraints designed to insulate lay fact finders from potentially unfairly prejudicial evidence. This is not the place to analyse the many differences in the two forms of trial procedure. As I have said in Chapter 5, there are many well established models of trial by judge alone in the United States and several Commonwealth countries, and we have it nearer to home in the Diplock Courts in Northern Ireland and in our magistrates' courts when presided over by a District Judge. For a useful examination of the possibilities and practicalities of this mode of trial I can do no better than refer the reader to the writings of Professors Jackson and Doran and other authors mentioned in Chapter 5.

Trial by judge and magistrates in the District Division

- 57 As with trial by judge alone, the main structure of the trial process would be the same as with trial by judge and jury. I have already summarised in

Chapter 7 how the District Division could work.⁴⁷ For the sake of convenience I repeat part of that summary here.

- 58 I propose that the District Division bench would consist of a judge, normally a District Judge, and two magistrates. However, the District Judge should be able to make binding preliminary rulings on his own at pre-trial hearings as would a Crown Division judge. At the trial the judge would be the arbiter of all matters of law, procedure and the admissibility of evidence. He would rule on such matters in the absence of his lay colleagues wherever he considered it would be potentially unfairly prejudicial to the defendant to do it in their presence. As to the facts, he and the magistrates would each have an equal say, and the decision of the court when not unanimous could be by a majority of any two of them.

The case and issues summary

- 59 It should not normally be necessary to have a case and issues summary in the District Division. However, in cases of complexity, the judge should be able to direct it if it will assist him or his colleagues on the bench. In that event, he should also, where appropriate, discuss and amend it with the advocates in the course of the trial and/or just before closing speeches.

Speeches

- 60 The prosecuting advocate's opening statement should ensure that the court has sufficient information about the issues in cases where there is no need for a case and issues summary. The same order of speeches should apply as in the Crown Court. I have considered, but have rejected, proposing that the prosecuting advocate should not have a right to make a closing speech save to correct defence errors of fact on law, or with the permission of the court in cases of particular complexity. The sole justification for doing so would be to remove some of the scope for repetition of evidence which is a feature of jury cases. However, it would not be an even-handed way of shortening the proceedings and, I believe, would not shorten them very much. Often the prosecuting advocate's closing speech is much shorter than that of the defending advocate. And before this tribunal the likelihood is that the judge would be better placed and more justified than a judge sitting with a jury to keep the whole proceedings within a tight rein, including both sides' closing speeches. After speeches the judge and magistrates would retire to consider their decision. Whether unanimous or by a majority, the judge on their return

⁴⁷ paras 29 - 32

to court would deliver a fully reasoned judgment of the court. It follows that I see no need for the judge publicly to sum up the case before he and his colleagues retire. Any outstanding issues of law and the issues of fact at that stage can and should be publicly resolved in the court's judgment.

Sentencing

- 61 Sentencing would be a matter for the judge alone, for the reasons I have given in Chapter 7,⁴⁸ though there is no reason why the magistrates should not remain on the bench while he deals with it.

I recommend that in the District Division:

- the judge should be the sole judge of law;
- the judge and the magistrates should together be the judges of facts, each having an equal vote;
- the judge should normally conduct any pre-trial hearings on his own;
- the judge should be empowered to make binding pre-trial rulings as would a Crown Division judge;
- the judge should rule on matters of law, procedure and the admissibility of evidence in the absence of the magistrates whenever he considers it would be potentially unfairly prejudicial to the defendant to do so in their presence;
- the same order of speeches and structure of trial should apply as in the Crown Division;
- the judge should not sum up the case to the magistrates, but, after retiring with them to consider the court's decision, should give a publicly reasoned judgment of the court; and
- the judge should be solely responsible for sentence.

⁴⁸ para 31

Trial in the Magistrates' Division

- 62 The magistrates' courts are peculiar in having a body of laymen who, together, are judges of both law and fact. Magistrates are assisted in the performance of their functions by legal advisers (who are often qualified solicitors or barristers). In many respects the latter's function resembles that of a judge, giving advice on matters where in trial on indictment the jury would receive direction or warning. However, the legal adviser has specific duties and responsibilities to the magistrates and parties which reflect the special regime that applies to summary level proceedings. For example, they provide advice on matters of mixed fact and law, practice and procedure in open court, participate in the proceedings to the extent of asking questions in order to clarify evidence and issues, and assist the magistrates in the formulation and recording of reasons.⁴⁹
- 63 I see no overwhelming case for any major change in the general structure and procedures of summary trial as they are today. They combine reasonably well fairness and speed appropriate to the trial of summary offences. Particular strengths are the legal adviser's public statement of advice he has given to the magistrates on matters of law, procedure or evidence and their move to giving publicly reasoned decisions.
- 64 There is, however, the much canvassed problem of magistrates, as judges of law, having to rule on the admissibility of evidence which could potentially unfairly prejudice them against the defendant in their capacity as judges of fact. Short of radical change in the judicial composition of magistrates' courts – for example by making the legal adviser, the sole judge of law, procedure and admissibility of evidence – which I have not recommended, the best answer lies in the reform of the law of evidence for judges, magistrates and jurors alike. If, as I propose,⁵⁰ there is a move away from orality and rules of inadmissibility to trusting fact finders to assess the weight of the evidence for themselves, there would be no need for the present artificial procedure. And if there were to be some relaxation of present restrictions on admitting evidence of previous convictions, it would be for the magistrates to assess their relevance and weight to the issues before them.

⁴⁹ see *Practice Direction (Justices: Clerk to Court)* [2000] 4 All ER 895

⁵⁰ paras 80 - 81 below et seq

Accordingly, I recommend that the structure and procedures of trial in the Magistrates' Division of a new unified Criminal Court should broadly follow those of the present magistrates' courts.

Abbreviated procedures

- 65 Summary trial and guilty pleas are two examples of abbreviated procedures in English law. Historically, both were ways of abridging the normal form of criminal procedure. Another possibility is an abbreviated form of summary procedure in mostly minor cases where guilt is clear, such as that used in Germany (Strafbefehlsverfahren) and France (ordonnance pénale) under which the prosecutor invites the court to deal with the matter on paper and proposes a punishment, leaving it for the defendant to object and, in any event, for the court to agree. In the event of objection or the court's non-agreement, the matter proceeds to court in the normal way. In Germany this procedure applies to the lower of two categories of crime (Vergehen) and extends to offences carrying custodial penalties of up to 12 months where the defendant is legally represented, and accounts for 30% of the work of the lower courts. In France the procedure is more restricted, applicable only to *contraventions*, the least serious of its three classes of criminal offence and punishable only by fines and confiscation.⁵¹
- 66 In England and Wales there are two main procedures which magistrates' courts use to dispose of certain straightforward summary cases expeditiously. The first affects trial procedure, and the second, to which I refer in more detail at paragraphs 217-219 below, relates to sentencing. They both apply to a defendant charged with offences not imprisonable for more than 3 months nor specified by statutory instrument.⁵²
- 67 Where the prosecution has served witness statements on a defendant with the summons and the defendant does not send a plea of guilty by post, it may then prove the case in his absence or in his presence on the first hearing on the basis of the statements. Where the prosecution has made use of the procedure, there has been a significant reduction in time and work for operational police officers, the Crown Prosecution Service and the courts. There has been a fall in the number of adjournments previously caused by the widespread failure of defendants to respond to summonses and a corresponding increase in the proportion of cases finalised on the first hearing. It also safeguards the rights

⁵¹ Barbara Huber, in Hatchard, Huber and Vogler, *Comparative Criminal Procedure*, (BIICL, 1996), pp 158-159

⁵² Magistrates' Courts Act 1980, s 12 as amended by the Magistrates' Courts (Procedure) Act 1998, s 1

of defendants who attend the hearing and only then object to the absence of the witness, since the court may then allow an adjournment. The trouble is that not all areas have made use of the procedure. A recent Joint Inspectorate Report⁵³ showed that only 40% of police forces were fully using it and that 50% were using it in part or planned its implementation. The main reason for the incomplete and/or slow take-up of such an obviously worthwhile scheme is lack of co-operation between the various agencies. The Trial Issues Group, through the Local Trial Issues Groups, have recently urged local criminal justice agencies to take full advantage of it. The use of such a procedure has obvious advantages. It significantly reduces the administrative burdens for the police and prosecuting authorities and inconvenience to witnesses and saves court time. In the many cases of defendants failing to respond to summonses it is a speedy and efficient means of overcoming such disregard.

I recommend use in all areas and by all prosecuting authorities of the present provisions of section 12 of the Magistrates' Courts Act 1980, as amended, for disposal of cases on pleas of guilty or on proof of guilt in the absence of the defendant.

The role of the victim

- 68 The Government, in its recent policy paper *The Way Ahead*, records a number of measures already introduced or planned to improve the lot of victims and witnesses in the criminal justice process.⁵⁴ I have referred in Chapter 10 to a number of them at the pre-trial stage. Those concerned with the trial stage include: protection of alleged victims of rape from being cross-examined by defendants in person, or as to their previous sexual history;⁵⁵ new statutory protection of vulnerable or intimidated witnesses when giving evidence;⁵⁶ the extension of the Witness Service to all magistrates' courts, the introduction of victim personal statements (in which victims, in their own words can say how the alleged crime has affected their lives) for use throughout the criminal justice process; requiring the Crown Prosecution Service to inform victims about certain key casework decisions⁵⁷ and requiring the Probation Service to consult, and subsequently to inform, victims of serious violent and sexual crimes about offenders' release and conditions. The Government also proposes: a new Victims' Charter, possibly including statutory rights and a Victims' Ombudsman; better court facilities to secure separation of

⁵³ *The Implementation of Section 1 of the Magistrates' Courts (Procedure) Act 1998* A joint study by HM Magistrates' Courts Service Inspectorate, HM Inspectorate of Constabulary and the Crown Prosecution Service Inspectorate, November 2000

⁵⁴ *Criminal Justice: The Way Ahead*, 26th February 2001, CM 5074, pp 69-75

⁵⁵ Youth Justice and Criminal Evidence Act 1999, ss 34-43

⁵⁶ Youth Justice and Criminal Evidence Act 1999, Part II

⁵⁷ implementing the recommendations of Sir Iain Glidewell's Review and the Stephen Lawrence Inquiry

prosecution and defence witnesses and their families; provision of information about the progress of cases by internet technology; a significant increase in compensation for victims of rape and child abuse and for bereaved families in fatal cases;⁵⁸ and generally better facilities for the care of and information to victims. However, these latter proposals are, in the main, concerned with better treatment of victims, rather than with their role at the trial.

- 69 The *Way Ahead* Paper makes no mention of a number of other, more radical, suggestions that have been mooted by Ministers and others from time to time. One is that a victim, actual or alleged, and/or his family should be permitted to be a party to a criminal prosecution, as in most Continental systems, including, famously, the French *partie civile*, or even ‘an auxiliary prosecutor’, as in a few countries, notably, Germany. Sir William Macpherson in his Report on the Stephen Lawrence Inquiry,⁵⁹ recommended consideration of the former as an addition to the existing right in English law of private individuals to initiate their own criminal proceedings. In a conference considering these and other proposals in 1999 the weight of informed opinion seems to have been against the introduction of either system.⁶⁰
- 70 The ‘*partie civile*’ or ‘adhesion procedure’, which carries with it rights of information as well as the right to participate in the trial, is not considered to confer much practical advantage in either respect over the English system. As a means of obtaining adequate or any compensation, continental experience suggests that it is too complicated for those who have no legal representation or advice. Free legal aid is limited. For those who can afford legal representation, the net recovery is often not worth the outlay. And European criminal court judges are, seemingly, reluctant to rule on the victim’s claim, often referring it to the civil court. Even if a victim secures a compensation order in the criminal court, he is left with the often hopeless task of having to enforce it against the offender. An English victim has the same problem. As most offenders are poor he can mostly only expect to receive his compensation in instalments, often extending over a year and exceptionally for up to three years. If the offender does not pay and the court is unable to enforce the order, the victim remains without compensation.
- 71 Similar considerations apply to a system enabling the victim to participate in a criminal trial as an auxiliary prosecutor and also to claim compensation. In the few continental jurisdictions that provide for it, he is entitled to free legal aid for the purpose. However, the role, in the way it is exercised, is largely symbolic and passive, the conduct of the prosecution being left entirely or

⁵⁸ subject to approval by Parliament and the Scottish Executive

⁵⁹ February 1999, CM 4262-1

⁶⁰ see the Report of the Conference held by the Home Office's Special Conferences Unit in September 1999 *The Role of Victims in the Criminal Justice Process*.

almost entirely to the public prosecutor. As in the *partie civile* procedure, there are important benefits to the victim in knowing at each stage what is going on and in the opportunity to make representations, either direct or indirect.

- 72 One view is that rights of information and effective compensation could be secured without the victim's participation in the process in either of those ways. As to information, there needs to be clear definition of who is responsible for informing the victim/witness of the progress, listing and outcome of the prosecution and provision of resources, in particular, information technology, to do it.⁶¹ The Government, according to its *Way Ahead* Paper clearly has these matters in mind. As to compensation and recognition of the victim's role in the case, there is undoubtedly scope for improving the manner in which the Court is informed of the impact of the crime on him.⁶²
- 73 Victim Support has suggested that the victim should have a more prominent role in the process. I believe that it had in mind giving the victim, whether witness or not, some formal or special status in the proceedings at trial and at sentence. This seemingly would have included permitting him or his representative to intervene to ask questions or to tell of the injury done to him to the extent that he had not already done so in evidence as a prosecution witness. Another suggestion is that he should at least have some clearly indicated place in court and one sufficiently close to the prosecutor to enable him to confer with him, for example, to enable him to contradict any misrepresentation by the defence.
- 74 It is difficult to see how such a scheme would fit our adversarial system, in which there are only two parties and the hearing is a substitute for private vengeance not an expression of it. To put an alleged victim whose account the defendant challenges - as will often be the case - in the ostensibly privileged role of an auxiliary prosecutor would be unfair. Whilst the current concern for the plight of victims in the criminal justice process and the steps being taken to right it are thoroughly justified, care must be taken, in particular when there is an issue as to guilt, not to treat him in a way that appears to prejudice the resolution of that issue.
- 75 I warmly commend the important contribution that Victim Support has made to improving the recognition and care of victims in the criminal justice process and the steps that the Government has proposed to further those ends. However, I recommend against giving victims, as some have suggested, a formal role in the trial process similar to that of the continental *partie civile* or

⁶¹ see Chapter 10, paras 239 - 255

⁶² see paras 220 – 223 below

auxiliary prosecutor, or any outwardly special position in relation to the prosecutor.

EVIDENCE

General principles

76 My terms of reference require me to examine the fairness and efficiency of the rules of evidence in the criminal justice process. That is an enormous subject in its own right, suffering, as Professor Colin Tapper has put it, from a ‘blight’ in the law of evidence as a whole. It is a blight that he and many distinguished academics have long attributed to incoherence, confusion and conflict in the aims and policy of the law of evidence. This is in large part due to our tradition of sporadic and piecemeal statutory reform and constantly evolving overlay of judge-made law softening its edges.⁶³ It also suffers from a neglect of the needs of summary trial. Rules devised in the main for, or which have their origin in, jury trial are often far too complex or artificial for application in the fast moving list of magistrates’ courts. Magistrates, who undertake the bulk of summary work, or their advisers, cannot be expected to grapple with the minutiae and refinements devised principally for the more leisurely proceedings in the Crown Court.⁶⁴ Indeed, I suspect that District Judges, with their equally long and arduous lists, have little time or patience for fine evidential points.

77 For these reasons there is an urgent need for a comprehensive review of the whole law of criminal evidence to make it a simple and an efficient agent for ensuring that all criminal courts are told all and only what they need to know. I believe that an important part of this exercise should be an examination of the justice and feasibility of a general move away from rules of inadmissibility to trusting fact finders to give relevant evidence the weight it deserves. It is no part of this Review to attempt a comprehensive study or to make detailed recommendations for reform in this field. As I have indicated in Chapter 1, that should be part of a principled and comprehensive exercise in the reform and codification of the criminal law, to be undertaken by a standing body working under the oversight of the Criminal Justice Council.⁶⁵ In the meantime, I have tried to identify those areas where I see the greatest need for, and potential benefits from, change and to suggest, in the broadest terms, possible lines of reform. To provide a framework for that task I have

⁶³ *Hearsay in Criminal Cases: An Overview of Law Commission Report No 245*, [1997] Crim LR 771

⁶⁴ see Penny Darbyshire, *Previous Misconduct and the Magistrates’ Courts – Some Tales from the Real World* [1997] Crim LR 105

⁶⁵ see Chapter 8, paras 78 - 84

accepted a number of features of our criminal process as given and have adopted a number of general principles, I have taken as given:

- a continuation of a trial procedure that is in the main adversarial and that relies largely on oral evidence and argument;
- the involvement of juries and lay magistrates as the main fact finders on the issue of guilt;
- the criminal burden of proof and the defendant's right to silence in its present qualified form;
- relevance as a threshold of admissibility; and
- fairness as a criterion for admission.

78 Within those constraints, rules of evidence should aid, not hinder, the search for truth; be such as to promote a fair trial for the defendant; be clear; be simple to apply; and, so far as is consistent with those principles, secure an efficient trial process. A common theme of all my recommendations under this section is the view I have just expressed, that we should, in general, move away from technical rules of inadmissibility and focus more on the weight of evidence. I express the theme here as a recommendation in its own right.

I recommend that the English law of criminal evidence should, in general, move away from technical rules of inadmissibility to trusting judicial and lay fact-finders to give relevant evidence the weight it deserves.

Orality

79 A common justification for our system of orality of evidence, including the rule against hearsay, is that seeing the demeanour and hearing the evidence of a witness in the witness box is the best means of getting at the truth. But there is much judicial, academic and psychological scepticism about the weight that even seasoned observers of witnesses should attach to the impressions they form of them in the witness box.⁶⁶ It may be a factor, depending on the witness and what he has to say and on the experience and good judgment of the fact finder. But it is only one factor and I respectfully agree with the Law Commission that it is not of such significance, on its own, as to justify the exclusion of hearsay.⁶⁷ I would go further and join Lord Bingham and a

⁶⁶ Law Commission Consultation Paper, *Evidence in Criminal Proceedings: Hearsay and Related Topics*, 1995, Law Comm 138, para 6.1

⁶⁷ *ibid* para 6.30

growing band of other distinguished jurists who, on the whole, doubt the demeanour of a witness as a reliable pointer to his honesty.⁶⁸

- 80 Nevertheless, I can see no well-founded argument for a general move away from orality of evidence in criminal proceedings where there is an issue of the reliability or credibility of a witness's account on a material matter. For there are features other than the demeanour of the witness which make it a convenient way of testing the truthfulness of his evidence, in particular its external and internal consistency, consistency with what he has said previously, and matters going to credit. And, in issues not turning on truthfulness, but accuracy or reliability of memory, there is clear advantage in an oral process, at least for the purpose of testing the strength of the evidence in cross examination. The witness box (or by way of video-tape or video-link) is the place for such critical evidence to be tested and, if necessary, challenged. But there are some rules of evidence surrounding this tradition that, in my view, deserve urgent review. In one form or another, they are an expression or consequence of the rule against hearsay. Professor John Spencer in his contribution to the Law Commission's consultation process on the reform of the law of hearsay, wrote that the weakness of the principle of relying solely or mainly on oral testimony is that it requires us:

“to accept two remarkable scientific propositions: first, that memory improves with time; and secondly, that stress enhances a person's powers of recall”.⁶⁹

‘Refreshing memory’/ Witness Statements

- 81 A witness may refresh his memory in the witness box from a ‘contemporaneous’ document, namely a note that he made or verified when his memory was clear.⁷⁰ However, the exercise is often, not one of ‘refreshing memory’, but of permitting a witness to substitute for his evidence the reading of a note of matters of which he has little or no memory.⁷¹ Every day, in courts all over the country, police officers are permitted to give evidence by reference to their notebooks of matters of which they could not possibly be expected to have any independent recollection. Often, they freely acknowledge their total dependence on their note when the point is put to them by way or as a result of a challenge from the defence advocate. Yet, they are still expected, when giving evidence, to go through the charade of seemingly not reading their notebooks, but only glancing at them from time to

⁶⁸ Lord Bingham of Cornhill, *The Business of Judging*, (OUP, 2000), *The Judge as Juror: The Judicial Determination of Factual Issues*, at pp 7-13

⁶⁹ see Law Comm 245, para 10.31; see also his article *Hearsay Reform: A Bridge Not Far Enough* [1996] Crim LR29, at 32-33

⁷⁰ see *Attorney General's Reference (no 3 of 1979)* 63 Cr App R 411, CA, per Lord Widgery CJ at 414; see also *R v Richardson (D)* [1971] 2 QB 484, at 490, 55 Cr App R 244, at 251, CA

⁷¹ see eg *R v Bryant and Dickson* (1931) Cr App R 146, at 150

time when their memory needs jogging. The understandable reality is, of course, that they have usually spent time, shortly before going into the witness box, reading and re-reading their notes so that, at best, their evidence is a test of their short-term memory of what they have just read. So, for all practical purposes, the note, though not physically admissible, becomes the evidence in chief. The absurdity of all this is aggravated by the usual and recognised practice that a witness may also refresh his memory shortly before going into the witness box by reading a non-contemporaneous written statement if he has made one.⁷²

82 In recent years the courts have attempted to loosen the rules for refreshing memory so as to accord more with reality. In 1990, in *R v Da Silva* the Court of Appeal held that, in the exercise of a judge's discretion, a witness who has begun to give evidence could be permitted to read, for the purpose of refreshing his memory, a statement made near to the time of the events in question subject to a number of provisos: 1) that he cannot remember the events because of the lapse of time; 2) that when he made the statement it represented his recollection at the time; 3) that he has not read the statement before coming into the witness box; 4) that he wishes to read the statement before continuing with his evidence; and 5) that, having read the statement he should then continue his evidence without further reference to it.⁷³ In 1996 in *R v South Ribble Magistrates, ex p Cochrane*⁷⁴ the Divisional Court held that the Court of Appeal in *Da Silva* had not intended to confine the discretion of a court by reference to those provisos and that there was strong discretion in the court to permit a witness to refresh his memory from a non-contemporaneous document, applying the requirements of fairness and justice. On that approach, the Court held: that it did not matter whether the witness had not read the statement before coming into the witness box or had done so but had not taken it in for some reason; and that in some cases it could be appropriate to permit the witness to refresh his memory from the witness statement while giving evidence.

83 As the editors of the 2001 edition of Archbold indicate,⁷⁵ these decisions could lead to the routine use of witness statements as memory refreshers. They suggest that the rule should be re-cast to avoid altogether the test of contemporaneity and to make the only condition of use of a document that there is good reason to believe that the witness would have been significantly better able to recall the events in question when he made or verified the statement than at the time of giving evidence. That would permit most witness statements made much nearer the time to be used as memory refreshers. The editors of Archbold mention two features in all this to which the courts should

⁷² see Home Office Circular 82/1969; *R v Richardson* (1971) 55 Cr App R 244 at 250, per Sachs LJ; see also *Lau Pak Ngam v R* [1966] Crim L R 443, Supreme Court of Hong Kong

⁷³ (1990) 90 Cr App R 233, CA

⁷⁴ [1996] 2 Cr App R 544, CA

⁷⁵ para 8-76

have regard. The first is that a witness with his statement in the witness box tends to use it as a script. But that has long been the reality in the use of contemporaneous records as memory refreshers. The second is that a witness statement often bears little relationship to a witness's evidence. But inconsistency between a witness's statement and his evidence may have a number of causes, including: fallibility of the witness's recollection without it; incorrect drafting by a police officer not corrected at the time by the witness; and lies in the statement, possibly in collusion with other witnesses; or lies in the evidence. The first of those is a reason for allowing the witness to see the statement; in the second and third the defence will usually ensure that he sees it and that the court is made aware of the conflict; only where, by dint of the witness's good memory or lies, there is consistency between the two, does the statement tend to remain unused as a memory refresher or tool for cross-examination.

- 84 In my view, the suggested new rule would be a clearer and more principled way of recognising the reality of the *Da Silva* approach, namely that testimony should be an exercise in truthfulness rather than a test of long or short term memory. At present the rules seem to me to have more to do with gamesmanship than the criminal burden of proof or the reliability of evidence. In their application to prosecution witnesses, in respect of whose evidence the point mostly arises, the defence may do their best to deprive a witness of access to his statement in the witness box in the hope that he will not keep to it, whereupon they will confront him with the inconsistency and make much of it with the jury. If, notwithstanding such denial of access to his witness statement, the witness does keep to it, the defence can keep the consistency from the jury. In either case, his credibility or accuracy falls to be tested by what he said nearer the event alongside what he says in the witness box. If he has had the opportunity to read his statement before going into the witness box, he will tell the truth or lie as he did in the witness statement; if the former, the only casualty of justice may be the weakness of his short term memory. The suggested new rule would also clear away more cleanly the pre-*Da Silva* anomaly that a witness may refresh his memory from a witness statement before going into the witness box but not use it as a memory refresher when in the box.
- 85 But, whether such a useful but small step would remove the mostly time-wasting – and to the witness and jury, mystifying – procedural wrangling as to whether the witness needs or should be permitted to refresh his memory from the document in question, I have some doubt. There would still be scope for defence advocates to take points as to whether the defendant has indicated a need to refresh his memory and, if so, whether the memory refreshing document originated at a time when his memory was much clearer. Nevertheless, as a starting point in a line of reasoning and on the road to a longer goal:

I recommend consideration of making the only condition for a witness's use of a written statement for refreshing memory that there is good reason to believe that he would have been significantly better able to recall the events in question when he made or verified it than at the time of giving evidence.

Prior witness statements as evidence

- 86 The present rule – ‘the rule against narrative’ – excludes evidence of a witness's previous witness statements except where they contradict his testimony, when they may be used to challenge his truthfulness or reliability. If we reach the stage when witnesses may have recourse in the witness box to a broader range of memory refreshing documents and may largely read them, would it not be more sensible, expeditious and helpful to the tribunal, to a jury in particular, to invite the witness to put in the document as his evidence in chief, as in civil or family cases and ask him simply to confirm and, if required, add to it orally. He could then be cross-examined both as to his written statement and as to any additional oral evidence in the ordinary way. It would also remove the present nonsensical requirement for juries, magistrates and judicial fact finders, when previous statements are presently admitted as a result of cross-examination, to treat them as relevant only to the credibility of the witness and not as evidence supportive of his account of the facts.
- 87 As long ago as 1972 the Criminal Law Revision Committee recommended the admission in evidence of previous statements, expressing the view that if a witness is honest, what he said soon after the event is likely to be at least as reliable as his evidence at the trial, and probably more so; and if he is dishonest his evidence can still be tested in cross-examination.⁷⁶ In Scotland a witness's prior statement is admissible as evidence of any matter stated in it if it was contained in a ‘document’ and sufficiently authenticated by the witness prior to the trial, provided that the witness was competent when making it, that he confirms having made it and adopts it as his evidence.⁷⁷ Other Commonwealth jurisdictions have, in various ways, shown more flexibility about this than we have, tending to adopt an inclusionary rather than exclusionary approach to such hearsay, and trusting juries to give it the weight it deserves.⁷⁸

⁷⁶ Eleventh Report, Evidence (General), Cmnd 4991, para 239 and Clause 31 of its Draft Bill

⁷⁷ Criminal Justice (Scotland) Act 1995, s 18, and Criminal Procedure (Scotland) Act 1995, s 260

⁷⁸ Law Comm 138, para 13.40 and Appendix B

- 88 The Law Commission, in its 1997 Report, *Evidence in Criminal Proceedings: Hearsay and Related Topics*, was not prepared to go that far.⁷⁹ It expressly rejected the option that any previous statement should be admissible regardless of the ability of the witness to remember the details in it or of their freshness in his memory at the time he made it. The Law Commission did so because it feared that it would allow the admission of many previous consistent statements, adding little or nothing and distracting fact-finders from more important evidence. It also considered that defendants would be tempted to make many denial statements in the hope that their volume would impress a lay tribunal. It acknowledged the ability and readiness of judges to exclude material which is purely repetitious and for that reason irrelevant and that, in practice, only statements adding value to a witness's statement or enhancing his credibility would become admissible. However, it foresaw long arguments on the relevance of documents and a focus on statements in documents at the expense of oral evidence, the latter of particular concern because of doubts as to the general quality of witness statements taken by police officers. For those reasons it rejected this option.⁸⁰
- 89 Those concerns seem to me to give insufficient weight to the ability of the criminal courts to restrict where appropriate the use of unhelpful or simply repetitious hearsay by the mechanism of judicial permission, as applies in civil proceedings.⁸¹ Disputes about the grant of permission should not interrupt or delay trials once under way; the proper place for resolution of such matters is before trial as part of the process leading to pre-trial assessment and, if necessary, pre-trial hearing. In the result, the Law Commission recommended the admissibility of a witness's previous statement as evidence of fact where the witness: first, does not, and cannot reasonably be expected to, remember a matter well enough to be able to give oral evidence of it; second, he has made a statement about it when it was fresh in his memory; and third, he indicates in evidence that it is his statement and that to the best of his belief it is true.⁸² As the Law Commission states, for most purposes such a rule would remove the necessity for witnesses to have recourse to statements to refresh their memory because the statement would stand as part of their evidence. The only possible use for it as a memory refresher would be where a witness has a partial recollection which genuinely needs jogging by his witness statement.
- 90 However, there is little logic in distinguishing between no independent recollection and partial recollection for this purpose. And, as the Law Commission points out, under the present law, the use that can be made of the statement, if the witness is cross-examined on it, varies according to whether it is regarded as evidence or a memory refreshing document – in the former,

⁷⁹ Law Comm 245

⁸⁰ *ibid*, paras 10.30-10.34

⁸¹ Civil Evidence Act 1995, s 6(2)

⁸² Law Comm No 245, para 10.80

evidence of the facts, in the latter going only to consistency. In my view, the answer is not to maintain the two possible uses of witness statements and give them the status of evidence of fact, as suggested by the Law Commission.⁸³ Instead, all previous statements should be admissible regardless of the existence or extent of the witness's memory, leaving their weight, along with the oral evidence of the witness after testing in cross-examination, a matter for determination by the tribunal. I draw strength from the following argument of the Scottish Law Commission in its Report in 1995, giving rise to the present Scottish law admitting prior witness statements:

“7.14 ... First, if a prior statement by a witness is of such a nature that its reliability may be accurately assessed by a properly directed jury, it should be admissible not only to support or undermine the witness's credibility, but also as evidence of the truth of its contents, whatever the witness may say in court about the matters dealt with in the statement.... That would simplify the law and render admissible reliable evidence which, under the present law, is inadmissible for that purpose.

7.15 Secondly, if a witness finds it difficult to give evidence in court – whether because his or her memory of events is no longer accurate, or because he or she is under considerable stress ... for any ... reason – a prior statement by him ... should be admissible provided that ... the witness accepts that he ... made a statement and adopts it as his ... evidence.

7.16 ... the effect of our recommendations is that the prior statement would be no more than an admissible item of evidence for the jury's consideration. The witness could be examined and cross-examined as to the truth of its contents and the circumstances in which it was made, and contradictory evidence could be led about the matters dealt with in the statement. Further, we propose that any objection which could have been properly taken if the contents of the statement had been given orally may be taken to the statement or any part of it, or to any question which is recorded as having been put to the witness”.⁸⁴

- 91 Such an approach would also be more of a piece with the Law Commission's recommendation to extend the present exception to the hearsay rule of recent complaint in sexual cases to all offences and to treat it as evidence of the facts complained of, not (to the extent that any difference is discernible) simply of the witness's credibility.⁸⁵ And, as Professor John Spencer has pointed out in a consultation paper for the Review, it would merely be a reversion to English

⁸³ *ibid* para 10.82

⁸⁴ *Evidence: Report on Hearsay Evidence in Criminal Proceedings*, Edinburgh, 22nd February 1995, Scot Law Comm No 149, at para 7.14

⁸⁵ Law Comm No 245, paras 10.22-10.26 and 10.53-10.61.

law as it was until the 19th century⁸⁶ and incorporated by Stephen as late as 1872 into the Indian Evidence Act.⁸⁷ The rule as to the admissibility of complaints as relevant only to consistency was peculiar to complaints in sexual cases and had its origin in a strong presumption against the truthfulness of a woman complainant in such a matter if she had made no complaint at or shortly after the sexual assault of which she complained.⁸⁸ The rationale for singling out sexual allegations in this way was the unavailability of independent evidence in most such cases.⁸⁹ But the same is true of many offences; and the law now no longer penalises complainants in sexual offence cases by requiring corroboration of their evidence.⁹⁰ I agree, for the reasons I have given, that a witness's previous statement in written, audio-recorded or video-recorded form, consistent or inconsistent, should be capable of being put in evidence, and that the rule should be extended to all cases. I also agree with the Criminal Law Revision Committee⁹¹, the Law Commission⁹² and, I suspect, just about every judge sitting today that it is unrealistic to tell a jury, as the law currently requires, that a recent complaint in a sexual offence case only goes to the truthfulness of the complainant not as to whether the complaint itself was true. The complaint, if admitted in evidence, should be regarded as evidence of the truth of its contents, challengeable in the same way as the witness's oral evidence.

92 Accordingly, and as further step on the road to ultimate reform,

I recommend consideration of amendment of the law as to admissibility of witness statements so that:

- **where a witness has made a prior statement, in written or recorded form, it should be admissible as evidence of any matter stated in it of which his direct oral evidence in the proceedings would be admissible provided that he authenticates it as his statement;**
- **an integral part of the new rule should be that a defendant's previous statement should in principle be admissible whether it supports or damages his case and the fact that it may appear to be self-serving should go only to weight; and**
- **the witness should be permitted, where appropriate, to adopt the statement in the witness box as his evidence in chief.**

⁸⁶ Hawkins, *Pleas of the Crown* (7th ed, 1795) Vol 4, p 427

⁸⁷ s 157

⁸⁸ see Hawkins' *Pleas of the Crown*, bk I C 41, s 9, cited by Hawkins J in *R v Lillyman* [1896] 2 QB 167, CCR, at 170-171

⁸⁹ Law Comm No 245, para 10.22

⁹⁰ or accomplices.

⁹¹ Eleventh Report, Evidence (General), Cmnd 4991 para 232

⁹² Law Comm para 10.57

93 But that is not the end of that story. There is the danger, to which I have referred, of a statement, whether in documentary, audio-recorded or video-recorded form, carrying much greater authority with a lay fact finder than in the impermanent forms of hearing the statement read and/or seeing it in the course of the evidence and/or in oral reminders of it by the advocates and the judge. If, for example, a jury were left to take a prosecution witness's statement to their retiring room when considering their decision with only oral reminders of the judge in his summing-up of the defence inroads on it in cross-examination, there is a danger that the printed words in front of them would carry more weight.⁹³ This danger also arises in relation to evidence presented by electronic means, such as computer graphics or virtual reality simulations. One way of dealing with it would be to make the reading of the statement or the playing of the recording in the course of the trial evidence of the facts to which it relates, but not to permit the jury to have it in any permanent form. This is the solution adopted in the United States Federal Rules of Evidence, which admit prior statements into evidence, subject to certain conditions, but by 'reading it into evidence' and not by way of an exhibit unless offered by an adverse party, the object being to deny the jury the statement in their jury room during deliberation.⁹⁴

94 This may become less of a problem with the march of science when all courts are equipped with facilities for the transcription, searching and ready production in electronic or hard copy form of oral evidence, but that is not likely to be achievable everywhere for some time. There would also be the danger, to which the Law Commission referred, of swamping juries with much unnecessary material. An alternative, also in the long-term, would be to improve and to refine the practices of the police when taking witness statements and for the recording of interviews with witnesses as for suspects.⁹⁵ Sir Anthony Hooper, who has recently written of the need for a comprehensive reform of the manner in which the evidence of witnesses is taken and presented,⁹⁶ cited the recent extension of provision for the use of video recorded evidence of children to all vulnerable witnesses⁹⁷ as examples of 'sticking plaster culture', and urged its extension, for serious crime at least, to the evidence of all witnesses. Such a system, he argued, could be subject to the sort of safeguards provided by Police and Criminal Evidence Act 1984 and its Codes in the interview of suspects. It would enable the witness to give his account in his own words at a time when it is fresh in his mind, thus avoiding the distortions of incompetent or subjectively over zealous statement

⁹³ see for comparable problems arising in evidence by video-link: *R – v- Rawlings & Broadbent* [1995] 2 Cr AppR222, CA; *R – v- M(J)* [1996] 2 CrApp R 54, CA; and *R v Morris* [1998] Crim LR 754 CA

⁹⁴ Rule 803(5)

⁹⁵ as urged by, among others, Anthony Heaton-Armstrong and David Wolchover, *Analysing Witness Testimony* (Blackstone, 1999)

⁹⁶ *The Investigation And Trial Of Criminal Offences In The New Century – The Need For A Radical Change*, (1999) 21 Liverpool Law Review, 131, at 136-138

⁹⁷ Part II of the Youth Justice and Criminal Evidence Act 1999

taking by the police. Inadmissible material could be edited out later. Such recordings, accompanied by transcripts or written summaries, would become, or form part of, the witness's evidence in chief at the trial whether or not he then confirmed it, any inconsistency and the reason given for it going to weight.⁹⁸ In my view, such a scheme deserves serious consideration. It would be likely to make demands in terms of skill and manpower on the police for which they are not presently equipped, but with the increasing use of video technology in the investigation and prosecution of crime, coupled with ready editing mechanisms, the long term benefits in cost to, and justice administered by, the criminal justice system as a whole could be worth it.

Accordingly, I recommend consideration in the long term of extending the present provisions for the use of video-recorded evidence to the evidence of all critical witnesses in cases of serious crime, coupled with provision where required of a record and/or transcripts or summaries of such evidence and also of that in cross-examination and re-examination.

Hearsay⁹⁹

- 95 The rule against hearsay in criminal proceedings, like many other past and present rules of inadmissibility in that jurisdiction, has its origin in the late 18th and early 19th centuries when the cards at trial were so stacked against defendants that judges felt the need to even the odds. The classic definition of hearsay is “an assertion other than one made by a person while giving oral evidence in the proceedings as evidence of any fact asserted”.¹⁰⁰ It is an exclusionary rule of evidence, albeit subject to a number of wide statutory¹⁰¹ and common law exceptions. In civil matters it has been abolished completely.¹⁰² At its most basic, the rule confines a witness to giving evidence orally and only about matters of which he has direct or personal knowledge. It excludes four main categories of evidence: first, that which I have just considered, an earlier statement of a witness proffered in support of his oral evidence; second, written, tape-recorded or filmed evidence proffered as a substitute for oral evidence; third, an oral account by a witness of what someone else told him; and fourth, reliance on a written record to prove a disputed fact. On one view, it tends to exclude weak evidence and to ensure that a defendant may question his accusers, thus preserving the oral character

⁹⁸ see footnote 96

⁹⁹ I am much indebted to Professor John Spencer, in his capacity as a Consultant to the Review, for his contribution to much of the analysis in this section

¹⁰⁰ *Cross and Tapper On Evidence*, eighth edition (Butterworths, 1995) p 46

¹⁰¹ eg the ‘documentary hearsay’ provisions of the Criminal Justice Act 1988, ss 23-26, and the ‘deposition’ provisions of the Criminal Procedure and Investigations Act 1996, s 68 and Sch 2

¹⁰² Civil Evidence Act 1995, s 1

of the English trial. On the other, it is capable of being too restrictive so as to work injustice either way and, in its artificiality, interferes with the smooth running of the trial process.

96 It is common ground that the present law is unsatisfactory and needs reform. It is complicated, unprincipled and arbitrary in the application of a number of the many exceptions. It can exclude cogent and let in weak evidence. It wastes court time in requiring it to receive oral evidence when written evidence would do. And it confuses witnesses and prevents them from giving their accounts in their own way.

97 There is a strong case for reversing the rule so as to render all relevant hearsay admissible, leaving its weight for determination by the tribunal. The Runciman Royal Commission, while recognising the complexity of the law on this matter and the need for examination by the Law Commission, favoured that approach:

“We think that, in general, the fact that a statement is hearsay should mean that the court places rather less weight on it, but not that it should be inadmissible in the first place. We believe that the probative value of relevant evidence should in principle be decided by the jury for themselves, and we therefore recommend that hearsay evidence should be admitted to a greater extent than at present.”¹⁰³

98 Much, of course, depends on the quality of the fact finders, who are mostly jurors or magistrates. Many are of the view that both are already more competent than we give them credit for in assessing the weight of evidence, including hearsay evidence presently admitted under the various exceptions to the rule. If the recommendations that I have made in Chapters 4, 5, 6 and 7 are adopted, future fact finders in our tribunals should improve in quality.

99 However, the Law Commission, in its recent Report,¹⁰⁴ recommended continuation of the exclusionary hearsay rule, with specified exceptions.¹⁰⁵ These were to consist of three categories of automatically admissible hearsay, namely unavailability of the declarant, reliable hearsay and admissions and confessions, and two categories of hearsay admissible at the discretion of the court, namely where required in the interests of justice and in the case of frightened witnesses. The Law Commission described the first of the two discretionary categories, as a “limited inclusionary discretion” or a “safety-valve”, for use where, “despite the difficulties in challenging the statement, its

¹⁰³ *Runciman Royal Commission Report*, Chapter 8, paras 26 - 28

¹⁰⁴ Law Comm No 245

¹⁰⁵ in this broad respect, its approach was the same as Scottish Law Commission in its Report, *Evidence: Report on Hearsay Evidence in Criminal Proceedings*, 1995, Edinburgh HMSO, Scot Law Comm No 149, see in particular, paras. 4.47-4.48

probative value is such that the interests of justice require it to be admissible”.¹⁰⁶

100 A number of contributors to the Review have suggested that those recommendations do not go far enough in their relaxation of the rule. And there is much distinguished academic support, past and present, for substituting for the present, exclusionary rule subject to exceptions, an inclusionary approach, leaving the fact finders to assess its weight – also the approach, as I have indicated, of the Runciman Royal Commission. Professor John Spencer, as a consultant to the Law Commission in preparing its consultation paper and to this Review, is among them. Praying in aid the views of such eminent writers in the common law world as Jeremy Bentham, JB Thayer, CT McCormick and Glanville Williams,¹⁰⁷ he has argued that there should be a generally inclusionary system subject to a “best available evidence” principle. That is, each side would be obliged to produce the original source of the information if the source is still available. He also suggested as part of that solution, the establishment of some regular means of deposing witnesses who, for one reason or another, it is thought might not be available to give evidence at trial. Professor John Jackson and the Standing Advisory Committee on Human Rights are of a similar view, arguing that the Law Commission “should ... have approached the subject on the basis that relevant hearsay should be admissible except where there is good reason for exclusion”.¹⁰⁸

101 The Law Commission considered the ‘best available evidence’ principle as its third option for reform, likening it to the approach of the German Courts which have a duty to search for the truth and in which the directness of the evidence goes to its weight and not to its admissibility.¹⁰⁹ It rejected the option principally on the ground that, whilst it might suit an inquisitorial system like that in Germany, it would not work in our adversarial system where the parties, not the tribunal, are responsible for seeking out and calling the evidence. In doing so, it was plainly much influenced by the weight of the opposition to it from most of its respondents, in the main judges and practitioners, but also the Society of Public Teachers of Law. It concluded its discussion with these words:

“... we are troubled by the change of attitude that this option would require on the part of practitioners and judges. It would be necessary for them to change the habits of a lifetime and be re-educated. We do not underestimate this task,

¹⁰⁶ *ibid.* para. 1.39

¹⁰⁷ see also his article, *Hearsay Reform: A Bridge Not Far Enough* [1996] Crim LR 29, at p 30

¹⁰⁸ see also Adrian Zuckerman, *The Principles of Criminal Evidence* (Clarendon, 1989), p 216; and *The Futility of Hearsay* [1996] Crim LR 4; Andrew L-T Choo, *Hearsay and Confrontation in Criminal Trials* (Clarendon, 1996), and Professor Richard D Friedman, *Thoughts from Across the Water on Hearsay and Confrontation* [1998] Crim LR 697, particularly at 700-701

¹⁰⁹ paras, 6.17-6.32

and this consideration fortifies the conclusion that we had already reached”.¹¹⁰

- 102 The Law Commission’s proposals for relaxation of the rule against hearsay, looked at individually, represent useful improvements on the present law.¹¹¹ They relax some of the rigidity of the present rule through a widening of the exceptions and the introduction of the limited inclusionary discretion. However, their implementation would not significantly change the present landscape nor, I believe, remove much of the scope for dispute that disfigures and interrupts our present trial process. Within a short time the new scheme, as Professor Spencer has put it, would “generate a new crop of case law interpreting the limits of the definition and exceptions, leaving us essentially in the position we are in today”.¹¹² In my view, this difficult subject should be looked at again, I suggest by the body that I have recommended should be established to undertake the reform and codification of our law of criminal evidence. It would also have the benefit of the impressive Report in 1999 of New Zealand Law Commission and its Draft Code for criminal and civil evidence.¹¹³ That body took as its two main criteria the reliability of the proposed statement and the unavailability of the person who made it, adopting the following proposition of Lamer CJ:¹¹⁴

“[H]earsay evidence of statements made by a person who is not available to give evidence at trial ought generally to be admissible, where the circumstances under which the statements were made satisfy the criteria of necessity and reliability ... and subject to the residual discretion of the trial judge to exclude the evidence when its probative value is slight and undue prejudice might extend to the accused. Properly cautioned by the trial judge, juries are perfectly capable of determining what weight ought to be attached to such evidence, and of drawing reasonable inferences therefrom.”

- 103 In advance of over-all reform of the law of criminal evidence, I make the following obvious points. The need and form of reform of the rule against hearsay should be approached from the fundamental standpoints that rules of evidence should facilitate rather than obstruct the search for truth and should simplify rather than complicate the trial process. Inherent in a search for truth is fairness to the defendant and his protection from wrongful conviction – but

¹¹⁰ paras 6.22 and 6.31

¹¹¹ see Professor Colin Tapper, *Hearsay in Criminal Cases: An Overview of Law Commission Report No 245* [1997] Crim LR 771

¹¹² in a consultation paper prepared for the Review

¹¹³ Report No 55, Evidence, Vol 1, pp 13-20 and Vol 2, p 53 setting out section 19 of the Commission’s Draft Code covering hearsay in criminal proceedings

¹¹⁴ *R v Smith* (1992) 15 CR (4th) 133 SCC, at 152

it should not be forgotten that the present rule can operate unfairly against a defendant as well as the prosecution.

- 104 As to the Law Commission's view that an inclusionary approach based on the best evidence principle might not suit our adversarial system, I share Professor Spencer's view that, if our courts are expected to police an exclusionary system hedged with exceptions, they could surely do the same with a system based on the availability of the witness. As I said at the beginning of this chapter, the boundaries between the adversarial and inquisitorial systems of trial are blurring; our judges and magistrates are already assuming an increasingly active role in the preparation of cases for trial and becoming more interventionist in the course of it than has been traditional. If they do not already have authority to secure the production of the best available evidence, they can be invested with it, without prejudice to the defendant's right to put the prosecution to proof of his guilt. Whilst due respect should be given to the views of judges and practitioners trained in and with long experience of the present system, their resistance to a particular form of change should not hold sway if there is otherwise a compelling case for it.

I recommend:

- **further consideration of the reform of the rule against hearsay, in particular with a view to making hearsay generally admissible subject to the principle of best evidence, rather than generally inadmissible subject to specified exceptions as proposed by the Law Commission; and**
- **in this respect, as with evidence in criminal cases generally, moving away from rules of inadmissibility to trusting fact finders to assess the weight of the evidence.**

Unfair evidence

- 105 There is a mix of broadly overlapping statutory and common law rules designed to protect defendants from the admission of evidence that is unfair to them. They are directed at the reliability of the evidence in question and whether admission of it will prejudice a fair trial. Alleged confessions of a defendant may be excluded under no less than four main rules, two of which also apply to evidence generally. First, under section 76(2)(a) of the Police and Criminal Evidence Act 1984, a court *must* exclude a confession unless it is sure that it was not obtained by oppression of the defendant. Second, under section 76(2)(b) of the 1984 Act, a Court *must* exclude a confession unless it

is sure that it was not obtained in consequence of anything said or done which was likely, in the circumstances existing at the time, to render unreliable any confession which he might have made in consequence of it. Third, under section 78(1), a Court *may* exclude any evidence upon which the prosecution proposes to rely if it appears that, having regard to all the circumstances, including those in which the evidence was obtained, the admission of the evidence would have such an adverse effect on the fairness of the proceedings that it ought not to admit it. Fourth, pursuant to section 82(3) of the 1984 Act preserving the common law, a court *may in its discretion*, exclude evidence so as to protect a defendant from an unfair trial.

106 There is a separate but, some would say, closely related jurisdiction in the courts to stay proceedings for abuse of process, which may include improper police activity or illegally obtained evidence. There is a ‘disciplinary’ element in the exercise of this jurisdiction. It is not restricted to cases where a fair trial is impossible, but is also exercisable where it would be contrary to the public interest in the integrity of the criminal justice system that a trial should take place. However, the jurisdiction can only be exercised to stay the prosecution, not to exclude the offending evidence and permit a trial to continue.

107 The 1984 Act statutory provisions had their origin in the Philips Royal Commission Report of 1981.¹¹⁵ The Commission had considered the ‘reliability’ principle as expressed by Lord Diplock in *R v Sang*,¹¹⁶ namely whether evidence, by virtue of its nature and quality, was arguably reliable, and the ‘disciplinary’ principle of exclusion well established in the United States of America, namely whether, despite its arguable reliability and cogency, the court may exclude it because it does not like the manner in which it was obtained.¹¹⁷ The Commission had commented on the ineffectiveness of the latter as a deterrent to police misconduct, drawing on the experience of the United States and citing Chief Justice Burger’s powerful observation:

“We can well ponder whether any community is entitled to call itself an ‘organised society’ if it can find no way to solve the problem except by suppression of truth in search of truth.”¹¹⁸

It had concluded that the solution was to be found in police supervisory and disciplinary procedures coupled with a discretion in the court to exclude or

¹¹⁵ paras 4.123 –4.135 and 5.18

¹¹⁶ [1980] AC 402, HL 402, at 436F-437C

¹¹⁷ paras 4.123-134

¹¹⁸ Warren Burger, *Who Will Watch the Watchman?*, American University Law Review 14.1, pp 11-12 and 23

admit evidence obtained in breach of those procedures, where the breach was relevant to its reliability.¹¹⁹

108 The Runciman Royal Commission, in 1993, expressed general satisfaction with the working of the resultant provisions in the 1984 Act.¹²⁰ However, it is only since then that the size of the problem in their application, has become apparent. Not only is there a confusing overlap between the various provisions, there is much uncertainty as to the ambit of section 78(1) and the common law power to exclude and as to their relationship one with another. The central problem is whether under section 78 and at common law the courts are generally¹²¹ confined to excluding evidence only on the ground of its quality, the “reliability” principle of exclusion. An associated question, on which there is a division of judicial and academic views, is whether section 78, in requiring the court to have regard to “all the circumstances, including the circumstances in which the evidence was obtained”, widened the common law so as to require consideration of the propriety of obtaining of evidence as well as or regardless of its reliability.¹²² Of course, in those cases where the impropriety may affect the reliability of the evidence, there is no difficulty. The problem arises where the evidence, despite the impropriety, is potentially reliable and cogent. Quite apart from the question of construction of section 78 and the effect of the authorities, there is an argument that evidence, however reliable, which should never have been before the court because of the way in which it was obtained, may for that reason violate Article 6.

109 A further question is the overlap between the courts’ increasing exercise of its jurisdiction to stay proceedings for abuse of process, which, as I have said, clearly does include a disciplinary as well as a reliability function, and its statutory or common law power to exclude evidence, which, in general, arguably only includes the latter. As academic commentators have observed,¹²³ if there is such difference in the two jurisdictions, then, where the tainted evidence in question is not the only or even crucial prosecution evidence, it would be anomalous if the court were confined to the drastic measure of staying the prosecution and could not simply exclude the evidence. The answer to this question may affect in turn the statutory power

¹¹⁹ para 5.18

¹²⁰ *Runciman Royal Commission Report*, Ch 4, paras 33-40

¹²¹ that is, save in the case of admissions, confessions and evidence obtained from the accused after the commission of the offence

¹²² authorities in favour of the reliability principle include: [1980] AC 402, HL 402, at 436F-437C *R v Mason* [1988] 1 WLR 139, CA; *R v Christou and Wright* (1992) 95 Cr App R 264, CA, per Taylor J at 269; *R v Khan (Sultan)* [1997] AC 558, per Lord Nolan at 582B-C; and *R v Chalkley and Jeffries*, supra (but see Professor IH Dennis’s powerful critical analysis of this case in his book, *The Law of Evidence*, (Sweet and Maxwell 1999), at pp 74-77); and *Attorney General’s Reference (No 3 of 1999)* [2001] All E R 577, HL per Lord Steyn at 585h-j. Authorities said to support the disciplinary principle, see *R v Horseferry Road Magistrates’ Court, ex p Bennett* [1994] 1 AC 42, per Lord Griffiths obiter at 61A; *R v Smurthwaite* (1994) 98 Cr App R 437, CA, per Taylor LCJ at 440; *R v Cooke* [1995] 1 Cr App R 318, per Glidewell LJ at 328; *R v Mullen* (1999) 2 Cr App R 143, CA; *Mohammed (Allie) v The State* 2 AC 111, PC; and *R v Togher and Ors* [2001] 3 All ER 463 CA

¹²³ Andrew L-T Choo and Susan Nash, *What’s the Matter with Section 78?* [1999] Crim LR 929, p 933

of the Court of Appeal, as it is presently stated, only to quash a conviction if it is ‘unsafe’.¹²⁴

- 110 It may be, as the editors of the 2001 edition of Archbold suggest, that the effect of the Human Rights Act 1998 is to require courts’ approach to section 78 to be more ‘rights based’. Perhaps, as Professor I.H. Dennis¹²⁵ and others¹²⁶ have argued, the answer lies in the opening words of section 78. “In any proceedings”, indicating that the court in its assessment of the fairness of admitting evidence is concerned with more than the trial and that:

“[t]he fairness of the proceedings as a whole may be adversely affected if admission of the prosecution evidence in question means that the prosecution have an advantage which is inconsistent with the fundamental moral and political values of the criminal justice system.”

- 111 Whatever the true position, the sooner the law in this field is clarified and simplified the better. In my view, consideration should be given, as part of the reform and codification exercise that I have recommended, to rationalising, possibly by combining, and certainly by simplifying, the various forms of jurisdiction for exclusion of evidence and that of staying a prosecution for abuse of process on account of improperly obtained evidence.

I recommend, as part of the over-all reform of the law of criminal evidence that I have recommended, consideration of rationalising and simplifying the various forms of statutory and common law rules for exclusion of evidence because of its unfairness and that of staying a prosecution for abuse of process on account of improperly obtained evidence.

Previous misconduct of a defendant/ Similar fact evidence

- 112 The general rule in England and Wales is that evidence of a defendant’s criminal record or any other evidence that he has a tendency to commit the offence charged or offences in general is inadmissible in evidence against him. The main reasons advanced for the rule are that such evidence is generally irrelevant and that, in any event, its prejudicial effect is likely to outweigh its probative effect. There are three exceptions to the general rule: first, where it would be admissible to prove he is guilty of the offence

¹²⁴ see further Chapter 12 paras 8 - 10

¹²⁵ *The Law Of Evidence*, pp. 81-82

¹²⁶ Andrew Choo and Susan Nas, *What’s the Matter with Section 78?*, p 940

charged, in the main similar fact evidence,¹²⁷ but also including evidence under various statutes; second, where he has sought to establish that he is of good character or has attacked the character of a prosecution witness or a deceased victim; and third, where he has given evidence against a co-defendant in the proceedings.¹²⁸

113 It has long been acknowledged that the law in this area is highly unsatisfactory in its complexity and uncertainty.¹²⁹ The Criminal Law Revision Committee in 1972,¹³⁰ and the Runciman Royal Commission in 1973¹³¹ recommended continuation of the scheme of general exclusion, but subject to slightly different exceptions, the latter also recommending that the Law Commission should consider it. In 1994 the Law Commission was asked to do so; it produced a consultation paper in 1996¹³² and is shortly to produce its final report. In the meantime, the Government, in its recent policy paper, *The Way Ahead*,¹³³ mentioned as a possibility for ‘simplification’ of the law, the admission of evidence of previous convictions where relevant, providing that their prejudicial effect does not outweigh their probative value. The Labour Party, in its election manifesto in May 2001 stated that it saw “a strong case for a new presumption” to that effect.

114 Before I continue, I should acknowledge my long held resistance, both at the Bar and as a judge, to putting a defendant’s previous convictions before a jury as part of the proof of guilt even under the present statutory regime. It has always seemed to me that it is a poor prosecution case that needs to rely on a man’s previous convictions in order to convict him. If the case is strong, why bother? If the case is weak, it is unfair. That is still my instinct, which my examination of the matter in this Review has not shaken. However, the reality of the present law is that it mostly does not conceal from the tribunal of fact that a defendant has some – though not precisely what – criminal record. In the resultant scope for speculation, it is thus capable of engendering as much or more prejudice against him. And it is not an honest system in that it does not do what it is claimed to do.

115 This is a complex issue, for which there are no straightforward answers. It has been widely accepted for some time that reform is needed, but much dispute as to the form it should take. As the Law Commission is about to

¹²⁷ which is capable of including evidence of complainants in previous cases resulting in acquittals; see *R v Z* [2000] 3 WLR 117, HL

¹²⁸ Criminal Evidence Act 1898, s 1

¹²⁹ for helpful and close analyses of the problems, see the trilogy of articles in [1997] Crim LR at 75 – 115: (1) Paul Roberts; *All the Usual Suspects: A Critical Appraisal of Law Commission Consultation Paper No 141*, (2) Jenny McEwan *Law Commission Dodges the Nettles in Consultation Paper No 141*, and (3) Penny Darbyshire *Previous Misconduct and Magistrates’ Courts – Some Tales from the Real World*

¹³⁰ Eleventh Report: Evidence (General), Cmnd 4991, at para 78

¹³¹ Report, Chapter 8, paras 29-34

¹³² Law Comm No 141

¹³³ CM 5074, para 3.51

publish its final report on the matter, I do not think it appropriate for me to venture any firm recommendation. However, given the Government's indication of interest in introducing a general rule of admissibility of relevant evidence where its prejudicial effect does not outweigh its probative value, I should touch briefly on the two broad opposing approaches of general admissibility or non-admissibility, each qualified either by specified exceptions or a balancing of probative value and prejudicial effect.

- 116 The main advantage claimed for a general exclusionary rule, subject either to specified exceptions as at present or a balancing of probative value and prejudicial effect, is that it leans against admission of evidence unfairly prejudicial to a defendant. The main advantages of subjecting a general exclusionary rule only to a general exception based on balancing probative value over prejudicial effect are said to be simplicity and more focus on the relevance of the evidence. There is no doubt that the present system, with its mix of statutory and common law, is unduly complex, difficult to apply, particularly in the case of similar fact evidence. And it often fails to distinguish between relevant and irrelevant evidence and – some would say – leaves too much discretion to individual judges.¹³⁴ If it were to be replaced by a test of balancing proof against prejudice, the imprecision of the exercise applied on a case by case basis might in the early days substitute uncertainty for complexity, only to succumb again to complexity as it became overlain with case law. In either form of general exclusionary rule, there is the practical problem of keeping from the tribunal of fact that a defendant who does not put his character in evidence is likely to have a bad one.
- 117 A general inclusionary rule subject to one or other form of exception might or might not, depending on the extent and bases of the exceptions, expose the previous bad character of more defendants. But there would be the same practical difficulty of keeping it from the fact finders even when the court excludes it.
- 118 Professor John Spencer has long been of the view that there is an entirely different and better avenue for reform, a view that he has advanced as consultant to the Law Commission in the preparation of its consultation paper and as consultant to this Review. In brief, he considers that the present law, both in its form and application by the judges, is unreasonably favourable to defendants and is, in any event, ineffective as a protection to them where they are entitled to it. His proposals are: first, in order to remove the scope for possibly prejudicial speculation by a jury or lay magistrates when a defendant's character is not mentioned, his criminal record should be put in evidence quietly and in a matter of fact manner at the start of every trial; second, the prosecution should be allowed to treat it as supportive of the

¹³⁴ see in particular, the considerable body of case law on similar fact evidence

defendant's guilt where it goes beyond showing he has a general tendency to break the law and is relevant - that is, probative; and third, where there is no other substantial evidence of guilt, the court should normally be required to stop the case. The Law Commission, in its consultation paper, considered this with other options for reform and rejected it. Its arguments were that it would involve the admission of irrelevant and prejudicial material for no very clear purpose.¹³⁵ It provisionally favoured continuation of a system similar to the present exclusionary rule subject to exceptions.¹³⁶

- 119 There is no doubt that the admission of all convictions as a matter of course at the beginning of the case, even if not relied upon as supportive of guilt, could result in the admission of irrelevant and unfairly prejudicial material. Dr Sally Lloyd-Bostock's research on the effect of bad character evidence on mock jurors ('the Oxford Study')¹³⁷ indicated that a jury would be more likely to convict if they know that the defendant either had a conviction for a similar offence or for indecent assault (irrespective of the offence charged). As against that, Professor Spencer and others have advanced the following arguments:
- it is illogical for the law to allow a defendant to put in his good character to indicate lack of propensity but to deny the prosecution the opportunity to establish the converse when he has a bad one;
 - jurors rapidly learn and magistrates and judges know that if there is no mention of a defendant's good character, he probably has a bad one, and so it permits the tribunal of fact to guess what it is not officially allowed to know;¹³⁸
 - magistrates, in any event, soon recognise the regular offenders in their court;
 - in the case of the exception where a defendant's character goes in because he has wrongly sought to establish his own good character or attacked a prosecution witness, the requirement on the judge to tell a jury that it goes only to credibility, not to propensity, is confusing and unreal;¹³⁹
 - evidence showing that a defendant has committed offences of a similar type before statistically and logically suggests that he is more likely than those without such a record to commit such offences again, and should for that reason be regarded as relevant evidence - and some propensities can be more significant than others.¹⁴⁰

¹³⁵ paras 9.15-9.23

¹³⁶ paras 9.72-9.73

¹³⁷ commissioned by the Home Office in 1995 and later partly replicated with a sample of magistrates; see Sally Lloyd-Bostock, *The Effects on Juries of Hearing about the Defendant's Previous Criminal Record: A Simulation Study*, [2000] Crim LR 734

¹³⁸ see also Penny Darbyshire, *Previous Misconduct and the Magistrates' Courts – Some Tales from the Real World* [1997] Crim LR 105, at 109-110

¹³⁹ see also Paul Roberts, *All the Usual Suspects: A Critical Appraisal of Law Commission Paper Consultation Paper No 141* [1997] Crim LR 75; and Jenny McEwan, *Law Commission Dodges the Nettles in Consultation Paper No 141* [1997] Crim LR 93, at 102-103

¹⁴⁰ see also Jenny McEwan, *Law Commission Dodges The Nettles In Consultation Paper 141*, at 95 - 98

- though studies have shown that juries would be influenced to some extent¹⁴¹ by knowledge that the defendant has a criminal record, they do not show that juries would be *unduly* influenced by it;
- to remove the scope for possibly prejudicial speculation, fact-finders should be informed at the start of the trial whether the defendant has a criminal record and, if so, what it is;
- we should substitute weight for admissibility, confining the prosecutor to making active use of the criminal record or bad tendencies where they appear to be relevant to some disputed element in the case, and we should trust jurors and other fact finders to give it the weight it deserves;¹⁴²
- adequate safeguards against juries and other fact finders giving unduly prejudicial weight to such evidence would be to prevent prosecutors inflating its importance and to prohibit a conviction when there is no other prosecution evidence of substance;¹⁴³ and
- such a system would be simpler and more honest.

120 Those are powerful pointers to the futility of a rule, whatever its form, for rendering inadmissible prejudicial matter inferential knowledge of which cannot and arguably need not be kept from fact finders. As I have said, magistrates will know,¹⁴⁴ and so will most jurors - if not the first time they sit on a jury, the second time - that silence about a defendant's character probably means he has a criminal record. They may not know what it is, but they can speculate about it. Professional judges, sitting as fact finders in the magistrates' courts or on appeal in the Crown Court usually cannot avoid knowing the full details if an issue arises before them as to character. Prominent among the reasons for retaining a lay element in the administration of criminal justice is a belief in their worldly judgment and common sense. Magistrates and jurors are seemingly trusted now, where as a result of the conduct of a defendant's case his previous bad character goes in, to distinguish between its relevance to his credibility but not to his propensity, a distinction which must be incomprehensible to most jurors and, possibly to many magistrates. Yet they are not to be trusted as a generality to assess such evidence for themselves. In my view, there is much to be said for a more radical view than has so far found favour with the Law Commission, for placing more trust in the fact finders and for introducing some reality into this complex corner of the law.¹⁴⁵ Whilst judgment should be reserved until publication of the Law Commission's final report, there is a strong case for

¹⁴¹ Sally Lloyd-Bostock *The Effects on Juries of Hearing about the Defendant's Previous Criminal Record: A Simulation Study*, [2000] Crim LR 734

¹⁴² see also Penny Darbyshire, *Previous Misconduct and the Magistrates' Courts – Some Tales from the Real World* [1997] Crim LR 105, at 115

¹⁴³ cf similar suggestions supported by some members of the Criminal Law Revision Committee, in its Eleventh Report, see para 90

¹⁴⁴ see Martin Wasik, *Magistrates: Knowledge of Previous Convictions* [1996] Crim LR, 851; and Penny Darbyshire, *Previous Misconduct and the Magistrates' Courts* at 109 -110

¹⁴⁵ see per Lord Griffiths in *R H* [1995] 2 WLR 737, HL, at 750

considering its recommendation in a wider review of the law of criminal evidence as a whole.

I recommend consideration of the Law Commission's imminent final report on evidence in criminal proceedings of a defendant's misconduct in the context of a wider review of the law of criminal evidence, having regard, in particular, to the illogicality, ineffectiveness and complexity of any rule, whatever its form, directed to keeping a defendant's previous convictions from lay, but not professional, fact finders.

Evidence of children

- 121 This is a vast and difficult subject on which a great deal of work has been, and is being, done within and without government agencies. Childline and the NSPCC, under the guidance of Professor Spencer, in a joint submission, provided me with an evaluation of the changes in the rules of evidence and procedure since the 1980s, with a view to considering possible reforms. More research is a necessary pre-condition of legislative and policy changes, more perhaps than in any other area of criminal law. The interrelation of law, psychology, child welfare and fair trial considerations make this very delicate terrain, and it has not been feasible for me to undertake detailed research in the course of this Review. But, in deference to the many submissions that I have received (and with acknowledgements to Professor Spencer), I shall mention, without making any recommendations, some of the possible areas for reform.
- 122 The major area of concern is in child abuse cases, but it is not confined to them. At the heart of the problem are the strongly conflicting interests of the need for sensitive and supportive treatment for children, both as alleged victims and witnesses, and of the requirement of the criminal justice process that the prosecution must prove the defendant's guilt to a high standard. It is clearly in child witnesses' interest that the proceedings should be got over as quickly and painlessly for them as possible. Defendants, on the other hand are entitled to the protection of a fully disclosed prosecution case to enable them properly to prepare their defence, and to the opportunity, to test in cross-examination, the child's evidence. There is also a frequently expressed concern that a child's evidence should not be 'tainted' in the meantime as a result of interviews with him or her as part of care proceedings and/or by way of therapy, such concerns often resulting in delays in resolving the child's future and the start of any necessary therapy. A solution that does full justice to those conflicting interests is likely to remain elusive, though, as I have

noted in Chapter 10, a recent initiative for joint plea and directions hearings has had promising results.¹⁴⁶

- 123 A fundamental concern is whether trial by judge and jury – which is the normal forum for most child abuse matters – is suitable for cases in which children are required to give evidence. First, there is the, possibly damaging, ordeal for the child witness, only partly mitigated by his or her being able to give evidence by video-tape and video-link. Second, many feel a real unease in entrusting assessment of a child's evidence to a randomly selected body of twelve people, most of whom will have little experience of assessing evidence at all let alone children's accounts of such traumatic matters. It is certainly strange when one considers that Circuit Judges have to be specially trained and authorised to try rape and other serious sexual offences or to exercise care jurisdiction in family work, and that magistrates must reach a certain level of experience and training once elected to a youth court panel. Alternatives suggested by contributors to the Review are for trial in such cases by judge alone or by judge and two magistrates drawn from the youth court panel. However, given the heavy penalties that convictions for child abuse often attract, many would consider it wrong to deprive defendants of the opportunity to defend themselves in front of a jury. Yet, as I have indicated in Chapter 5,¹⁴⁷ it is in just such cases that defendants often waive jury trial, in jurisdictions providing for it, because of their concern at the possible emotional response or outrage of juries to the horrific nature of the allegations. My recommendation that defendants should have an opportunity, subject to the consent of the court, to opt for trial by judge alone, should go some way to meeting the concern of many, including defendants, that juries are not the appropriate fact finders in such cases. It would not, however, be an answer in cases in which defendants did not exercise the option. If jury trial is to continue, it may be that some thought should be given by psychologists and lawyers alike as to what, if any, special guidance might, in fairness to both sides, be provided to juries in such cases. It could possibly take the form of a court appointed expert and/or of a special direction from the judge.
- 124 As to the timing and means by which children give evidence, a start was made in 1989 with the much applauded report of the Pigot Committee,¹⁴⁸ the main thrust of which was to start and complete a child complainant's evidence in sex cases on video-tape well before the trial so as to remove from him or her the strain of the proceedings at the earliest possible stage and to enable the start of any necessary therapy. The Committee specifically recommended that cross-examination should take place as soon as possible after the initial video

¹⁴⁶ para 216

¹⁴⁷ para 112

¹⁴⁸ The Home Office Advisory Group on Video Evidence, chaired by His Honour Judge Pigot, then the Common Serjeant of London (Home Office, 1989); see also the Report of the Scottish Law Commission: *The Evidence of Children and other Potentially Vulnerable Witnesses* (SLC No125)

interview and any subsequent police interview of the defendant. The Committee's recommendations were only partly adopted, and then only in piecemeal form.

- 125 The Criminal Justice Act 1991¹⁴⁹ introduced a scheme under which the evidence in chief of children could take the form of a video-taped interview before the trial, but the child still had to attend trial for cross-examination, either through a video-link system or in court if thought suitable. Now, under the 'special measures' provisions of the Youth Justice and Criminal Evidence Act 1999,¹⁵⁰ provision is to be made effectively requiring the evidence of persons under 17 to be given by video-tape and live video-link and, where the prosecution is for a sexual offence, for the evidence to be given entirely on video-tape, thus replacing 'live' cross-examination at trial with a pre-recorded cross-examination unless the witness wishes to give live evidence.¹⁵¹ However, these new provisions still fall short of the Pigot Committee's recommendations in that they will not ensure that video-recording of the cross-examination of the child takes place shortly after the initial video-taped interview (save possibly without exceptionally vigorous pre-trial control of the case by the judge). The reality is that most video-taped cross-examinations will take place shortly before the trial, namely not much earlier than now. That is because cross-examination cannot take place until after disclosure, including any third party/local authority disclosure and the defence advocate has been fully instructed. Even then, the cross-examination is likely to be at a court centre unless and until alternative facilities are provided.
- 126 I leave these statutory provisions with three further comments. First, they and the other special measures provisions in Part II of the 1999 Act are extraordinarily complicated and prescriptive. I can only assume that those drafting them have no idea of what judges and criminal practitioners have to cope with in their daily work of preparing for and conducting a criminal trial or of what they need as practical working tools for the job. Simple and more flexible rules of court are what are needed – another task I suggest, for a Criminal Procedure Rules Committee. Second, the Court Service will need to do better than it has done so far to provide enough courtrooms equipped for showing video evidence, so as to avoid delays in the speedy trial of child abuse cases. Third, there is a striking difference between the care for children as witnesses in these provisions and the lack of any corresponding provision for them when they are accused of grave crime in the Crown Court, a disparity that concerns many judges. The proposals that I make for young defendants to be tried in a youth court appropriately constituted for different categories of case should ensure that the formalities of Crown Court trial are no

¹⁴⁹ s 54, which added section 32A to the Criminal Justice Act 1988

¹⁵⁰ Chapter 1, Pt II, but not as yet implemented nor given a date for implementation

¹⁵¹ s 21

longer a problem, but that will not resolve the lack of provision of ‘remote’ and video evidence facilities for them.

127 Moving to the content of children’s evidence, I have said that there is a general illogicality and impracticality in our law of confining a witness’s evidence in chief to what they say in the witness box and leaving it to the defence, if they wish, to draw attention to previous statements in the course of cross-examination. This is a particular defect in the case of the evidence of young children where it could be vital in the interest of justice to know the circumstances of and terms in which the complaint was first made and how it was dealt with up until the time of the video-recording of his evidence in chief. If my recommendation under paragraphs 86 – 92 above, that prior witness statements should be admissible as evidence of fact, is accepted, it would remove some of the difficulties for fact finders in assessing the truthfulness and reliability of young children’s evidence. Another possibility would be the use of court appointed experts, as is done in family and care cases where similar issues arise, but this is not a matter on which I am equipped to make any positive recommendation.

128 There are other problems. One, to which I have referred in Chapter 10, is third party/local authority disclosure, which is a particular difficulty in child abuse cases.¹⁵² Another – seemingly insoluble – is minimising the trauma to the child witness of cross-examination whilst ensuring that the defendant’s advocate can thoroughly test his evidence. Of course, the defence advocate can do this quietly and circumspectly, and if he doesn’t the judge can intervene to restore fairness. But often advocates overdo it, making what may amount to a ‘third speech’, and the judge may not intervene soon enough in an excess of caution about the defendant’s right to a fair trial. The result can be both damaging to the child and cause him, out of confusion or a desire to please, to distort his evidence or to break down so that he is unable to complete it. One possibility would be for a testing of the evidence of very young children by some neutral person, say the judge, or a court appointed expert or a special counsel. However, as I have said, all such suggestions should await the outcome of more wide-ranging and detailed research on the best way to balance the rights of the child and of the defendant.

Expert evidence

129 As with Lord Woolf’s work on Civil Justice, the subject of expert evidence has featured strongly in the Review. The main topics covered were: the

¹⁵² paras 185 - 190

competence and objectivity of those who put themselves forward as expert witnesses; the suitability of calling expert evidence; simplification of the manner of presentation of their evidence; inequality of arms between prosecution and defence experts; delays in obtaining expert evidence; the effect of listing practices on busy forensic practitioners; and poor pay for publicly funded defence experts. Although many of these issues concern preparation for trial as well as the trial itself, it seems to me more convenient to deal with than all together here.

Competence

- 130 The competence of an expert witness is governed by the common law. Whether, in any particular case, a witness is qualified to give expert evidence is for the judge. However, there is no single or comprehensive guide to the courts in the form of a professional register of accreditation to which they or parties may have recourse when considering the suitability of proposed expert witnesses. Although the Runciman Royal Commission did not recommend any fundamental changes on the subject of expert evidence, it gave detailed consideration to this question. It recommended the establishment of a Forensic Science Advisory Council to oversee matters including accreditation, performance evaluation and professional development, with a view to the possible introduction of an enforceable code of conduct for all forensic scientists.¹⁵³ Although the Government did not implement that recommendation, it supported the principle of development of standards, training and accreditation by a non-statutory body or bodies. The Forensic Science Society and the Academy of Experts¹⁵⁴ were already in the being, each with its draft code of practice. Since then the field has become more crowded. In 1995, the Society of Expert Witnesses and in 1996 the Expert Witness Institute were founded, each producing its own Code of Practice and maintaining a membership list. And most recently, in early 2000, the Council for the Registration of Forensic Practitioners, a company limited by guarantee was established with financial support from the Government. The Law Society maintains an annual Directory of Expert Witnesses and there are also other associations of experts from particular disciplines.
- 131 It seems to me that it would be sensible, make better use of resources and be of more value to users and the Courts, if the work of all these bodies could be concentrated in one. It could then set, or oversee the setting of, standards, maintain a register of accredited forensic scientists in all disciplines and regulate their compliance with those standards. I do not suggest that it should be a statutory or governmental body, for I believe that professional self-regulation, albeit with governmental encouragement and financial help to the

¹⁵³ Chapter 9, paras 33 - 36

¹⁵⁴ then the British Academy of Experts

extent that it may be necessary in the early days, is the better way forward. The Council for the Registration of Forensic Practitioners, although only recently established looks a strong candidate for such a role. It is an independent body of forensic practitioners, their managers and bodies and people who use their services, including the police, lawyers and judges. Its Register, which it opened in the Spring of this year will include forensic practitioners of all kinds. Entry to the Register, which is voluntary, is by peer review of current competence against agreed criteria, with revalidation every four years to ensure that practitioners maintain their skills and keep up to date. The Council has underpinned the Register with a Code of Conduct which includes the principle that a forensic practitioner's overriding duty is to the court and the administration of justice and that his findings and evidence must be presented fairly and impartially. There will be procedures to deal with complaints of professional misconduct, poor performance or ill health, with the ultimate disciplinary sanction of removal from the Register. It is hoped that the courts will regard entry on the Register as an indicator of competence, though of course they will retain the power to determine whether a witness is qualified to give expert evidence on a case by case basis. The Crown Prosecution Service and other prosecuting bodies, legal practitioners and the courts should, in their various ways, encourage and support the Council in its work.

I recommend that:

- **consideration should be given to concentrating in one self-governing professional body within England and Wales the role of setting, or overseeing the setting, of standards and of conduct for forensic scientists of all disciplines, the maintenance of a register of accreditation for them and the regulation of their compliance with its conditions of accreditation; and**
- **for those purposes, the several existing expert witness bodies providing for all or most forensic science disciplines should consider amalgamation with, or concentration of their resources in, the Council for the Registration of Forensic Practitioners.**

Objectivity

- 132 All the inter-disciplinary bodies to which I have referred and, I am sure, all others accept the principle that the overriding duty of their members is to provide the court with objective evidence. The same applies to government agencies, such as the Forensic Science Service and to every forensic scientist individually contributing to the Review. Indeed, they positively welcome it as

a protection against being drawn into the adversarial mode of some of those instructing them. In my view, this consensus should be given the same formal recognition in new Criminal Procedure Rules as it has been given in the civil jurisdiction by Civil Procedure Rules, Part 35.3, which reads:

“(1) It is the duty of an expert to help the court on the matters within his expertise.

(2) This duty overrides any obligation to the person from whom he has received instructions or by whom he is paid”.

It would also be a useful reminder to all expert witnesses about to give evidence – and to their clients – to require them to include a declaration to like effect at the start of their witness statements or reports.

I recommend that:

- **the new Criminal Procedure Rules that I recommend should contain a rule in the same or similar terms to that in Part 35.3 of the Civil Procedure Rules that an expert witness’s overriding duty is to the court; and**
- **any witness statement or report prepared by an expert witness for the assistance of the court should contain at its head a signed declaration to that effect.**

Suitability of expert evidence

- 133 An expert witness is different from other witnesses in a number of respects, an important one of which is that he is permitted to express an opinion on the issue to which his evidence relates. But, at common law, it is for the judge to decide in each case whether the issue is one which is suitable for opinion evidence. Often the issue clearly does justify the calling of an expert. However, there is an increasing tendency, particularly in the criminal courts, for parties to seek to call opinion evidence masquerading as expert evidence on or very close to the factual decision that it is for the court to make. It is for the judges or magistrates to determine whether an issue truly is susceptible to and justifies the calling of expert evidence, in particular whether a proffered expert is likely to be any more expert than anyone else in forming an opinion on separately established facts. In the Crown Court the judge normally directs or indicates at the pre-trial stage whether any particular issue justifies the calling of expert evidence and, if so, of what nature.
- 134 There is a side effect to this when the defence seek to call an expert and need legal aid to pay for it. If the judge directs or indicates that it is a suitable case for a defence expert, it is still for the Legal Services Commission to decide whether to fund it. That body can and sometimes does effectively second

guess the judge's direction by declining to authorise the instruction of an expert. Even when it agrees with the judge, the need to obtain, and the slowness in grant, of its authorisation is a frequent cause of substantial delay in the preparation of cases for trial. One has only to consider how much has to be done following the grant of authorisation to see why this is so. The expert has then to be instructed, he must be provided with all relevant papers and prosecution forensic science reports, and possibly be given access to original prosecution exhibits. Then he has to prepare his report and, often confer with those instructing him.

- 135 Whenever there is a possible need for the instruction of expert witnesses on either side, the decision is for the court. It should be taken at the earliest possible stage and, in my strong view, in publicly funded cases, it should not be subject to further authorisation by the Legal Services Commission. Once a judge has directed that expert evidence is appropriate in a particular case, I cannot see upon what basis that body is competent to take a different view.
- 136 In my view, criminal courts' power to control the admission of experts' evidence should be formalised in the new Criminal Procedure Rules that I have recommended and put on a similar footing to that for the civil courts as set out in the Civil Procedure Rules, Part 35, 1 and 4, namely by imposing upon them a duty, and declaring their power, to restrict expert evidence to that which is reasonably required to resolve any issue of importance in the proceedings.

I recommend that:

- **criminal courts' power to control the admission of experts' evidence should be formalised in the new Criminal Procedure Rules that I have recommended, and put on a similar footing to that for the Civil Courts as set out in the Civil Procedure Rules, Part 35. 1 and 4, namely by imposing upon them a duty, and declaring their power, to restrict expert evidence to that which is reasonably required to resolve any issue of importance in the proceedings;**
- **judges and magistrates should rigorously apply the test governing that power and duty, and the Court of Appeal should support them; and**
- **in publicly funded defence cases, where a judge or magistrates' court has directed that it would be justifiable to call a defence expert, that direction should constitute authorisation for the expenditure of public money on an expert at a specified rate.**

Manner of presentation of expert evidence

- 137 At the heart of this question is the seeming absurdity in our present system of entrusting to a tribunal, whether judge, magistrates or jury, unversed in a particular discipline the task of determining which of two conflicting experts is right. However, to hand over the decision to a single expert or body of experts would remove that part, possibly the crucial part, of the decision-making from the court. Lord Justice May ruminated on this central dilemma in an address to last year's Annual Conference of the Expert Witness Institute,¹⁵⁵ when citing the following passage from a seminal article of Judge Learned Hand in 1901:

“The trouble with all this is that it is setting the jury to decide, where doctors disagree. The whole object of the expert is to tell the jury, not facts, as we have seen, but general truths derived from his specialised experience. But how can the jury judge between two statements each founded upon an experience confessedly foreign in kind to their own? It is just because they are incompetent for such a task that the expert is necessary at all.... If you would get at the truth in such cases, it must be through someone competent to decide”.

That conviction of Judge Learned Hand led him to stop short, but only just, of removing the decision from the court. He turned instead to a removal of adversarial expert evidence, replacing it with a board of experts or a single expert on the assumption that, in all but exceptional cases, the court would adopt its or his advice in reaching its conclusion.

- 138 The same dilemma, most acutely present in an adversarial and jury system, and at its sharpest in criminal trials, has remained the subject of debate ever since, and is still unresolved. It has given rise to a large number of submissions in the Review, as it did in Lord Woolf's Review of Civil Justice. Short of providing specialist courts of one sort or another for every discipline in which expert evidence may be required, the search is to find some compromise by which the court more closely controls the way in which expert evidence is put before it. It could be done by the court appointing or selecting a single expert or body of experts to advise it, or by more closely controlling the parties in the manner in which they deploy their own expert evidence.
- 139 A number of contributors to the Review have suggested that criminal courts should have power to appoint a court expert to give evidence to the exclusion of expert evidence on each side. Lord Woolf made such a recommendation in his interim report,¹⁵⁶ but it did not find general support and he did not pursue it

¹⁵⁵ EWI Conference: *The Expert Witness –Present issues and future challenges*, 12th October 2000

¹⁵⁶ Chapter 23, paras 20 - 23

in his final report. Others have suggested that criminal courts should have similar power to that in fact introduced in the Civil Procedure Rules, that the court should have power to direct that evidence is to be given by a single joint expert, leaving it only with a residual power of selection of the expert where the parties cannot agree who it should be.¹⁵⁷ Where a civil court exercises that power, the practice is for the preparation of the joint expert's report to be treated as the first step and, if one or other party is dissatisfied with it, then, subject to the court's discretion, he should be allowed to call his own expert evidence.¹⁵⁸ The rule is, I believe, increasingly used. A recent survey of 500 experts¹⁵⁹ has indicated that a single joint expert is being appointed in about 40% of cases. In the civil jurisdiction there may not be any Article 6 difficulties in a system of court appointed or directed and selected experts, save that our adversarial process would probably entitle both sides to be actively involved in the process by which he prepares his report, for example, in submitting to interviews and having access to documents on which the report is based.¹⁶⁰

- 140 Interestingly, the Runciman Royal Commission, despite its drive to introduce a more inquisitorial flavour to the pre-trial stage, showed little interest in court appointed experts in criminal proceedings, either to the exclusion of parties' experts or in addition to them.¹⁶¹ The overwhelming majority of the many contributors to this Review were against it. Where the court has directed that expert evidence is appropriate, I too cannot see any scope for introduction to criminal trials of a system of court appointed experts to the exclusion, even in the court's discretion, of the right of each party to call its own expert evidence. Even without Article 6, it seems to me that there are fundamental difficulties in denying a criminal defendant that entitlement, particularly where the issue is highly controversial and central to the case and - I would add with Lord Bingham¹⁶² - whatever the weight of the case. He would have to instruct an expert to obtain advice as to whether to accept the court expert's view and, if not, he would probably need his assistance for the purpose of cross-examination of the court expert. Yet he would be unable, unless permitted by the judge, to call him to justify the points put in cross-examination or to give his contrary view on which they were based. To leave it to the judge's discretion, as under the Civil Procedure Rules, would, I believe, result in most judges allowing the defendant, or the prosecution for that matter, to call their own expert witness – effectively making the provision a dead letter. Otherwise, the court appointed or selected expert would

¹⁵⁷ CPR Part 35.7

¹⁵⁸ *Daniels v Walker* [2000] 1 WLR 1382; CA; *Cosgrove v Pattison*, the Times, 13 February 2001, Neuberger J

¹⁵⁹ conducted by Bond Solon Training

¹⁶⁰ *Mantovanelli v France* (1997) 24 EHRR 370, ECHR

¹⁶¹ Chapter 9, paras 67 and 74

¹⁶² *Forensic Experts: The Past Present and Future*, an address to the Expert Witness Institute's first Annual Conference on 29th September 1999

effectively decide the issue and, depending on its importance, possibly the case.¹⁶³

- 141 Nor do I believe that it would be helpful for the court to appoint its own expert in addition to any expert witnesses called by the parties, since, in jury cases, the very nature of his appointment might suggest to a jury a greater authority than one or other or both of the parties' experts. Accordingly, where there is an issue on a matter of importance on which expert evidence is required, I can see no justification for empowering the court to appoint or select an expert, whether or not it excludes either party from calling its own expert evidence. Of course, where there is no issue or one in which the parties are content that the matter should be resolved by a single expert, they should be encouraged to deal with it in that way, agreeing his report or a summary of it as part of the evidence in the case.

I recommend that:

- **where there is an issue on a matter of importance on which expert evidence is required, the court should not have a power to appoint or select an expert, whether or not it excludes either party from calling its own expert evidence; and**
- **where there is no issue, there is or one in which the parties are content that the matter should be resolved by a single expert, they should be encouraged to deal with it in that way, agreeing his report or a summary of it as part of the evidence in the case.**

- 142 Two other, less controversial, aspects of simplifying the presentation of expert evidence to courts are advance mutual disclosure of experts' reports and pre-trial meetings between them to identify and narrow what is in issue.

- 143 As to mutual disclosure, there is already detailed provision for it in rules made under section 81 of the Police Criminal Evidence Act 1984,¹⁶⁴ corresponding broadly to Part 35,10 and 13 of the Civil Procedure Rules. However, slowness in prosecution disclosure of expert evidence is a major cause of delay in many criminal trials. Until it is provided, the defence expert cannot get on with or complete his work, the preparation of the defence statement may have to be wait and, in turn, secondary prosecution disclosure. The

¹⁶³ In addition, such a system might violate Article 6(3)(d) ECHR which guarantees the right of the accused, not only to cross-examine witnesses, but to call and examine his own under the same conditions as the prosecution witnesses; see *Bonisch v Austria* (1985) 9 EHRR 191, Ecomm, HR. However, the counter argument is that there is parity between them if, as would be the case under this approach, the prosecution is also excluded from calling expert evidence

¹⁶⁴ Crown Court (Advance Notice of Expert Evidence) Rules 1987; and Magistrates' Courts (Advance Notice of Expert Evidence) Rules 1987

delays are in large part due to poor co-ordination between the police, the Crown Prosecution Service and the Forensic Science Service, the Government agency responsible for providing prosecution expert witnesses. A second factor is the tendency of the police not to refer matters to the Forensic Science Service for examination unless and until they are sure the case is to be contested, a saving in money for the police but a negation of the advance disclosure system the object of which is to inform the defendant at the earliest of the nature and strength of the case he has to meet. A third factor is the time taken by the Forensic Science Service itself to prepare its reports. In fairness to the Service, the tight time constraints imposed by the present pre-trial programme and the increasing demands on its services do not help. But the result of all these factors is often serious delay to the mutual disclosure regime, unreadiness of both parties for the plea and directions hearing, necessitating a second hearing and a generally disorderly preparation for trial.

- 144 Under the present regime, it is not easy to find a sure solution. A start is the theme that permeates this Report, the need for closer co-ordination and less sectionalism among the various agencies responsible for the process of a case through the courts, in this case the police the Crown Prosecution Service and the Forensic Science Service. To be fair to them they have attempted, within the constraints of their individual budgets, to do something about it by entering into a tripartite agreement in June 1999 for better co-ordination of their working practices in this respect. Another step is to speed the flow of communication by greater use of electronic transfer of documents and for providing ready access to defence experts of original exhibits where required. Greater co-operation and joint efficiency at some individual cost at this stage of the proceedings could produce significant savings for all in the quicker resolution of issues and smoother progress to trial.
- 145 As to pre-trial meetings between experts, this occasionally takes place on an informal basis with the agreement of both parties, but I believe it to be the exception rather than the rule. If the views expressed in the Review are representative, the reluctance to arrange such meetings comes mainly from the defence, not the prosecution or the expert witnesses themselves, both of whom urge it. Subject to proper safeguards of confidentiality as to undisclosable information on both sides, I strongly encourage it. It is obviously of great assistance to the court in the simplification of the expert evidence over-all. And it can give no improper advantage to either party if they can discuss and identify in advance the extent of the likely issue between them when the matter goes to court. It is of particular importance where one side is proposing to use information technology for the presentation of some of its evidence, since there will need to be discussion of the system to be used, as well as of content of the evidence.
- 146 Two further questions are whether the court should be given a power to direct such discussion, which could be in person or over the telephone or by video-

conferencing, similar to that which civil courts have under paragraph 35.12 of the Civil Procedure Rules, and who, if anyone, should be present at or party to it in addition to the experts. As to the former, I consider that the court should have power to direct such discussions and, normally, to exercise it. It could be subject to the sort of conditions set out in CPR Part 35, 12, that the content of the discussions would not be divulged at the trial or the parties be bound by any agreement reached unless they, the parties, agree. As to who, if anyone, should be at such discussions in addition to the experts, I do not think it necessary or wise to be too prescriptive; much may depend on the nature and circumstances of the over-all issue or issues and the relationship to them of the proposed expert evidence. I note that this has been the subject of much debate in the civil jurisdiction but, as yet, there is no all-purpose solution.¹⁶⁵ It may be that this could be left for the specific direction of the judge in each case after hearing representations from both sides, as the Runciman Royal Commission appears to have considered when making a similar recommendation.¹⁶⁶

I recommend that:

- **the prosecution and defence should normally arrange for their experts to discuss and jointly to identify at the earliest possible stage before the trial those issues on which they agree and those on which they do not agree, and to prepare a joint statement for use in evidence indicating the measure of their agreement and a summary of the reasons for their disagreement; and**
- **failing such arrangement, the court should have power to direct such a discussion and identification of issues and preparation of a joint statement for use in evidence and to make any consequential directions as may be appropriate in each case.**

- 147 I have suggested a wide ranging reconsideration of the rule against hearsay in criminal matters. It is of particular relevance to scientific evidence with its increasing reliance on the build-up of conclusions from electronic records and reports by others of their work. Most advocates co-operate sensibly on matters of continuity of treatment of exhibits and as to various stages of testing and/or analysis that have gone into producing a final report. There is provision of a conditional nature for the admission of such hearsay material in the Advance Notice of Evidence Rules¹⁶⁷ and of the final reports themselves under section 30(1) Criminal Justice Act 1988; and the Runciman Royal Commission and the Law Commission have proposed some extension of it.¹⁶⁸

¹⁶⁵ see the White Book, (2001) Vol 1, para 35.12.1

¹⁶⁶ *Runciman Royal Commission Report*, Ch 9, para 63

¹⁶⁷ see footnote 164 above

¹⁶⁸ *Runciman Royal Commission Report*, Chapter 9, para 78; Law Comm No 245, paras, 1.42- 1.43

Nevertheless, points, good and bad, can be taken on such minutiae, and unrepresented defendants have been known to spin out trials for weeks unjustifiably putting the prosecution to proof of everything in sight. The wide-ranging and fast-moving developments in information technology will have a particular impact in the field of expert evidence, its preparation and the way it is given. Just one of the matters for attention will be the admissibility, where the point is taken, of electronically transmitted certificates or other documents bearing a scanned copy of a signature. I am sure that there will be many others.

- 148 Other facilities of modern technology that are already well established are video-conferencing and the giving of evidence by video-link or, increasingly, via the internet. As they become more widely available, these new techniques should be used wherever possible for instructing and conferring with experts. And the law should be developed and facilities provided nationally to enable experts in appropriate cases to give evidence via one or other of these technologies at locations remote from the court and more convenient to them, for example, where their evidence is self-contained and does not turn on possible developments in other evidence in the course of the trial. Expert witnesses are particularly exposed to the vagaries of our listing system, which result in them committing themselves to court fixtures that are cancelled or delayed at the last moment, or which require them to spend much wasted time waiting around at court to give evidence. Anything that can be done, by more efficient preparation of cases for trial, greater use of fixed listing dates and by shorter or alternative ways of giving evidence will make for better use of busy professionals' time and a more respectable trial process.

I recommend:

- **close attention in any further and general review of the rule against hearsay to the increasing reliance of forensic science laboratories and of many experts in certain disciplines on electronic recording, analysis and transmission of data;**
- **greater use by legal practitioners of video-conferencing and other developing new technology for communicating and conferring with experts in preparation for trial; and**
- **development of the law and the provision of national facilities to enable experts to give evidence by video-link or other new technologies in appropriate cases.**

- 149 I leave the subject of experts by commenting, without recommendation, on a few miscellaneous matters that have prompted many submissions. The first is the practice of some defence solicitors of 'shopping around' for an expert who

will support the defence case and not disclosing the reports of those who have reported unfavourably to it. The problem arises mainly in the cases of privately funded defences, not in the vast bulk of cases where the defence is publicly funded and there are tight financial constraints on such expenditure. There have been suggestions that the defence should be required to disclose all 'unused' expert reports of this sort. So long as our system remains adversarial, I can see no proper basis upon which the defence should be required to disclose material of this or any sort that is unfavourable to their case. There is undoubtedly a lack of parity between the prosecution and the defence in this respect, but that is a necessary consequence of where the burden of proof lies.

- 150 The second matter that has been the subject of considerable complaint by defence solicitors and experts is the low level of publicly funded experts' fees. I have had a look at the current scales, and, without going into detail on the figures, they are meagre for professional men in any discipline. I am not surprised that solicitors complain that they have often had difficulty in finding experts of good calibre who are prepared to accept instructions for such poor return. The best expert witness in most cases is likely to be one who practises, as well as giving expert evidence, in his discipline, rather than the 'professional' expert witness – one who does little else. Justice is best served by attracting persons of a high level of competence and experience to this work. If we expect them to acknowledge an overriding duty to the court and to develop and maintain high standards of accreditation, they should be properly paid for the job. I hope that the Legal Services Commission will take an early opportunity to review and raise appropriately the levels of their publicly funded remuneration.
- 151 Finally, I state the obvious in urging the judiciary, magistracy and criminal practitioners to maintain and, where possible, improve their familiarity with the more common aspects of forensic science that engage the courts. If we expect experts to raise their act in the manner of presentation of their evidence, the least we can do is complement and assist their task by ensuring a basic level of understanding of what they are talking about. I am conscious that much is already being done in this field, most recently, for example, in presentations by the Forensic Science Society on DNA evidence to the Judicial Studies Board and publication of a guide on the subject.

THE COURT AT WORK

Respecting Diversity

- 152 An important feature of a modern court should be its ability to respond flexibly to the differing needs and concerns of the wide variety of people who participate in its proceedings. Much work has been done in recent years to raise awareness of diversity issues (race, gender and disability issues in particular) amongst judges, magistrates and court staff. In August 1999, building on earlier guidance about equal treatment of ethnic minorities, the Judicial Studies Board published an Equal Treatment Bench Book providing detailed guidance to judges in all courts and tribunals on a variety of topics that might lead litigants, victims, witnesses or legal representatives to feel disadvantaged in dealing with our legal system. At the same time, the Board published *Race and the Courts*, a companion leaflet to the Bench Book designed to be used by judges as a practical working guide. The Board has also produced a training pack containing guidance, information and exercises for equal treatment training events for magistrates.¹⁶⁹ The third competence of the Magistrates New Training Initiative framework covers magistrates' commitment to a non-discriminatory approach implicit in the judicial oath, impartiality of their decision-making and their ability to ensure fair and equal treatment. Once the Training Initiative is fully implemented, all magistrates will be appraised regularly against these criteria and, where appropriate, will undertake relevant training and development activities.
- 153 In 2000 the Magistrates' Courts Service Joint Liaison Group (whose membership is drawn from the main representative organisations) set up a Race Issues Group to consider the implications for the service of Sir William Macpherson's report of the Stephen Lawrence Inquiry.¹⁷⁰ The Group produced *Justice in Action*, a report that drew on examples of good practice from a number of magistrates' courts committee areas and proposed further action.
- 154 Notwithstanding these and other initiatives, there is more to be done. In its submission in the Review, the Bar Council's Disability Committee gave a number of practical examples where people with disabilities had been offended or had felt themselves to be disadvantaged by ignorance or prejudice displayed by judges or other court personnel. Other minority groups could, no doubt, provide similar examples. A new unified Criminal Court would

¹⁶⁹ Equal Treatment Training for Lay Magistrates Handbook, (JSB and NACRO), March 1998.

¹⁷⁰ February 1999, CM 4262-1

bring with it greater scope to drive forward national initiatives, develop common standards of good practice and monitor performance. At the same time, the emphasis I have placed on devolved decision-making at a local level, would allow court managers to work with their local communities to ensure that the service is responsive to their particular needs.

Interpreters

- 155 The Runciman Royal Commission commented on the difficulties of obtaining good quality interpreters at police stations and at court. They made a number of recommendations, in particular, for their better training and remuneration.¹⁷¹
- 156 There have been considerable improvements since then. From 1998 the courts have been responsible for securing the attendance of suitable interpreters for defendants.¹⁷² The parties remain responsible for providing interpreters for their own witnesses. In 1993 a National Register of Public Service Interpreters was established, which provided for a system of accreditation, guaranteeing that all its members were properly trained, conformed to professional standards and were subject to monitoring and disciplinary procedures.¹⁷³ Similarly, *The Council for the Advancement of Communication with Deaf People Directory* provides a list of accredited interpreters which conform to the same quality standards. Those two National Registers are the main sources for selection of interpreters required for all the criminal justice system agencies. It is intended by the Trial Issues Group that by the beginning of 2002 all agencies will be able to rely exclusively on them when selecting interpreters for criminal investigations and court proceedings. However, there are continuing difficulties in the distribution and variable standards of interpreters, resulting in a somewhat patchy provision of services country-wide. In some areas where there are few non-English speakers, there would normally be a correspondingly low demand for interpreters at local police stations and courts. But there will always be occasions when there is a demand that cannot readily be met, one that may be aggravated by surges of asylum-seekers from different countries and the high levels of competence now required of interpreters.
- 157 The establishment of the National Registers is a welcome improvement, but more needs to be done, particularly as the Human Rights Act 1998 may require a greater guarantee of the competence of interpreters than before. A

¹⁷¹ Chapter 3, paras 41- 45 and Chapter 8, paras 48 - 51

¹⁷² as agreed with TIG. It is not covered by the Crown Court or Magistrates, Courts Rules or Practice Direction, and is not the subject of any primary legislation

¹⁷³ as a result of the work of the Interpreters Working Group, a Trial Issues Group sub-group

recent attempt by a sub-group of the Trial Issues Group¹⁷⁴ to produce a national needs analysis on which to base further planning and work was thwarted by poor response from many local Trial Issues Groups.¹⁷⁵ The national Group, working on the responses available, found that shortages of interpreters in various languages had necessitated significant recourse to non-accredited interpreters, for example, to meet the recent increase in the number of immigrants from the Balkan States. As I understand it, the Trial Issues Group has attempted, with the National Register and the Institute of Linguists, to meet this problem, but its efforts have not been matched by government funding for wider and better local training where needed.

158 There are a number of other bodies or associations, with overlapping memberships or registration involved in accreditation and maintaining public registers of interpreters' services. These include: the Institute of Translation and Interpreting, the Association of Police and Court Interpreters, the Institute of Linguists and the Association of Sign Language Interpreters. This seems to me a wasteful spread and duplication of resources for the various bodies and their members, and an inefficient way of providing a comprehensive national and local service to the courts. In my view, it would be sensible, make much better use of resources and provide a better service to those involved in or exposed to criminal investigation and the courts, if the work of all these bodies were concentrated, as appropriate in one or other of the two national Registers, preferably by some form of amalgamation. At the very least, they should all meet the same standards of accreditation as the two National Registers.

159 There are signs in some of the local Trial Issues Group analyses that a number of nationally registered language interpreters and sign language interpreters do not wish to work in the courts because of the nature of the work, poor pay and the criticism of their work. Some of them also have a sense of isolation on attendance at court. They are, for the occasion, officers of the court yet have no accommodation or facilities there and are obliged to mingle in the public area, possibly in the vicinity of parties on one side or another. In my view, it would be a proper recognition of their official status and independence from the parties if they could have access and be welcomed to, say, a staff common room while waiting to interpret in court or during adjournments.

I recommend that:

- **the Government should continue to encourage the concentration in the two national Registers as**

¹⁷⁴ the Interpreters Working Group

¹⁷⁵ a notable exception was the West Midlands Trials Group who produced a useful analysis of needs and a number of good practical suggestions for improvement

appropriate of the role of oversight of national training, accreditation and monitoring of performance of interpreters, with a view to providing an adequate national and local coverage of suitably qualified interpreters;

- **training and accreditation of all interpreters should include coverage of the basics of criminal investigation and court procedures, and should provide for changing and different geographic demands for linguists;**
- **the Government should consider central funding of further education establishments to equip them, where necessary, to provide courses in lesser known languages for the Diploma in Public Service Interpreting;**
- **the Government should undertake a national publicity campaign in further education establishments and other colleges in support of the two national Registers;**
- **there should be a review of the levels of payment to interpreters with a view to encouraging more and the best qualified to undertake this work and to establishing a national scale of pay; and**
- **interpreters should be provided with facilities appropriate to an officer of the court when attending court to provide their services.**

160 The parties should inform the court at the earliest possible moment whether any of their witnesses will require an interpreter. The Trial Issues Group, in 1998, issued guidance to police forces for the early booking of interpreters. This guidance was largely ignored in many police areas with the result that courts had to make hurried arrangements on the day of the hearing. The latest (agreed, but as yet unpublished) version of the Group's national guidelines will require the police to book interpreters for the first hearing where it takes place only a few days after charge. Otherwise the police are reminded to inform the court early of the need for an interpreter and the details of the language.

161 In cases involving much documentation, or of a technical or otherwise complex nature, it would enable interpreters to perform their task more efficiently if they had access beforehand to papers relevant to the evidence for which their services are required. This should normally be capable of resolution between the parties without reference to the court. But, if there is a problem, the judge should be asked to give a direction in writing or at a pre-trial hearing if it is necessary. In doing so, he should have regard to any need for confidentiality and security of documents and to the arrangements for the

interpreter to familiarise himself with them. In addition, I consider, that an interpreter should be entitled where necessary to apply direct to the court for such access.

I recommend that:

- **the standard check-list for agreement or directions leading to the pre-trial assessment should require all parties to indicate to the court in good time before the trial date the need for an interpreter, identifying the party or witness for whom he is required and the language;**
- **the check list should also require the parties to agree or, failing agreement, to seek the court's directions for making available to the interpreter in good time before trial, any documents likely to assist him in his task at court;**
- **an engaged interpreter should be entitled to apply direct to the Court for such access; and**
- **in all cases where an interpreter is provided with or given access to such documents, it should be in circumstances under which he undertakes to preserve their confidentiality until trial or otherwise in conditions of security directed by the court.**

- 162 A further aid to interpreters would be to provide them with adequate, visible and audible working positions for their work in court. Many present courtroom layouts require an interpreter to stand uncomfortably next to the witness in a confined, and sometimes precarious, space next to the witness box. Sometimes, the geography of the courtroom is such that they cannot always hear, or be seen or heard by, others in the court. This can be a particular problem for interpreters assisting a defendant in the dock, where sight lines and audibility may be obstructed by high dock partitions or glass screens. The Institute of Translation and Interpreting have raised, in addition to problems of visibility and audibility, concerns about intimidation, particularly when interpreting in the dock for a defendant when some may perceive them as acting for him. They suggest that interpreters should be provided with a set position away from the defendant and means of communication with him by portable radio microphones and headsets. Wherever feasible, existing courtrooms should be adapted and equipped to take account of these concerns. They are not yet a consideration in the design of new court buildings. In my view, they should become part of the design brief. Those responsible should consult with a suitably experienced and representative body of interpreters drawn, say, from the two National Registers, to establish standards of best practice for this purpose.

I recommend the establishment of standards of best practice in the design of new court buildings and the adaptation of equipment in existing courtrooms for the provision of adequate accommodation and facilities to interpreters.

Information about the court

- 163 The growth in information technology will make it easier for the public to obtain information about the criminal courts. The internet is often the first place people look now; I have been impressed with the information I have been able to obtain in this way during the course of the Review. Some magistrates' courts have already developed their own web pages, though the quality is variable. Every court centre should be able to set up its own website in a relatively short space of time, and at relatively little cost. A website could provide useful information to all involved in a case, or to members of the public who are more generally interested in the work of the court.
- 164 Each court website could include cases listed for future hearing and their fixed or estimated hearing dates, the cases listed on each day and their individual progress. The Court Service is already looking at the use of such technology, as well as more basic aids, such as electronic bulletin boards at court and automated telephone information services. These information services should be standard provision for all court centres in the new unified Criminal Court that I have recommended and for the Court of Appeal (Criminal Division). In addition to the service that they will provide for all involved in individual trials, they will be a valuable source of information for the media. A court website could also give details of the advice and support services available at each court centre, its other facilities and information about the area, including travel arrangements, eating places, shopping facilities etc.. However, not everyone will have access to information technology. It should, therefore, be matched with more basic communication and information aids such as an automated telephone information system, giving like information.

I recommend that early progress should be made to equip each court centre or group of court centres, as appropriate, with:

- **its own website containing information of cases listed for future hearing and their fixed or estimated**

hearing dates, daily listings of cases and information as to their progress; and general information about the court centre, travel to it and local facilities; and

- **an automated telephone information system giving like information.**

165 Strangers to courts can be unfamiliar with and intimidated by their geography. Much can be done to make the court building, and the courtroom, a more open and less intimidating place. Proper signs around the court should be standard; there are still many centres where directions are confusing or non-existent. Each court centre should have, as a minimum, a reception desk, after any security arrangements, where those attending can obtain information.

166 Once inside the courtroom, the furniture and layout can also be intimidating and confusing. While there is usually an usher on hand to offer assistance, that is not always so. Some courts have helpful diagrams of the layout of courtrooms in the waiting areas outside. Some magistrates' court centres have signs in each of their courtrooms giving the same information. The Witness Service is, of course, of great help, its members showing prospective witnesses around the courtroom when not in use and pointing out who sits where. In the Crown Court, familiarisation visits are often arranged for young or vulnerable witnesses, but not for the vast majority of those who are asked to come to court. In my view, all courts should have a layout diagram in the waiting area outside each courtroom, or group of courtrooms if they are similar. This would help to remove much of the mystery before people enter the courtroom. It would also be helpful to have function plates inside the courtroom, to clarify for witnesses, jurors and members of the public the role of each person present.

167 I have already indicated that the Court Service is experimenting with electronic bulletin boards. These are a considerable improvement on the paper copies of the daily lists that are pinned up in most court centres each day, and amended by hand when the usher has time as the day progresses. The bulletin boards, which would be placed in the public areas of the court and outside each courtroom, would provide up-to-date information on the progress of each case – information that it should also be possible to provide to the court websites when they are more widely and fully developed.

I recommend that early progress should also be made to equip each court centre with:

- **electronic bulletin boards indicating the progress of cases listed each day; and**

- **diagrams in waiting areas of the layout of courtrooms and corresponding signs inside each courtroom.**

168 In many courtrooms it is still difficult for those present other than the main participants to hear what is being said. Modern court design has the judge and the advocates facing each other at fairly close range, the witness to one side of them facing across to the jury on the other side of them. Those outside that ‘inner square’ often have difficulty following the proceedings. The speakers are naturally modulating their speech to their group and, because the advocates have their backs to those instructing them, the defendant in the dock and the public gallery, others tend to feel excluded. Having spent much time observing in most Crown Court centres in England and Wales and in many magistrates’ courts, I can vouch for the common scene of members of the public, defendants and even those sitting behind the advocates, straining forward trying to hear what is being said. The answer to this practical impediment to open justice is simple, though no doubt expensive. All courtrooms should be equipped with suitable sound amplification systems to ensure that everyone in court can hear what is going on.

Sitting times

169 An issue in the Review has been whether Courts should sit for longer than they do. Conventional sitting hours for magistrates courts are Monday to Friday 10 am to 1 pm and 2pm to about 4.30 pm or earlier or later according to the list. Sitting hours in the Crown Court and the Court of Appeal (Criminal Division), are much the same, though 10.30 am is a more common starting time. However, many Crown Court judges and High Court judges sitting in the Court of Appeal will start earlier to deal with interlocutory matters, bail applications and for other urgent reasons. Some magistrates’ courts sit on Saturdays and Bank Holidays, particularly in the larger metropolitan areas. Magistrates’ courts may also sit at abnormal hours on special occasions to deal with emergencies and surges of work occasioned by particular events.

170 Many contributors to the Review – mostly those who are not directly or regularly involved in the criminal justice process – have argued that courts should routinely sit for longer hours. On the face of it, they have an arguable case. 10.30 am or even 10 am to about 4.30pm is a short working day. And, like shops before they were allowed to open late in the evenings and on Sundays, courts do not cater for those who work a full working day, whether it be to attend a hearing, pay a fine or simply to seek advice or information from court staff. For that reason witnesses of crimes may be reluctant to put themselves forward, and accused persons who are in work may be seriously inconvenienced or prejudiced if they have to seek time off work to attend court.

171 The Government, in its recent policy paper, *The Way Ahead*,¹⁷⁶ signalled its interest in longer court opening hours and weekend sittings to improve the courts' service to the public, reduce delays, deter criminals and reassure local communities. It proposed two pilot schemes, one in a high crime area and another in a low crime area. Such pilots should be devised so as to enable a confident assessment of how extended hours might meet a significant demand, for what types of work, where and at what cost and benefit to all concerned.

172 First, there is the question whether such extended sitting times would relieve present pressures of listing and reduce delays. I assume that magistrates' courts are the main candidate for late evening, night and weekend courts. There has been no serious proposal that courts above that level should effectively move over to shift work, and the costs of it would be formidable. Whatever the level of courts involved, there is no point in using them as remand courts for those arrested late in the afternoon or at night-time. Police officers are already required to bring an arrested person before a court within 24 hours. Presumably the main work in high and serious crime areas, apart from remands, would be dealing with pleas of guilty. But, if evening or night courts are going to dispose of cases straightaway, or even attempt directions for their disposal, they will need the assistance of lawyers, probation and welfare agencies responsible for advising on and arranging community disposals and prison or custody contractors. Given the sort of work that the courts might attract in high crime areas, there would also be a need for ready access to medical support, drug-testing facilities and a strong security presence. In short, unless evening and night courts are to serve only as remand courts or for speedy disposal of trivial offences (as is mostly the role of night courts in high crime areas in the United States¹⁷⁷), there is a strong likelihood that they would cost a lot of money for relatively small benefits to the system.

173 Evening or night courts in low and less serious crime areas, probably catering in the main for traffic and relatively minor offences, might be less labour intensive and provide a valuable service to those who could not, for one reason or another, conveniently attend court in normal working hours. However, with the present move to greater use by magistrates' courts of postal pleas of guilty and paper proceedings, to which I have referred,¹⁷⁸ it remains to be seen how much demand there would be for out-of-normal-hours sittings for minor cases of this sort.

¹⁷⁶ CM 5074, paras 3.82-84

¹⁷⁷ much of the demand for which, for example, in New York, stems from a dramatic increase in the work of inner city courts as a result of policies of zero-tolerance leading to many arrests for very trivial offences

- 174 As to extension of sitting hours generally, it is a mistake to regard the working day of judges, magistrates, court staff and all others who are involved in their proceedings as confined to the sitting hours of the court. All court work needs much daily preparation and follow-up. Judges and, to an increasing extent, magistrates, need to familiarise themselves with the papers and the issues of fact and law with which they may have to deal. Judges need the beginnings and the ends of the day to keep up with their current trial, including the preparation of rulings and their summings-up, and to cope with their increasing burden of case management of future cases. For the more senior judges, there are also daily administrative tasks requiring close liaison with court staff. And court staff too have a correspondingly heavy daily round of work to service the sittings and to draw up and transmit orders and directions.
- 175 Lawyers engaged in court have the same problem. They have to cram all their preparatory, advisory and administrative work into the cracks of the day when the courts are not sitting. Prosecutors have much to do to ensure an orderly start to the day and the days ahead if trials are to run smoothly and without interruption. Defence lawyers need time to confer with their clients, to contact witnesses, to turn round their correspondence and generally to attend to the daily responsibilities of their practices. The same will apply to the Criminal Defence Service when it is in operation. Police too have patterns of working and responsibilities outside the individual cases in which they attend court as witnesses. Prisons contractors have to bring prisoners to court early in the morning and take them back in the late afternoon or evening, often involving long, tortuous and, for the prisoners, uncomfortable journeys. The prisons and the contractors between them already find it difficult to provide a timely delivery of prisoners to and from court. The Probation Service, Witness Support and various other agencies vital to the efficient running all have to be considered. The Probation Service is already under great pressure to provide a speedy and efficient service to the courts, split as they are between their responsibilities of assessing and supervising offenders and their reporting and advisory work in the Courts.
- 176 In short, I believe that any general and significant extension of court working hours would be very costly and would demand a massive increase in resources if the courts and all who serve them were to be adequately equipped to make good use of the extra time. This has been the experience of the much publicised night courts in the United States, confined, as they are, in the main, to particular problem areas in major metropolitan centres and supported by special Federal funding.
- 177 There may be more scope for providing a better service to everyone, and at little or no extra cost, in various initiatives already undertaken by judges,

¹⁷⁸ paras 65 and 67 above

magistrates and court staffs, and with the willing co-operation of those involved in the trial process. I mention some of them only to commend them and pay tribute to those involved in the day to day work of the courts who have found solutions for particular patterns and types of work and who are flexible in response to the needs of particular cases. No national targets or standards or key performance indicators were, or are, needed to monitor their success. These include the introduction of ‘Maxwell’¹⁷⁹ sitting hours in long and complicated jury cases, the judge sitting with the jury from about 9:30 am to 1.30 pm, with only a short break mid-morning, leaving the afternoon for the judge and the parties to deal with matters of law or procedure not requiring the jury or, in their different ways, to keep on top of the case. Another is the readiness of judges and court staff where necessary to hold pre-trial hearings of one sort or another out of normal court hours to enable the trial advocates, currently engaged in other case, to attend them. Other initiatives, with local variations, are in the arrangements for more considerate staging of the evidence of witnesses, enabling them to be called to court at short notice and by providing waiting jurors with pagers to absent themselves from the court building for short periods to do their shopping or attend to other domestic needs.

- 178 However, I can see advantages both to the public and to the courts’ administration in the provision of out-of-hours access to court staff for the purpose of advice or information about individual cases or court procedures and payment of fines and the like. These facilities could be provided on the premises by a duty clerk and/or over the telephone and/or by internet facilities. As I have said, it should be possible, as technology develops and its use becomes more wide-spread, for inquirers to obtain information from court electronic bulletin boards of the progress of cases, hearing dates etc, and of general information and on common points of procedure.

Accordingly, I recommend that:

- **there should be thorough examination of the need for and the costs/benefits of extending court working hours, including the use of evening, night and weekend courts, whether as a general provision or for areas with a concentration of serious and/or minor crime; and**
- **out-of-hours provision should be made for administrative assistance to court users through the medium of help-desks, the telephone and electronic means for obtaining advice or information, paying fines, obtaining forms etc.**

¹⁷⁹ so-called because Phillips LJ, as he then was, adopted this pattern in his trial of the Maxwell brothers in 1996

Court dress

- 179 Court dress is presently governed by a 1994 Practice Direction of Lord Mackay of Clashfern LC.¹⁸⁰ Although it was prompted by the Courts and Legal Services Act 1990's extension to solicitor and other higher court advocates of rights of audience in the Supreme Court, it confirmed the long-standing practice and difference in court dress for the Bar and solicitors. Queen's Counsel wear a wig and silk or stuff gown, with wing collar and bands, over a court coat. Junior counsel wear a wig and stuff gown with wing collar and bands. And solicitors wear a black stuff gown with wing collar and bands, but no wig. The Practice Direction concluded by stating that the Lord Chancellor proposed to consult further "with a view to reaching a long-term decision". I have received many submissions about the court dress of judges and advocates, suggesting variously its retention or modification or abolition. The interesting feature of the different options is that each has a broad mix of support from a wide range of persons involved in the trial process. Many judges want to retain wigs and gowns, but many do not. The same division of views applies to jurors, witnesses and past defendants. However, most of the members of the Bar and solicitors who have expressed a view on the subject tend to favour retention of some special court dress, the latter making a strong case that solicitor-advocates in the higher courts should wear the same as the Bar.
- 180 The main arguments advanced for retention of formal dress for judges and advocates in the higher courts are that it assists to maintain the authority, formality and dignity of the court, and that it bestows a degree of anonymity on the wearers, both 'de-personalising' their roles and protecting them from identification outside court. Arguments against retention are that wigs and gowns are old fashioned, too formal and intimidating. Arguments for modification are primarily for abolition of the 18th century style wigs, wing collars and bands, but retention of a simple gown, which, it is said, would still serve to maintain the special dignity and authority of court proceedings. Such modification would also remove an appearance of a difference in standing between the Bar and solicitor-advocates in the higher courts.
- 181 The issue of court dress has surfaced from time to time over the last two or three decades. In 1992, shortly before the Practice Direction, the Court Service undertook a survey of a range court users, including judges, members of both legal professions, witnesses, jurors, court staff, prison officers, and even defendants. The result was a substantial majority in favour of retention of wigs and gowns. In a poll of jurors conducted, as part of that survey, by His Hon. Judge Giles Rooke, QC, at the Crown Court in Canterbury, only a small minority of them, before sitting on a jury regarded court dress as undesirable,

¹⁸⁰ *Practice Direction (Court Dress)* [1995] 1 Cr App R 13; as varied by *Practice Direction (Court Dress) (No 3)* of Lord Irvine of Lairg, LC [1999] 1 Cr App R 336

a minority that fell by about two thirds after they had completed their jury service.

- 182 There is, I believe, something to be said for the view that judicial uniform, and to a lesser extent, advocates' uniforms, give a proper sense of authority and formality to the proceedings of a criminal court. The same may not be so important in civil and family courts where it is more common in certain proceedings for the judge and the parties' advocates to conduct matters without such formal trappings. Court dress is also useful as a distinguishing mark for those attending courts who are unfamiliar with their personnel and ways of working, just as it is to identify the ushers by their gowns or a policeman by his uniform or in other contexts, a clergyman by his collar or a doctor in a hospital by his white coat. And a gown has at least some practical advantage as a protective working garment, saving suits from becoming shiny through wear and giving warmth in winter in cold and draughty courtrooms. Most courts all over the world retain some special uniform of that sort for judges and advocates.
- 183 However, I believe that, in the Crown Court, and possibly all the Superior Courts, we should consider dispensing with some of the present highly inconvenient garb as we enter the 21st century. Perhaps the answer would be to modify court dress for judges and advocates by discarding wigs, wing collars and bands. Judges could continue to wear gowns distinctive of their judicial status and of their level within the judicial hierarchy, possibly also including District Judges whether sitting on their own in magistrates' courts or as chairmen of mixed tribunals in the District Division of the new Unified Court.¹⁸¹ Barristers and solicitors could also continue to wear gowns. Queen's Counsel could continue to wear one distinctive of the status, which is now achievable by solicitors as well as junior counsel. But junior counsel and solicitor higher court advocates could wear the same type of gown to give them parity in appearance as well in their rights of audience.
- 184 Wherever formal authority lies in the matter, I do not consider that Parliament or the Government should be the arbiter of change. Nor do I consider that change, if it occurs, should take place only in the criminal courts or without reference to the civil and family jurisdictions. It seems to me that the Higher Judiciary should consider the question for each of the jurisdictions and after consultation with all levels of judges, the legal professions and any other bodies they consider appropriate, should advise the Lord Chancellor.

**I recommend that the Higher Judiciary, in consultation
with all levels of the judiciary, the legal professions and**

¹⁸¹ I believe that District Judges in Hull, by long tradition, sit robed

any other appropriate bodies, should consider and advise the Lord Chancellor on what, if any, formal court dress judges, barristers and solicitors should wear in future in the Supreme Court of Justice and the County Court.

Forms of address

- 185 Similar considerations should apply to present forms of addressing judges. Judges of the Court of Appeal and High Court Judges are addressed as ‘My Lord’ (or ‘Your Lordship’) or ‘My Lady’ (or ‘Your Ladyship’). Circuit Judges are addressed as ‘Your Honour’,¹⁸² District Judges are called ‘Sir’ or ‘Madam’, and so are magistrates when addressed individually; but collectively and in the third person as ‘the Court’ or, less usually nowadays, ‘Your Worships’.
- 186 Judges, including Lords Justices of Appeal, are not Lords; the title is a remnant of a bygone legal age and is now purely honorific and not usually used outside courts or their immediate precincts. Circuit Judges, though deserving respect, no longer need an 18th or 19th century handle to engender it. And magistrates, equally worthy of respect, do not need it garnished with veneration. Many contributors to the Review have argued that the time has come to remove these anachronistic forms of address from what is supposed to be a modern criminal justice system. Others cling to familiar traditions and arguments that such formality, like present court dress, is a practical reminder of the authority and dignity of the court.
- 187 There is something to be said for courts not becoming so ‘user-friendly’ as to lose their appearance of authority. However, forms of address in the Superior Courts identifying the judicial function would command just as much or more respect than the quaint unprofessional forms at present in use. Why not ‘Judge’ used vocatively for all professional judges? I see no need to distinguish between their level of appointment in this respect; it need not affect their various judicial titles or roles. As to magistrates, the only probable need for change is the already diminishing use of the collective ‘Your Worships’ in favour of a vocative ‘the Court’ used in the third person. However, as in the case of court dress, any change of this sort could not be made in isolation from the civil and family jurisdictions of the Supreme Court. It is no doubt a matter for the Lord Chancellor after consulting the Higher Judiciary who, before advising him should consult with all levels of the judiciary, magistracy, legal professions and any other bodies they consider appropriate.

¹⁸² with some exceptions such as the Recorder and Common Serjeant of London, and any judge whilst sitting at the Central Criminal Court.

Accordingly, I recommend that the Higher Judiciary, in consultation with all levels of the judiciary, the magistracy, the legal professions and any other appropriate bodies, should consider and advise the Lord Chancellor on future forms of address in all courts.

Court language

- 188 It is important that the criminal justice process as it unfolds in court, as well as in its pre-trial rules and procedures, should be comprehensible to all involved in or exposed to it. Plain English, and/or, in Wales, Welsh, should be the norm. And whatever is said as part of the trial should be audible to everyone in court. Both those considerations are vital to the principle of open justice and proper understanding by all of what is going on. There is much improvement on the old days when the proceedings had more the feel of a private colloquy between the judge, counsel and the witness, not only difficult for many to hear because of the geography of the courtroom, but also difficult to follow when heard because of the unfamiliarity of legal language.
- 189 Drawing on Lord Woolf's recommendations in his Access to Justice Reports on the civil justice system,¹⁸³ I believe that there should be a thrust throughout the criminal justice process for the use of plain and simple English and, where appropriate, Welsh so that it is understandable by lawyer and non-lawyer alike. However, where technical expressions are conveniently concise and have an established and important legal meaning, it may be counterproductive and lead to legal uncertainty to attempt some alternative description. There are far fewer Latin expressions in use in the criminal courts than was the case in the civil jurisdiction. Many technical terms are, in any event, well understood by many outside the judiciary and the legal professions and are the common coin of television programmes about the police, courts and criminals. Simplification of language, both in procedural rules and forms and in court proceedings should be one of the tasks for early consideration by a Criminal Procedure Rules Committee, the establishment of which I have recommended.

I recommend that a Criminal Procedure Rules Committee should examine all court procedures, forms and terms with a view simplifying their language and content.

Oaths and affirmations

- 190 The subject of oaths and affirmations extends well beyond the criminal law and, if there is to be attempt at reform, it should be looked at in the broadest context. It is of concern to all jurisdictions, not just the criminal courts. It is closely related to questions of the competence and compellability of witnesses, as Parliament has recently underlined.¹⁸⁴ And any significant change would have considerable knock-on effects, notably in the law of perjury. The current position is that oral testimony of a competent witness is not admissible unless the witness has been sworn or has asked to, or been required by the court, to affirm¹⁸⁵ or is a child under the age of 14.¹⁸⁶
- 191 This is not the place to attempt a review of the law of competence and compellability, particularly in relation to the evidence of children, where – partly for want of implementation of sections 53 to 57 of the Youth Justice and Criminal Evidence Act 1999 – it remains in a statutory mess.¹⁸⁷ My main enquiry, and that of the few contributors to the Review who have commented on the subject of oaths and affirmations, is whether they should be abolished and replaced by a simple and solemn promise to tell the truth.
- 192 A Christian taking the oath is required to hold the New Testament, and a person of the Jewish faith, the Old Testament, in his uplifted hand and say, or repeat after the court officer administering the oath “I swear by Almighty God that I shall tell the truth, the whole truth and nothing but the truth”.¹⁸⁸ For other religions the law simply requires that the oath shall be administered “in any lawful manner”, the critical matters being whether the oath appears to the court to be binding on the conscience of the witness and, if so, whether the witness himself regards it as so binding.¹⁸⁹ Witnesses in the youth court and children and young persons in any court swear the same oath save that it begins with the words “I promise before Almighty God...”.¹⁹⁰ A witness affirming says “I, ... do solemnly, sincerely declare and affirm”, and then continues with the words of the oath prescribed by law, omitting any words of imprecation or calling to witness.¹⁹¹

¹⁸³ Interim Report, June 1995, Chapter 26, paras 32-36; and Final Report, July 1996, Section V, paras 13 - 16.

¹⁸⁴ Youth Justice and Criminal Evidence Act 1999, ss 55 and 56, yet to be brought into effect.

¹⁸⁵ Oaths Act 1978, ss 5 and 6

¹⁸⁶ Criminal Justice Act 1988, s 33A(1)

¹⁸⁷ see Archbold, (2001 edition) paras 8-32 – 8-35c. And for a compelling historical account and analysis of the role of the oath in court proceedings and, in relation to the evidence of children in particular, see J R Spencer and Rhona Flin, *The Evidence of Children: The Law and The Psychology*, 1993, 2nd ed, pp 46-65

¹⁸⁸ Oaths Act 1978, s 1

¹⁸⁹ *ibid* s 1(3) and *R v Kemble* 91 Cr App R 178, CA

¹⁹⁰ Children and Young Persons Act 1963, s 28

¹⁹¹ Oaths Act 1978, ss 5 and 6

- 193 The general rule requiring witnesses to give evidence on oath has a relatively recent history by common law standards, developing only in the 18th century. By the late 19th century judges seem to have regarded its significance as an acknowledgement by the witness of his belief that, if he did not keep to it, he would suffer “some kind of divine punishment, although it need not be as bad as hell-fire”.¹⁹² Since then, as Professor John Spencer has put it, “the oath gradually became little more than a solemn promise to tell the truth with a reference to God attached”.¹⁹³ Bridge LJ observed in the Court of Appeal in 1977, that the reality in society by then was that most adults probably did not recognise the divine sanction of the oath.¹⁹⁴ Today, I suspect that many, if not most, witnesses regard its administration as a quaint court ritual which has little bearing on the evidence they are going to give; they will have resolved by then whether to tell the truth or to lie. For some, however, it may remain an important manifestation of the religious imperative upon them to tell the truth.
- 194 In my view, there is a need to mark the beginning of a witness’s evidence with a solemn reminder of the importance of telling the truth and to require him expressly and publicly to commit himself to do so. However, for many – both witnesses and those observing them – the combination of archaic words invoking God as the guarantor of the proposed evidence and the perfunctory manner in which they are usually uttered detracts from, rather than underlines, the solemnity of the undertaking. I consider that it should now be enough to mark the beginning of a witness’s evidence and to acknowledge the great diversity of religious or non-religious beliefs, by requiring him simply to promise to tell the truth. If greater solemnity or emphasis is thought necessary, the oath could be administered by the judge.

**I recommend that the witness’s oath and affirmation
should be replaced by a solemn promise to tell the truth.**

- 195 Much the same considerations apply to a juror’s oath or affirmation. The words of the oath are “I swear by Almighty God that I will faithfully try the defendant[s] and give [a] true verdict[s] according to the evidence”. The affirmation begins “I do solemnly, sincerely and truly affirm”, and continues in the same form. It seems to me that a single undertaking for all in simpler language could usefully replace the present two forms. For some jurors, to have to stand up and speak in public, usually within minutes of their first introduction to a court at work, can be an ordeal, and they often stumble with embarrassment over the unfamiliar mantra. I suggest that an undertaking in the following, or a similar form would be better, “I promise to try the defendant and to decide on the evidence whether he is guilty or not”.

¹⁹² Spencer and Flin, *The Evidence Of Children* p 51, citing Brett MR in *Attorney General v Bradlaugh* (1885) 14 QBD 667

¹⁹³ *ibid*

¹⁹⁴ *R v Hayes* 64 Cr App R 194, CA, at 196

196 But for one factor, I would commend the Scottish practice, in which the judge administers the oath, collectively, to the jurors once they have all been called into the witness box. Sometimes a potential juror's difficulty in reading the oath is the only and last opportunity for the court to determine whether he is sufficiently literate to cope with a trial involving much documentary evidence. If it is obvious that the juror will have difficulty, the judge can diplomatically and quietly excuse him or the prosecution advocate can ask for him to stand by. It is an inappropriate and embarrassing way of ensuring that jurors have sufficient command of written English to follow the evidence. But, as I have indicated in Chapter 5,¹⁹⁵ short of the even more invidious option of introducing a literacy test and of the complications and expense of administering it in advance, I can see no alternative.

I recommend that the juror's oath and affirmation should be replaced with a promise in the following or similar form: "I promise to try the defendant and to decide on the evidence whether he is guilty or not".

SENTENCING

Introduction

197 In the event of conviction of a defendant, a court is required to impose a sentence that will do one or more or all of the following: punish him; mark the degree of harm to the victim and to society; deter others from similar offending, and assist him to mend his ways. This Report is not concerned with the practical or jurisprudential framework of sentencing. That is the subject of a recent Review by John Halliday CB.¹⁹⁶ But I believe my terms of reference do require me briefly to mention some matters: first, the need for a sentencing code; second, the means by which the sentence, and what it means, is communicated in court to the defendant, the victim, and those in the public gallery; and third, the way information is provided to judges and magistrates to inform their decision, above and beyond the evidence in the trial itself. I also comment on John Halliday's proposals for courts to be more actively engaged in reviewing the effectiveness of their sentences, pleas of guilty in summary matters and the involvement of victims in the sentencing process.

¹⁹⁵ para 49 - 50

¹⁹⁶ *Making Punishments Work: Report of the Review of the Sentencing Framework for England and Wales* (Home Office, July 2001)

A sentencing code

- 198 I start with a familiar refrain - the complexity of the law governing sentencing and the urgent need for the law to be brought together and maintained in a single and comprehensible Code. Although sentencing legislation has recently been consolidated in the Powers of Criminal Courts (Sentencing) Act 2000, it is not a code, and, as a consolidating instrument, the ink was barely dry on it before it was amended by the Criminal Justice and Court Services Act 2000. As I recommend in Chapters 1 and 12, codification and its maintenance should become the task of a standing body, under the general oversight of the Criminal Justice Council.¹⁹⁷

Honesty and simplicity in sentencing

- 199 As to the sentencing process, the present complexity in the law places judges and magistrates in an invidious position. Their aim in passing sentence should be to communicate clearly to the offender, to the victim and to those in the public gallery both what the sentence is and what it will mean in practice. The intricacies of the current law make these two objectives hard to reconcile in practice. I make no recommendation but urge: first, ‘honesty and sentencing’ in that the sentence pronounced should be the sentence served; and second, that judges should be freed from legislative mantra so that they can pronounce sentence simply and shortly, addressing the defendant rather than the Court of Appeal.

Sentencing information

- 200 As to the provision of sentencing information to the court, there is more to say. Lord Lane CJ observed: “Sentencing consists in trying to reconcile a number of totally irreconcilable facts. Judges receive little help in this difficult matter.”¹⁹⁸ The problem facing a judge passing sentence, even when it is possible to infer what facts the jury has found, is to weigh the various elements of a criminal’s behaviour against a body of decided cases, evidence about what course of action offers the best balance of deterrence, retribution and of rehabilitation in the instant case, and what options are actually available. The problem has been well summarised as follows:

“In certain ways, it seems that the judges currently have the worst of all possible worlds: they have too little information in an easily usable form, and too much of it in a form that

¹⁹⁷ Chapter 1, para 36 and Chapter 12, paras 110 - 111

¹⁹⁸ HL Deb, Vol 486, Col 1295

cannot be used effectively. Thus they might have no systematic, organised and easily accessible information, but will have hundreds of reports of cases scattered across volumes of law reports”.¹⁹⁹

201 The most important support to judges and magistrates in the courtroom comes from those who have had responsibility for the supervision and/or welfare of the defendant or who have assessed him for the purpose of advising the court as to sentence. There is also an important role for information technology. In sharp contrast to this country, a number of other jurisdictions have made striking uses of it. There are essentially two models. Diagnostic systems take the sentencer through the formal steps required to reach a valid sentence, according to the presence and seriousness of a range of factors prescribed by law. These systems, mainly in use in the USA, in the form of so-called ‘Grid Sentencing’, turn the exercise into a mechanical process, and have not found favour in this country or most other Commonwealth jurisdictions. In contrast, information systems provide sentencers with sophisticated means of analysing the case before them, and of obtaining access to comparative and other data in a form that will assist them in reaching a decision. These data relate principally to: sentences passed by other courts in similar cases; information on appropriate principles of sentencing; and about options for rehabilitative and other programmes.

202 So far, sentencing information systems in other jurisdictions have been developed to assist sentencers in four separate, but complementary ways:

- consistency – to provide judges with legal, factual and statistical data. The purpose of the system is not to curtail discretion, but better to inform it, and so achieve consistency of approach;²⁰⁰
- exercise of discretion – to support the decision-taking process;
- availability of sentencing facilities – to inform judges of the availability of facilities for any sentencing options they may be considering; and
- public understanding – to secure timely and adequate information to the public of sentencing decisions and the reasons for them.

203 I give four examples of the many well-established or developing sentence support systems in other jurisdictions.

204 Scotland –The Scottish system, introduced in the High Court in the early 1990s on the initiative of Lord Ross (then the Lord Justice Clerk) and

¹⁹⁹ Doob, AN and Park, NW *Computerised Sentencing Information for Judges* (1987) Criminal Law Quarterly 30, 54-72

²⁰⁰ Stein Schjølberg: *Judicial Decision Support Systems From A Judge's Perspective* International Journal of Law and Information Technology, vol 6, No 2, 93-98

researchers at Strathclyde University, contains information on all sentences passed by the High Court in the previous seven years. It allows the judge to enter into his computer the characteristics of the offence and the offender in the instant case, and to obtain from it the range and quantum of penalties imposed by the courts for similar cases. The system was developed in close consultation with the Senior Judiciary, and has been developed so as to be easily used, particularly by judges who are not experts in computing.²⁰¹ It is widely used and a much valued tool in the Court of Session.

- 205 New South Wales – The New South Wales system is one of the most sophisticated yet unobtrusive systems of its kind in the world.²⁰² It consists of: a database of over 3,500 full text judgments from the Court of Criminal Appeal in New South Wales from 1st January 1990; a database of 2,500 case summaries providing efficient means of finding cases of similar facts and their sentencing outcomes; a principles database consisting of an electronic textbook on sentencing; a statistical database which allows a judge to analyse aggregate sentencing outcomes for defendants displaying a wide range of behaviours and characteristics; a facilities database containing information about the availability of various services for both adult and juvenile offenders, cross-referenced by geographic location and type of service; a help desk; and a variety of information of interest to other court users and the general public. It is probably the world leader in this field.
- 206 British Columbia – British Columbia has a well-established sentencing information system which was developed in the mid-1980s. It was designed under the guidance of a Judicial Steering Committee and has a highly practical focus. Initially it contained first instance sentencing decisions in five Canadian Provinces (British Columbia, Saskatchewan, Manitoba, Prince Edward Island and Newfoundland), decisions of provincial Courts of Appeal being added later. The database allows sentencing decisions across a range of common offences to be analysed and interrogated according to six factors: seriousness of the offence; involvement of the offender; criminal record; aggravating/mitigating circumstances; impact on the victim; and the prevalence of the offence in the community.
- 207 The Netherlands – The development of sentencing support systems is not confined to the common law world. In the Netherlands, the NOSTRA system is at an early stage of development, but concentrates on those offences which come before the courts in the greatest number, and is based upon offence descriptions as used in legal practice rather upon strict legal classifications. The system will enable the judge to compare a pending case to comparable ones in the system. The judge will be able to enter case features to compose

²⁰¹ see Potos, *Judicial Information Research System :A Resume of Progress* NSW Judicial Offices Bulletin Vol II No6

²⁰² see Hutton, Patteson, Tata & Wilson, *Decision Support for Sentencing in a Common Law Jurisdiction* (Fifth International Conference on Artificial Intelligence and Law) Washington DC: ACM Press

an offence profile corresponding to the pending case. The statistical presentations will show him how many cases with these characteristics resulted in imprisonment, fines or community service orders, and the sentencing ranges.

- 208 Thus, the use of information technology in support of judicial sentencing is feasible and well tried and tested. England and Wales are significantly behind the game. In my view, urgent steps should be taken to rectify this. A sentencing information system should be introduced to meet the objectives I have mentioned: consistency; improved decision-making in the exercise of discretion; the provision of information of available local sentencing facilities and wider and better public access to sentencing information.

Administration of the system

- 209 If a sentencing information system is to be established, who should design and administer it? In the jurisdictions I have mentioned, there are different approaches. In Scotland, the database is administered by a university faculty. In New South Wales, it is one of the statutory responsibilities of the Judicial Commission of New South Wales.²⁰³ In the Netherlands, the system is administered by the Ministry of Justice. I doubt whether any of those solutions would work here. The independence of judicial decision-taking in sentencing is a cornerstone of our system, and I do not think our judges or practitioners would be comfortable with a database administered by the Executive. Clearly the use of an academic law faculty would present neither of these difficulties, but the database I have in mind would be substantially larger than that which exists in Scotland, not only because of the difference in size between our two jurisdictions but also because the Scottish system includes only decisions of the High Court. In order to be of practical value, a database for England and Wales would need to cover cases in all our criminal courts, including the Court of Appeal, together with other functions that the Scottish system does not provide.

- 210 One option would be for the Sentencing Advisory Panel established by the Crime and Disorder Act 1998 to administer the database as part of its responsibilities for providing advice to the Court of Appeal to assist it in framing sentencing guidelines. But, this would involve a significant extension of the work of the Panel that might impede the discharge of its core functions. And, as a matter of principle, I consider it important that the administration of the database should be under judicial control, as it is in New South Wales. I do not believe that the Judicial Technology Group as currently constituted would be in a position to sponsor and operate such a

²⁰³ Judicial Officers Act 1986 (NSW) Section 8

system. In the absence of a Judicial Commission on the Australian or Canadian models (covering also questions of appointment, conditions of service and complaints against the judiciary), the most appropriate body would be the Judicial Studies Board, as part of its wider remit to provide training materials and information to the judiciary. It would require significant additional resources to devise, implement and maintain such a project. But it does have experience of providing information and materials to judges online, via its website, and is under the control of a Board the majority of whose members are judges.

I recommend

- **early establishment of an online sentencing information service for all full- and part-time judges. The system should include:**
 - **a statistical record of sentences imposed in criminal courts at all levels, analysed according to key case features;**
 - **a statement of sentencing principles and the text of judgments in key cases via an online sentencing textbook; and**
 - **online and up-to-date information about the availability of sentencing and related facilities.**
- **the sentencing information system should be available online to members of the public and the media, and should be designed with their needs also in mind; and**
- **consideration should be given to charging the Judicial Studies Board with the responsibility for establishing and administering a sentencing information system, resourcing it sufficiently for the purpose.**

‘Making Punishments Work’

211 Finally, I consider briefly the recommendations in the Halliday Sentencing Review²⁰⁴ for development of the courts’ sentencing role, and in particular that of sentence review. The main proposals are to involve the courts more closely in the implementation of their sentences in four main respects:

- **action following breaches of community sentences;**

²⁰⁴ *Making Punishments Work* Report of the Review of the Sentencing Framework for England and Wales (Home Office, July 2001)

- appeals against recall to prison;
- pre-release planning (in relation to the new structure for community penalties recommended in the Halliday Report); and
- reviewing progress of the proposed new community or custody plus sentences, and deciding whether to vary their intensity.²⁰⁵

212 I support the principle of sentence review. At the moment, judges and magistrates are required to take a single decision at a particular time (often well after the offence to which the proceedings relate) to meet the objectives of retribution, deterrence and rehabilitation. Having done so, the same tribunal may not hear of the matter again, even in the event of breach proceedings for failure to comply with its order or of conviction of a further offence. In the latter event, the previous conviction is added to the tally, and the court repeats the one-off sentencing exercise. The suggestion is that the court might learn more and do more good by viewing a continuous film rather than just seeing an unconnected series of snapshots.

213 I start from the proposition that the expertise of judges lies in the law, the application of law to facts, and in trial and case management. Judges do not, in general, have qualifications or experience in psychology, sociology or social work. Articles 5 and 6 of the European Convention of Human Rights effectively require criminal sanctions to be imposed only by judges and magistrates. But in doing so they are entitled to all the help they can get. I believe that the introduction of a sentence review jurisdiction would be welcomed by many judges and magistrates, and that it would considerably strengthen their expertise in sentencing.

214 However, there are two main difficulties. The first is practicality. As the Halliday Report acknowledges,²⁰⁶ it would be unrealistic to expect a sentence review always to be carried out by the original sentencing judge or magistrates. Thus, those carrying out the review would not always have the same knowledge of, or personal involvement in, the case. It would be necessary to create and maintain more detailed records than at present of sentencing reasons and expectations. This would, of course, be a great deal easier if there were a common information technology system based upon a shared electronic case file, but it would still have significant resource implications.

215 The second difficulty is cost. The Halliday Report estimate²⁰⁷ for the basic cost of instituting review hearings is £28m a year. These are merely the costs

²⁰⁵ *ibid* para 7.26

²⁰⁶ *ibid* para 7.27

²⁰⁷ *ibid* para 9.15 and para 27 of Appendix 7

of conducting the hearings, and take no account of the significant training required for all judges and magistrates exercising the review jurisdiction. Consideration would also have to be given to the over-all capacity of the system to assimilate change. If the recommendations in this Report are implemented, then judges and magistrates will already have to adapt to new case management procedures, new rules of evidence, a new jurisdictional structure, different trial procedures and a different system of judicial management.

I support the recommendation in the Halliday Sentencing Review Report for the creation of a sentence review jurisdiction for the criminal courts, provided that resource and practical difficulties can be overcome.

Sentencing in the magistrates' court

- 216 A defendant on whom a short statement of facts has been served may plead guilty by post. On receipt of a postal plea of guilty in such cases the court may sentence in the absence of the prosecutor and the defendant on the basis of the copy of the statement of facts read to it by their clerk. This is widely used for less serious traffic offences, and assists both the court and the defendant in enabling cases to be concluded swiftly and fairly. These cases are usually dealt with en bloc in open court, often empty at the time apart from the magistrates and their clerk, and the prosecutor.
- 217 Some contributors to the Review have suggested that such formality could be dispensed with and that postal pleas should be dealt with in chambers and the outcomes posted in an open register, court bulletin and/or on a website. I do not see what would be gained by moving the proceedings into chambers. On the contrary, I can see little procedural or administrative advantage in them being conducted in private, and I think that there could be much to lose. I also believe that it would go against the grain of the time and Article 6 for the material upon which decisions are made and their pronouncement to be behind closed doors, whatever the manner of subsequent publication. Disposal of such matters in open court is an important discipline and a mark of due process, one to which the public, the press, interested parties and defendants, who may wish to turn up after all, should have ready access.
- 218 Greater use of the procedure is to be encouraged and there is no reason why it should not be extended to allow a plea of guilty by fax or by e-mail. However, there are clear limits to the nature of cases which can be dealt with in this way. The requirements of open justice run counter to extending the procedure to cases where other parties may have been injured, or there is any

possibility of a sentence greater than a fine, or where other public interest demands the defendant's attendance.

Participation by the victim in the sentencing process

- 219 A major area of concern for victims in the criminal justice system is the relevance of their suffering to the sentencing function and how the court is informed of it. For some years there had been an informal, but generally followed, practice in cases of violent crime by which the prosecuting advocate provided such information. Mostly this had been gleaned from the victim's witness statement taken shortly after the offence, sometimes supplemented by up-to-date information from a police officer at the time of the sentencing. However, the system had not been uniform and often left the sentencing tribunal with incomplete information, particularly where the effects were long-term and not readily measurable. A recent innovation is a victim 'impact' or 'personal' statement in which victims (including bereaved relatives in homicide cases) can give an account in their own words of how the crime has affected them. This is a welcome development, but care will have to be taken in the use of victim statements not to give victims false expectations of their role in the sentencing process.²⁰⁸
- 220 Judges have always regarded information on the effect of the crime on the victim as a relevant factor in assessing the seriousness of the offence and, where appropriate, as to whether and in what amount to order compensation. But Victim Support's view is that it is an imprecise tool for those purposes since no court can assess with confidence the full and possible long-term effect on the victim of an offence and of its aftermath. Victim Support regards such information more as a means of equipping the court openly to acknowledge the harm done to the victim, his contribution to the process and of identifying and securing protection and/or treatment and/or other help to him.
- 221 Whatever the mix of purposes of victim personal statements and their relative importance in the sentencing process, the Government has now decided to extend their use to every case and court in the country. Their purpose is not simply to provide information at the sentencing stage, but also to inform earlier decisions of the police, the prosecution and the courts as to bail and compensation and to identify any necessary support and protection to victims and, where appropriate, their relatives. The Government has not adopted a suggestion of some that victims should be permitted at the sentencing stage to

²⁰⁸ for recent discussion of the pros and cons of the use of such statements in an adversarial system, see Edna Erez, *Who's Afraid of the Big Bad Victim? Victim Impact Statements as Victim Empowerment and Enhancement of Justice*. [1999] Crim LR 545; see A. Ashworth *Victim's Rights, Defendants' Rights and Criminal Procedure* in Crawford and Goodey (eds) *Integrating Victims' Perspectives in Criminal Justice* (2000); and Sanders & Ors, *Victim Impact Statements: Don't Work, Can't Work* [2000] Crim LR 447.

give oral evidence of the harm they claim to have suffered or that they or representatives instructed for the purpose should be entitled to address the court or cross-examine the offender on the matter.

222 The greater prominence now given to the effect of the crime on the victim is undoubtedly an improvement and long overdue. However, it carries with it some practical problems. Often an offender or his representative will make serious allegations against the complainant/victim as part of his mitigation. These allegations may be unsubstantiated and incapable, or not readily capable, of independent verification or refutation. The allegations, if untrue, can be hurtful to the victim and, if given publicity, damaging to his or her reputation, particularly in the case of violent or sexual offences. The prosecution advocate, if properly instructed on the matter, has a duty to refute such allegations and, if they are likely to affect the sentencing decision, the court should order a Newton hearing²⁰⁹ to determine the facts. Such a hearing, depending on the defence allegations, could well result in a victim giving evidence. Fairness requires that the victim should have some opportunity to refute what he or she claims to be unfounded allegations. How this can be achieved without the criminal process descending into a detailed and public trading of allegations between victim and accused will require careful thought. It may be that at the sentencing stage there is something to be said for Victim Support's proposal that the victim should be allotted a place in court close to the prosecutor to enable the latter as part of his public function to refute where possible, or simply put in issue, unsubstantiated allegations of that sort.

223 The English criminal courts have long had a power to award compensation when imposing sentence in certain cases²¹⁰ and, there is a wider statutory scheme for the compensation of victims of crime administered, independently of the courts, by the Criminal Injuries Compensation Authority.²¹¹ However, there is a concern – not just of Victim Support – that these mechanisms do not always achieve for the victim the compensation he deserves and do not, in any event, formally or adequately recognise his central role in the process. I have already noted that the perceived advantages of the *partie civile* in France are often illusory, particularly when it comes to compensation and that an English victim has the same problem.²¹²

224 The problems of delayed payment and non-payment of awards of compensation could and, many say, should be resolved by requiring the State to pay the victim the whole amount awarded immediately and leaving it to

²⁰⁹ see *R v Newton* (1983) 77 Cr App R 13 CA

²¹⁰ Powers of Criminal Courts Act 1973, s 35

²¹¹ Criminal Injuries Compensation Act 1995

²¹² this is not so under the wider scheme for compensation awarded under the Criminal Injuries Compensation Scheme, where the State, not the victim, assumes responsibility for payment.

recover and/or enforce the award against the offender. I note from the Government's *Way Ahead* policy paper ²¹³ that it is considering the possibility of a Victim's Fund "to ensure that every victim receives immediate payment of any compensation order" leaving the courts to pursue defaulters. Whilst, at first sight, that seems a sensible and humane proposal, there are some counter considerations. First, such a scheme would amount to the State lending the offender money or, in the event of default, underwriting his obligation to pay. Second, if the recent transfer of enforcement functions from the police to the courts results in a general improvement in the recovery of fines and compensation, there would not be the same imperative for the State to underwrite recovery in this way. Third, it could be seen as an extension of the Criminal Injuries Compensation Scheme, and an inconsistent one at that, since the level of compensation would depend on what the courts consider the offender could afford to pay and not according to the nature and extent of the injury or damage as under the Scheme. Fourth, it could encourage victims or alleged victims to exaggerate or fabricate their complaint with a view to securing greater compensation and engender challenges to their credibility in cross-examination as compensation seekers.

- 225 I am conscious that I have raised more questions in this section than I have answered. But, I hope that it may have been useful, at least to highlight some of the practical issues for the courts, even though my terms of reference do not require me to answer them.

²¹³ para 3.118