

CHAPTER 5

JURIES

INTRODUCTION

- 1 The jury is often described as ‘the jewel in the Crown’ or ‘the corner-stone’ of the British criminal justice system. It is a hallowed institution which, because of its ancient origin and involvement of 12 randomly selected lay people in the criminal process, commands much public confidence. In the van of such confidence are the judges and legal practitioners who, when asked, invariably say that, in general, juries ‘get it right’. For most it is also an important incident of citizenship; De Tocqueville memorably described it as “a peerless teacher of citizenship”. However, support for it is not universal, not least among those who have been jurors. And there are many, in particular leading academic lawyers, who express reservations because we do not, and are not permitted by law¹ to, know how individual juries reach their verdicts. It is also well to keep in mind how rarely juries are used in the criminal trial process given the enormous importance with which they are invested by the public, politicians and legal professions. Only about 1% of criminal cases in England and Wales culminate in trial by jury.²
- 2 I take as my starting point that any change to the system of trial by jury requires a compelling case. I should say ‘further’ change, because it has evolved to its present form over many centuries, responding where necessary to the circumstances and demands of the time on the criminal justice system as a whole. 19th and 20th century examples of such change are the innovation in 1855 of a statutory system that grew over the next 150 years or so into the present wide category of ‘either-way’ cases, the introduction in 1967 of majority verdicts, the widening in 1972 of general eligibility for jury service

¹ Contempt of Court Act 1981, s 8

² see Appendix IV to the Report

from certain landowners to all on the electoral roll, the conversion in the 1980s of certain offences previously triable on indictment to summary only offences, and the abolition in 1988 of the right of peremptory challenge.

- 3 The Royal Commission on Capital Punishment, reporting in 1953, said that it had been “struck by the almost unanimous tributes paid by the judges and other experienced witnesses to the reliability and common sense of British juries”.³ The Morris Committee on Jury Service, in 1965⁴ observed that, although the merits of jury trial and the types of cases that should be heard by a jury were outside its terms of reference, it thought it right to record that the evidence before it showed “in general an acceptance of the desirability of maintaining the jury system in criminal cases”. And the Runciman Royal Commission in 1993 said much the same, though it urged research into the way in which juries worked, principally, it would seem, with a view to improve the system of jury trial rather than to consider whether it should continue:

“Juries are not specifically mentioned in our terms of reference. This may seem an anomaly since convictions of the innocent [*sic*] and acquittals of the guilty [*sic*] in serious cases are always jury decisions. But we are conscious that the jury system is widely and firmly believed to be one of the cornerstones of our system of justice. We have received no evidence which would lead us to argue that an alternative method of arriving at a verdict in criminal trials would make the risk of a mistake significantly less”.⁵

- 4 We talk of ‘trial by jury’, but it is more accurately described as ‘trial by judge and jury’. It is a partnership in which the two have separate and overlapping contributions to the final outcome. The judge tells the jury what the law is and how it bears on the issues in the case; and they apply their new-found understanding of the law to their consideration of those issues. As to the facts, whilst the jury have primary responsibility for finding them, the judge has much to do with that too.⁶ He may be called upon to rule whether there is evidence on which they could find the accused guilty; he may warn them to take particular care before acting on certain evidence; he may direct them about circumstantial evidence and whether, on the evidence before them, they can draw certain inferences from it; and he notes and sums up the evidence for them to assist their deliberations. The resultant verdict is, therefore, a product of a ‘partnership’ between judge and jury.

³ Cmnd 8932, 1953, p 202, cited by Glanville Williams, *The Proof of Guilt: The Hamlyn Lectures*, 7th Series (Stevens, 1995) p 214

⁴ *Report of the Departmental Committee on Jury Service*, (The Morris Report) Cmnd 2627 (HMSO, 1965), paras 3 and 6

⁵ *Report of the Royal Commission on Criminal Justice*, Chapter 1, para 8

⁶ more than in most United States jurisdictions; but, unlike many of their judges, he has no power to set aside verdicts with which he does not agree or which he regards as perverse

- 5 Many of the rules of criminal procedure and evidence that still dominate jury trial stem from its long evolution from trial by ordeal to its present form, and until 1965 against a back-drop of capital and other severe penalties for a wide range of offences. They also derive from judges' lack of confidence in the competence of juries for their task, despite their tradition of eulogy of the jury system. Hence also their elaborate directions on the law, emphatic cautions and often laborious rehearsal of the evidence before permitting jurors to consider their verdict. Dr Glanville Williams, one of the greatest English academic criminal lawyers of the last century, observed,⁷ citing Mr Justice Swallow in Sir Alan Herbert's hilarious tale, *Uncommon Law*, that such assistance should be deemed necessary is an acknowledgement of the peculiar difficulties of an amateur tribunal:

“Gentlemen of the jury, the facts of this distressing and important case have already been put before you some four or five times, twice by prosecuting counsel, twice by counsel for the defence, and once at least by each of the various witnesses who have been heard; but so low is my opinion of your understanding that I think it necessary, in the simplest language, to tell you the facts again”.

- 6 The only qualification required for jury service in England and Wales, apart from age and ordinary residence in this country, is entry on the electoral roll. The nature of this record results in under-representation of those in their early 20s, ethnic minorities and the more mobile sections of the community, such as those living in rented accommodation. Similarly, the many categories of ineligibility and scope for excusal as of right or for good reason mean that those in a wide range of demanding occupations are less likely to undertake jury service than the general population. Applications for excusal are most frequently received in long and complex cases where a range of experience and intellect is most needed. In New York⁸ and many other States of the USA source records for jury service have been expanded, all or most of the exemptions from jury trial have been swept away, and excusals have largely become deferrals. The result is that nearly everyone does jury service as an acknowledged civic duty, including judges, lawyers, policemen, doctors and clergymen.

THE 'RIGHT' TO TRIAL BY JUDGE AND JURY

- 7 In England and Wales there is no constitutional or indeed any form of general right to trial by judge and jury, only a general obligation to submit to it in indictable cases. It is often claimed that Magna Carta, traditionally regarded

⁷ *The proof of guilt*, pp.237-8

⁸ this development was pioneered in New York as a result of *The Jury Project*, a report of 31st March 1994 commissioned by the Chief Judge of the State of New York, Judith Kaye

as the foundation of our liberties, established such a right. The claim is incorrect. Certainly, Magna Carta is no basis for jury trial as we know it today. First, such right as it may have indicated seems to have had an earlier origin in the inquisition of the Carolingian Kings, adopted and imported into this country by the Normans.⁹ Second, as legal historians have pointed out,¹⁰ its reference to a free man's right to the lawful judgment of his 'peers' did not refer to trial by jury. Third, it did not protect everybody in the rigid class system of the time - it was not a truly democratic reform. Fourth, as Lord, then Sir Patrick, Devlin noted in his Hamlyn Lectures in 1956 entitled *Trial By Jury*,¹¹ it began as "something different". The form of trial to which it referred originated from an earlier reform of Henry II replacing trial by ordeal of fire or water. His jury consisted of 12 persons in the neighbourhood, witnesses, who swore to the truth of what they knew. It was not until much later that they emerged as a body of strangers to the case whose task was to decide it rationally upon evidence put before them. And, fifth and in any event, Magna Carta's statement of an accused's right was to one of two alternatives, either "by the lawful judgment of his peers or by the law of the land".¹²

- 8 Quite independently of Magna Carta, there is no legal basis for regarding the claimed 'right' to jury trial as a constitutional entitlement, that is an entrenched right overriding all other legal instruments, as in the United States for offences carrying more than six months imprisonment¹³ or under the Canadian Charter of Rights and Freedoms for offences punishable by five years imprisonment or more,¹⁴ or as a right at all. Nor has it become a right as a result of the incorporation into our law of the European Convention of Human Rights' Article 6 concept of a fair trial. On the contrary, there are suggestions that in some respects it may contravene that provision.¹⁵ Originally, the accused had no choice but to be tried by jury in all indictable cases; he still has no choice in indictable only cases. It was only when, in 1855, Parliament began to permit him to opt for summary trial of certain offences which had formerly been triable only on indictment, that he acquired an elective right to jury trial in what developed over the next 150 years into a wide range of 'either-way' offences. And, as I have already noted, Parliament has made a number of changes in recent years modifying or removing the right in certain of those offences. The right is claimed "only for a fluctuating class of crimes of intermediate gravity".¹⁶

⁹ per Maitland, quoted by Holdsworth, *A History of English Law*, 3rd ed., p312, quoted in turn in the Morris Report, para 7; and see generally paras 6-11

¹⁰ Forsyth, *History of Trial by Jury*, 1852, at 108; Holdsworth, *A History of English Law, Vol 1, 1903*, W R Cornish, *The Jury*, 1968 at p 12

¹¹ 8th Series, 1956, at pp 5 and 67

¹² Clause 39

¹³ see the 6th amendment to Article III of the US Constitution enshrining it as right in Federal and State jurisdictions for all offences not deemed to be 'petty'

¹⁴ Chapter 11(B)

¹⁵ see below, paras 88 - 98

¹⁶ Andrew Ashworth, *The Criminal Process: An Evaluation Study*, 2nd ed. (OUP, 1998), pp 255-262

- 9 Nevertheless, the institution of the jury has for long been a powerful symbol in our criminal justice system. In the 18th century Blackstone described it in a famous passage as ‘the palladium’ or ‘the grand bulwark’ of the Englishman’s liberties.¹⁷ Sir Patrick Devlin in 1956, spoke of it as “a little parliament” and the “lamp that shows that freedom lives”.¹⁸ But, save possibly for the so-called ‘dispensing power’ of the jury, it is doubtful whether those metaphors are apt as main or practical justifications for the institution. Random selection - to the extent that it has ever existed, given our history of restricted qualification for and exclusions and rights of excusal from jury service - is not to be equated with democracy. The jury does not represent or reflect the community as a whole, save in the broad sense of enabling some citizens to participate in the trial process. Over the last two or more centuries judges have been more instrumental than juries in declaring and protecting the rights of citizens. Sadly, juries did not prevent the miscarriages of justice uncovered in the late 1980s and early 1990s arising, in the main, from falsification or concealment of evidence that so shook public confidence and gave rise to the appointment of the Runciman Royal Commission some ten years ago. And, from the earliest times many offences have not been triable by jury; today, as I have said, it is a response to only 1% of all prosecuted crime.
- 10 However, the jury retains its aura – one of involvement of the community in the administration of justice. For many this counts for more than its efficiency as a fact-finding tribunal, as many distinguished academic lawyers have, sometimes wryly, observed.¹⁹ Baroness Kennedy of the Shaws is one of the many who have recently and eloquently articulated this basis for it:

“... jury tradition is not only about the right of the citizen to elect trial but also about the juror’s duty of citizenship. It gives people an important role as jurors - as stakeholders - in the criminal justice system. Seeing the courts in action and participating in that process maintains public trust and confidence in the law”.²⁰

¹⁷ Commentaries, IV (1776) p 347; see also 349; see also Stephen, *History of the Criminal Law*, I, p 566

¹⁸ *Trial By Jury*, The Hamlyn Lectures, 8th Series, 1956, p 164, also quoting, at 165, Blackstone's celebrated passage in his Commentaries, at IV, pp 349-350, inaccurately founding trial by jury as it became on the 39th clause of Magna Carta

¹⁹ see eg Baldwin and McConville, *Jury Trials*, 1979 at p 1; Penny Darbyshire *The Lamp That Shows That Freedom Lives: Is It Worth The Candle?*, [1991] Crim. L.R. 740, at pp 740-1; Sir Louis Blom-Cooper, QC in *Article 6 and Modes of Criminal Trial* [2001] EHRLR, pp 1-19

²⁰ Criminal Justice (Mode of Trial) (No. 2) Bill, House of Lords, 28 September 2000, Hansard, HL, col 995

COMPOSITION OF THE JURY

- 11 Despite all the reforms of the latter half of the last century, juries in England and Wales mostly still do not reflect the broad range of skills and experience or ethnic diversity of the communities from which they are drawn. Jury service may be an important incident of citizenship, but many in this country do not qualify for this civic privilege and duty. And many who do qualify, do not regard it as a privilege and do their best to avoid it. If the jury is to fulfil its valued role of giving the community a say in the administration of justice, it should reflect the community better than it does.
- 12 About a quarter of a million people are summoned for jury service every year. A recent Home Office research project²¹ suggests that only about a third of them are available to do it. It shows that, in a sample of 50,000 people summoned for jury service in June and July 1999, only one-third was available for service, about half of whom were allowed to defer their service until a later date. Of the remaining two-thirds, 13% were ineligible, disqualified or excused as of right, 15% either failed to attend on the day or their summonses were returned as ‘undelivered’ and 38% were excused.
- 13 The variety of mechanisms and broad scope for avoidance of jury service illustrated by these figures suggest that public perception of it as a civic duty is far from universal. And it is unfair to those who do their jury service, not least because, as a result of others’ avoidance of it, they may be required to serve more frequently and for longer than would otherwise be necessary. Most of the exclusions or scope for excusal from jury service deprive juries of the experience and skills of a wide range of professional and otherwise successful and busy people. They create the impression, voiced by many contributors to the Review, that jury service is only for those not important or clever enough to get out of it.
- 14 In my view, no-one should be automatically ineligible or excusable from jury service simply because he or she is a member of a certain profession or holds a particular office or job. Where the demands of the office or job are such as to make jury service difficult for him over the period covered by the jury summons, he should be subject to the same regime as the self-employed or ordinary wage earners or others for whom jury service is also costly and burdensome, that is, discretionary excusal or deferral. There is nothing new about this proposition in other common law jurisdictions. It was pioneered in New York in the mid-1990s and has been widely adopted throughout the USA. If and to the extent that it may be thought to bear heavily on persons with demanding and responsible jobs, it should be remembered that the wider

²¹ *Jury Excusal and Deferral, Research Findings No. 102*, Home Office Research Development and Statistics Directorate

the pool from which jurors may be drawn the less frequently each of them will be required for jury service and, on average, the shorter the time they will have to give to it.

- 15 Before continuing, I pause to say a word about the New York Jury Project initiated in 1993 by Judith S Kaye, the Chief Judge of the State of New York. One of its three objectives was the attainment of jury pools that were “truly representative of the community”. At that time, the New York State’s Judiciary Law,²² in accordance with the United States Supreme Court’s oft stated constitutional guarantee, declared its policy to be that all litigants were entitled to trial by a jury drawn from a “fair cross section of the community”. It had long before established source lists for jurors in addition to voter registration rolls but, as in this country, there were many occupational exclusions and exceptions. As a result of the Project Panel’s recommendations, the maximum age limit of 70 was abolished and those above that age were left to seek excusal on the ground of physical or mental incapacity or serious inconvenience, all statutory occupational exclusions and exemptions were abolished, the scope for excusal was reduced to non-permanent excusal for incapacity by reason of mental or physical ill-health or undue hardship, and those summoned for service were permitted one deferral as of right to a date specified by the potential juror.

- 16 In England and Wales, until earlier this year, each court (other than those in London) had its own arrangements for summoning jurors. A Central Juror Summoning Bureau has now been established to administer the juror summoning process for the whole of the country. It is designed to overcome the deficiencies of the former system, principally in securing a better match in numbers of jurors summoned to the workload of each court, in providing better communication with potential jurors and accommodation of their needs, and in bringing greater consistency to the treatment of their applications for excusal or deferral. It has developed a computer system to select potential jurors at random from the electoral roll and to generate summonses and letters confirming dates for service. Such a national body should be well placed to introduce and develop some of the reforms I recommend below. I have in mind, in particular, the combination of a number of directories and lists, entry on which would assist in identifying persons qualified for jury service, and better communication systems as to jurors’ qualification for and ability to undertake jury service. As to the latter, I understand that, as a first step, the Bureau has established an electronic link with the police criminal records system to enable automatic checks on any previous convictions of potential jurors.

²² NY Jud.L 500

The size of the jury

- 17 We take for granted that a criminal jury should consist of twelve people. This is a matter of tradition rather than logic.²³ There have been some - not many - proposals for change, mostly for a reduction in size to achieve economies and to reduce the general burden of jury service. Though those matters are relevant, they are not, in my view, of sufficient weight or merit to justify changing an institution that draws much of its public support from the number of decision makers that it brings to the task of determining guilt. Traditions of jury size vary from country to country, both in common law as well as civil law jurisdictions. For example, in Scotland, the number is 15.
- 18 There is, however, some support and precedent for the swearing of alternate or reserve jurors in case the number falls below the minimum of nine by reason of illness or other necessity, a particular hazard in long cases. Whilst this would involve extra expense in jury allowances and additional jury accommodation, the over-all savings in long cases, in both financial and in human terms, of aborted trials and re-trials could be worth it. To meet the possibility of lack of commitment to the case by alternate jurors, they and the primary jurors could be sworn and treated in exactly the same way throughout the trial. In that way neither they nor anyone else would know that they were in reserve until the time for deliberation. Alternatively, there could be a ballot at that time to determine who is to form the final jury. I acknowledge that a practical obstacle to such provision is the present size of jury boxes in courts all over the country, but enlargement would only be necessary in those courts large enough and customarily used for long and heavy trials. Such a system and provision are well and widely established in the USA, and is also to be found in some Commonwealth jurisdictions.
- 19 The Roskill Fraud Trials Committee was lukewarm about such an insurance provision for long cases; it was not opposed to it in principle, but not satisfied that the problem was sufficiently serious to warrant doing anything about it.²⁴ Enquiries made by the Court Service in 1998 disclosed no instance when a trial had had to be aborted because the number of the jury fell below nine. However, in one case, a fraud trial of some ten months' duration, the jury were reduced to nine during the course of their deliberations, which must have caused much anxiety to all concerned, including the remaining jurors. Jury trial in long and complex cases is a fragile and highly expensive exercise. It is also an ordeal to which all involved should not be subject a second time for want of a quorate jury.

²³ Sir Patrick Devlin, in his Hamlyn Lectures, at pp 8-9 said that "many romantic explanations" had been offered for the figure and, somewhat flippantly, compared it with the old currency of twelve pennies to the shilling exhibiting an early English abhorrence of the decimal system

²⁴ Report, para 7. 41

- 20 Although I later recommend a system of trial without jury in long and complex frauds,²⁵ I consider that a system of alternate or reserve jurors could have value in some other very long cases here. It would also have the advantage of maintaining a jury of 12 while continuing to provide for majority verdicts.²⁶ If such a system were introduced, judges would have to be vigilant to maintain the stringent criterion of ‘necessity’ for the discharge of jurors during the trial. There are indications in the USA of jurors being more prone to seek discharge in circumstances short of necessity because they know that there are jurors in reserve. I do not suggest that alternate jurors should be sworn in every long case, but that the judge should consider it at the pre-trial stage.

I recommend the introduction of a system enabling judges in long cases, where they consider it appropriate, to swear alternate or reserve jurors to meet the contingency of a jury otherwise being reduced in number by discharge for illness or any other reason of necessity.

Qualification for jury service

- 21 Until 1972²⁷ there was a statutorily imposed property qualification for jury service. Sir Patrick Devlin in 1956²⁸ reckoned that it excluded the majority of the adult population. As a result of the recommendations of the Morris Committee in 1965,²⁹ which eventually gave rise to the Juries Act 1974, that has gone. The only qualifications now are an age of at least 18 and not more than 70, to have been ordinarily resident in this country for a period of at least five years since the age of 13 and registration as a parliamentary or local government elector.³⁰ There have been a few submissions in the Review as to the age limit and residence qualification, but I see no compelling case for change in either of them. The requirement of entry on the electoral register is, however, an important candidate for change on grounds of principle and practicality. The overriding principle of selection from that register and, later in the process, from the panels and part panels drawn from it for each court, is that of random selection. Randomness is not an end in itself. It does not necessarily improve the quality of the decision-making. Its value is that it is considered to be the best, albeit a rough and ready way, of empanelling a jury that is likely to be collegiately independent and to reflect the community at large.

²⁵ see paras 173 - 206

²⁶ Juries Act, ss 16 and 17

²⁷ abolished by the Criminal Justice Act 1972, s 25(1); see now Juries Act 1974, s 1

²⁸ *Trial by Jury*, paras. 60-64

²⁹ *ibid*, paras 60-64

³⁰ Juries Act 1974, s 1

- 22 As I have said, there are many who, by statute, are ineligible to serve on a jury or who are entitled to excusal as of right, and some who are disqualified. There is also provision for discretionary excusal and for discharge of jury summonses because of disability. But quite apart from all of those exclusionary mechanisms, there is a fundamental weakness in dependence on entry on the electoral register as one of the main criteria of eligibility for jury service. Home Office research³¹ shows that in 1999 about 8% of those eligible for registration according to the 1991 Census and Electoral register were not registered. There are a number of reasons for that. Until earlier this year, the electoral register was simply a ‘snapshot’ of names and addresses in October of each year, and so rapidly became out of date. Although, the introduction of ‘rolling’ registration will improve the situation, people who live in insecure accommodation or who move relatively frequently will continue to be under-represented on the register. Comparisons with the census indicate that those aged 20 to 24, ethnic minorities and those living in rental accommodation are the most under-represented on the electoral roll.
- 23 It is plain that we should do what USA Federal and State jurisdictions and a number of Commonwealth countries have done for some time – supplement and/or cross-check the electoral roll by reference to other sources, for example the Driver and Vehicle Licensing Authority, the Department for Work and Pensions, the Inland Revenue and telephone directories. This would require a merging and constant updating of records from the various sources, but, with modern computer technology, it can be done. One complication of widening the net in that way is that it would include non-Commonwealth citizens who, save for citizens of the Republic of Ireland, are not entitled to vote or, therefore, to entry on the electoral roll. However, this could be dealt with, as it is in the United States, by resolving the issue of qualification at the summons stage.
- 24 Such a reform would be an important contributor to juries becoming a better reflection of the community from which they are drawn and would encourage the perception of jury service as a universal civic duty. And, by significantly increasing the jury pool, it would have the practical benefit of reducing both the frequency with which people are required for jury service and the length of it.

I recommend:

- **no change in the present statutory criteria for qualification for jury service, save as to registration,**

³¹ see footnote 21

as distinct from entitlement to registration, on an electoral roll; and

- **amendment of the law to substitute for the condition of registration on an electoral roll, inclusion in such a roll and/or on any one or more of a number of other specified publicly maintained lists or directories, but excluding anyone listed who, on investigation at the summons stage, is found not to be entitled to registration as an elector.**

Enforcement of jury service

25 The Home Office Research to which I have referred indicates that about 15% of summoned jurors fail to attend court on the day or have their summonses returned as ‘undelivered’. Failure to attend court in response to a jury summons is punishable summarily by a fine of up to £1,000 or as a contempt of court.³² But there is little attempt at enforcement. Those who do not respond to a summons are sent a further letter and their names are passed to the court. The courts rarely follow up those who, they know, have not responded to the summons or those who have indicated that they would attend, but have failed to do so. Even when recalcitrant potential jurors are brought before the court, judges are reluctant to impose any significant punishment. Some courts occasionally list a number of such acts of defiance for hearing on the same day with a view to giving publicity to their enforcement proceedings, but the publicity is too limited, patchy and sporadic to do much good. The result of all this is that it has become widely known that a jury summons may be ignored with impunity.

26 Something must be done to bring home to the public that jury service is a public duty, that they must do it unless ineligible or excused and that they will be punished if they do not. It can be done, as is shown by what has been achieved in New York and elsewhere in the United States, where very few now escape jury service. At the same time, it would be wasteful of court time to clutter up lists with the original penal proceedings for which the law now provides. I suggest that a better course would be to examine the practicalities of introducing a system of fixed penalties subject to a right of appeal to magistrates.³³ If introduced it should be accompanied by regular publicity of the sort that currently highlights action taken against those using a television without a licence.

³² 1974 Act, s 20

³³ cf the automatic fine system in New York

I recommend that there should be rigorous and well publicised enforcement of the obligation to undertake jury service when required and that consideration should be given to doing so by way of a system of fixed penalties subject to a right of appeal to the magistrates.

Ineligibility

- 27 There are many categories of person whom the 1974 Act makes ineligible for service. They include: present and past members of the judiciary at all levels, including justices of the peace; all those concerned with the day to day administration of the legal system or any court; others from a whole range of professions and occupations concerned with the administration of justice, including present or past barristers, solicitors, legal executives, police, prison and probation officers; and also clergymen, the mentally ill³⁴ and any person on bail in criminal proceedings.³⁵ There is also provision in the Act for disqualification of persons with a criminal record who have received particular types of sentence.³⁶
- 28 As to those who practise law or are concerned with the business of the courts and otherwise with administration of the law and justice, the Morris Committee had recommended before the 1974 Act that they should continue to be excluded from jury service. It was not of that view because such persons would readily deduce from what was and was not said in the proceedings whether the defendant had a criminal record. The Committee acknowledged that many without formal legal training knew enough about the workings of the courts to make a shrewd guess about that. But it considered that such persons' specialist knowledge and the prestige attached to their occupations would enable them unduly to influence their fellow jurors. For that reason,³⁷ it recommended a considerable widening of the categories of exclusion (to which the 1974 Act gave effect); and the Runciman Royal Commission, reporting in 1993, recommended no change.³⁸
- 29 The most commonly voiced objection to removing the ineligibility of all or most of those connected with the courts and the wider administration of justice is the one not relied on by the Morris Committee – that they would be able to deduce from the lack of reference to a defendant's good character, that he has previous convictions. In my view, such concern is unreal for the

³⁴ 1974 Act, Sch I, Pt I

³⁵ Criminal Justice and Public Order Act 1994, s 40

³⁶ Sch1, Pt.2

³⁷ The Morris Report, paras 103-115

³⁸ save as to the excusal of clergymen and members of religious orders; *Royal Commission on Criminal Justice*, Ch 8, para 57

reason given by the Morris Committee. It is widely known that a defendant is generally entitled to keep quiet in court about his past if it is bad and to make much of it is good. Any juror who has served before will know that, and any juror who sits for the first time will soon become aware of it if he does not already know. The second main objection - the one relied upon by the Morris Committee - that such persons, by reason of their status or position could unduly influence their fellow jurymen, is unlikely today. People no longer defer to professionals or those holding particular office in the way they used to do. Experience in the USA where, in a number of States, judges, lawyers and others holding positions in the criminal justice system have sat as jurors, is that their fellow jurors have not allowed them to dominate their deliberations.³⁹ A number of them have also commented on how diffident they would have felt about trying to do so since, despite their familiarity with court procedures, they found the role of a juror much more difficult than they had expected.

- 30 There is also the anxiety voiced by some that those closely connected with the criminal justice system, for example, a policeman or a prosecutor, would not approach the case with the same openness of mind as someone unconnected with the legal system. I do not know why the undoubted risk of prejudice of that sort should be any greater than in the case of many others who are not excluded from juries and who are trusted to put aside any prejudices they may have. Take, for example shopkeepers or house-owners who may have been burgled, or car owners whose cars may have been vandalised, many government and other employees concerned in one way or another with public welfare and people with strong views on various controversial issues, such as legalisation of drugs or euthanasia. I acknowledge that there may be Article 6 considerations in this. But it would be for the judge in each case to satisfy himself that the potential juror in question was not likely to engender any reasonable suspicion or apprehension of bias so as to distinguish him from other members of the public who would normally be expected to have an interest in upholding the law. Provided that the judge was so satisfied, the over-all fairness of the tribunal and of the trial should not be at risk.⁴⁰
- 31 As I have said, I consider that there is a strong case for removal of all the categories of ineligibility based on occupation. My one reservation has been as to judges. I say that, not because I consider that they are too grand for the task or that their work is so important that they could not be spared for it. On the contrary, I consider that it would be good for them and the system of jury trial if they could experience at first hand what jurors have to put up with. In particular, it would surely help them see how well or badly they and all those concerned in the process assist jurors in their task. And I have been heartened

³⁹ note the greater scope for challenging jurors in USA and the strong warnings as to impartiality etc that American judges give potential jurors before the challenge process

⁴⁰ see eg *Pullar v United Kingdom* (1996) 22 EHRR 391, which stated that jury trial was not unfair where an employee of a key prosecution witness was a member of the jury

by the knowledge that judges have sat on juries or been potential jurors in the USA.⁴¹ A number have spoken warmly of the experience. They include Judith S Kaye, the Chief Judge of the State of New York, Shirley Abrahamson, Chief Justice of the Wisconsin Supreme Court and Justice Breyer, of the Supreme Court of the USA who gave an account at the American Bar Association Meeting in London in July 2000 of his jury service.

32 There are two main reasons why I have hesitated over the notion of judges as jurors. First, some observers of and participants in the scene might regard the innovation as little more than a gesture, or as one New York columnist described it in its early days there, “a foolish experiment in injudicious pseudo-egalitarianism”. But, if it is well meant and, as I believe, capable of contributing both to the work of individual juries and to improvement of the jury system as a whole, it should be considered. A more practical difficulty is that potential judge/jurors may often know or be known to the trial judge or advocates or others involved in the trial. This could be regarded as compromising their independence and/or, dependent on their seniority or personality, as inhibiting the judge or advocates in their conduct of the case. However, such problems could be dealt with as and when they arise by discretionary excusal rather than a blanket ineligibility by reason of their occupation. They would be in no different position in that respect from all others concerned with the administration of justice if my recommendation for the general removal of ineligibility is adopted. For those reasons, I have come to the conclusion that it would be wrong to single out the judges for special treatment in this respect.

33 As to the ineligibility of clergymen, the 1974 Act reflected the Morris Committee’s recommendation for no change because of the possible embarrassment to them flowing from their pastoral role and compassionate instincts.⁴² However, there are many others in the community with similar roles and instincts. Like the Runciman Royal Commission⁴³ I consider that there is no justification for excluding them from jury service unless they find it incompatible with their tenets or beliefs. Provision has since been made for the excusal as of right of “a practising member of a religious society or order the tenets of which are incompatible with jury service”,⁴⁴ but I am not sure that that is quite what the Commission intended.⁴⁵ It seems to me that this would be more appropriately dealt with by way of discretionary excusal rather than an entitlement by reference simply to claim membership of a religious body.

⁴¹ eg in Colorado, Connecticut, Illinois, District of Columbia, New York and Wisconsin

⁴² The Morris Report, para 118-121

⁴³ *Royal Commission on Criminal Justice*, Ch 8, para 57

⁴⁴ Juries Act 1974, Sch 1 Pt. III, implementing the Runciman Royal Commission's recommendation

⁴⁵ *Royal Commission on Criminal Justice*, Ch 8, para 57 and recommendation 217

34 Thus, in my view, there is a strong case for removing all the present categories of ineligibility based upon occupation, that is, those in Groups A – the Judiciary, B – others concerned with the administration of justice and C – the clergy, in Part I of Schedule 1 to the 1974 Act. Any difficulty or embarrassment that the holding of any such office may pose in a particular case can be dealt with under the courts’ discretionary power of excusal. As to the categories of disqualification for those with a criminal record who have received particular types of sentence, as set out in Part II of Schedule 1 to the Act, I see no reason for change. Until recently there was very little check that persons summoned met the requirements for jury service, in particular, as to whether they had previous convictions. However, that has now changed with the establishment by the Central Summoning Bureau of an electronic link with the Police National Computer, which enables an automatic check on each person summoned.

Accordingly, I recommend that:

- **everyone should be eligible for jury service, save for the mentally ill, and the law should be amended accordingly; and**
- **there should be no change to the categories of those disqualified from jury service.**

Excusals as of right and discretionary excusal

35 In addition to persons who within specified periods have previously served on a jury or who have been excused by a court from doing so,⁴⁶ a large range of persons are entitled to excusal from sitting on a jury if they claim it. They include persons over 65 and members of certain religious bodies to whom I have referred and two groups of persons who, by reason of their public duties or medical responsibilities, might find it difficult to undertake jury service. The first group includes, Peers and Peeresses, Members of Parliament and full-time members of the armed forces. The second consists of medical practitioners, dentists, nurses, midwives, veterinary practitioners and pharmaceutical chemists.⁴⁷ The two groups reflect the reasoning and recommendations of the Morris Committee that excusal as of right should be granted to an occupation where it is in the public interest because of the special and personal duties to the State that it involves or because of the

⁴⁶ Juries Act 1974, s 8

⁴⁷ *ibid*, Sch I, Pt. III

special and personal responsibilities of its individual members for the immediate relief of pain and suffering.⁴⁸

- 36 Excusal as of right of those over 65 is relatively new, having been introduced by a statutory amendment in 1988.⁴⁹ But it seems to me that the increasing number and better health of persons over that age justify treating them as other potential jurors under the qualifying limit of 70, namely, fit to serve unless they can show that they are so physically or mentally unfit as not to be able to act effectively as jurors. No doubt, claims by persons over 65 on that account would be sympathetically considered.
- 37 As to the main two categories of persons excusable as of right, I consider that there may be a good reason for excusing them where it is vital that they are available to perform their important duties over the period covered by the summons. But I see no reason why that should entitle them to excusal as of right simply by virtue of their position. As the Morris Committee acknowledged,⁵⁰ it is extremely difficult to draw a line between those whose work is and is not so crucial that it would be against the public interest to compel them to serve as jurors. Invidious choices of that sort can be avoided, and the jury strengthened, by replacing excusal of right in such cases with discretionary excusal or deferral.
- 38 The remaining category of excusal as of right is that of persons who have served on a jury or who have attended to serve on a jury within two years before the service of the summons or who are within a period of excusal granted by the court.⁵¹ If my recommendations as to the composition of juries are adopted, many more jurors should become available for service than at present, with a consequent reduction in the need to expose them as often to selection for jury service. With that in mind, once patterns of jury usage for each court catchment area have emerged and the Central Summoning Bureau has developed more sophisticated computer controls, consideration could be given to permitting local increases in the period of excusal of right under this head. Such a proposal, it seems to me, would be more flexible and fair to those who wish to do jury service than another suggestion made in the Review. It was for the creation of three jury qualification lists, one for those who have never served on a jury, a second for those who have served once, and a third for those who have served more than once, and for random selection from the first list until it was exhausted, then from the second and then the third.

⁴⁸ The Morris Report, para 148

⁴⁹ Criminal Justice Act 1988, s 119(2)

⁵⁰ The Morris Report, para. 147

⁵¹ Juries Act 1974, s 8

39 As to discretionary excusal or deferral, an officer of the court may excuse or defer the attendance of a person summoned for jury service if he is satisfied that there is good reason for doing so. There is a right of appeal to the court in the event of refusal.⁵² The present scope for excusal accounts, as I have indicated, for 38% of those currently summoned for jury service who are able to avoid it. It is taken up in the main by those who are self-employed or in full-time employment who can make out a case for economic or other hardship for themselves or others if they have to give up their work for even a short period, and also by parents who are unable to make alternative arrangements for the care of their children. If, as I recommend, the main categories of ineligibility and all of excusal as of right are abolished, there will be more work for officials and judges in deciding whether to grant discretionary excusals or deferrals in such cases when sought. The claims will be at least as pressing as many claims for discretionary excusal already are. But they should be tested carefully according to the individual circumstances of each claim, otherwise there could be a reversion to the present widespread excusal of such persons by reason only of their positions or occupations. I hope that much of the present pressure to avoid jury service may go if, in accordance with these and other of my recommendations, people are asked to do it less often, for shorter periods, with more consideration for their personal commitments and under better conditions than now.

40 Where a claim for excusal appears to be well founded, the Central Summoning Bureau officers should aim to deal with it by way of deferral rather than excusal. I am much attracted by the regime successfully introduced in New York and many other USA courts of requiring the claimant to offer and make arrangements to do his jury service at some alternative time suitable to him or her. In certain counties in New York State, for example, an automated telephone system enables jurors to ‘postpone’ their first summons for up to six months, usually to a specific date of their choice. Subsequent applications for deferral should be considered against clear, published criteria and, if granted, for a specific period, with scope for an extended period where appropriate. Only if a request for deferral is not practicable or reasonable should the Bureau normally refuse it or consider its power of excusal.⁵³

I recommend that:

- **save for those who have recently undertaken, or have been excused by a court from, jury service, no-one should be excusable from jury service as of right, only on showing good reason for excusal;**

⁵² *ibid*, ss 9 and 9A

⁵³ the present jury summons states: “You will only be excused if the jury summoning officer is satisfied that it will not be reasonable to expect you to do jury service during the next year.”

- **the Central Summoning Bureau or the court, in examining a claim for discretionary excusal, should consider its power of deferral first; and**
- **the Bureau should treat all subsequent applications for deferral and all applications for excusal against clear criteria identified in the jury summons.**

Discharge of jury summons on account of disability or incapacity

- 41 The court has power to discharge a jury summons if it considers that the person, on account of disability⁵⁴ or “insufficient understanding of English”⁵⁵ will not be able to act effectively as a juror.⁵⁶
- 42 In both cases this power of discharge is quite distinct from that of excusal for good reason. As to disability, amendment of the law in 1994⁵⁷ effectively established a presumption that people with disabilities attending court in response to a summons can serve on juries. In a case of doubt the judge should only discharge the summons if he is “of the opinion that the person will not, on account of his disability, be capable of acting effectively as a juror”. This is of a piece with the strong move in this country and civilised countries everywhere to accommodate and, as far as possible, positively to include people with disabilities in all society’s activities. The European Convention on Human Rights speaks of the right of each individual to pursue a dignified and fulfilling life, and Article 14 of it, as interpreted by the Strasbourg Court, prohibits discrimination against people with disabilities. The Disability Discrimination Act 1995 is our opening legislative contribution to that movement.
- 43 As the Bar Council Disability Committee have observed, in a powerful submission in the Review, the concept of disabled persons sitting on juries is wholly consistent with the principle of random selection from all members of society. Enabling them to do so is not just a question of evaluating their disability and relating it to the task, but also of providing, where reasonably practicable, the facilities and/or assistance to them to undertake it. This includes fairly predictable needs, such as access for people with mobility difficulties to and, as necessary, throughout the court-building, space for jurors in wheelchairs in or near the jury box, special lavatories and suitable equipment for people with visual impairments. The Court Service has been

⁵⁴ 1974 Act, s 9B

⁵⁵ 1974 Act, s 10

⁵⁶ the Morris Committee had recommended that persons with physical difficulties, such as blindness or deafness, rendering them incapable of jury service should be ineligible; paras 123-127

⁵⁷ Criminal Justice and Public Order Act 1994, s 41, introducing s 9B of the 1974 Act.

alive to these basic needs for some years. All courts have been audited against the standards implied by the Disability Discrimination Act 1995 and a schedule of works has been compiled that should ensure compliance with those standards by October 2004. Priority will be given to works to the main court centres for each circuit.

- 44 There are, however, additional problems for the profoundly deaf since, if they are to contribute effectively to the verdict, they will require the assistance of an interpreter in the jury room before and during the jury's deliberations. Judges to date have ruled that if a person was so deaf that he could not participate in the jury's deliberations without an interpreter, he should be discharged as incapable of acting effectively as a juror, because the presence of a 13th party in the jury room would be an incurable irregularity.⁵⁸
- 45 In recent years a number of organisations concerned with disability generally and the deaf in particular have pressed for amendment of the law to permit a deaf person to act as a juror with the assistance of a sign language interpreter or lip speaker. The Bar Council Disability Committee suggest that anxieties about an interpreter intruding on the privacy of the jury room would be met if he were required to undertake to communicate with the disabled person and the other jurors only as an interpreter and not to divulge the jurors' deliberations to any third person.
- 46 There is understandable caution about the prospect of such a 13th person in the jury room. But accredited interpreters work to agreed professional standards that should preclude any attempt to intrude on or breach the confidence of juries' deliberations. In April 2000 the Lord Chancellor indicated that he could see no objection to deaf people serving as jurors. The Government has committed itself to a general review of support in court and in the jury room to jurors with disabilities and to those who cannot speak English. The Home Office was to issue a consultation paper on the matter towards the end of 2000, but has yet to do so. In the circumstances, it would be premature to attempt any specific recommendation. But, in principle, I consider that all reasonable arrangements, coupled with suitable safeguards, should be provided to enable people with disabilities to sit as jurors with third party assistance. I say this, not because there is a general right, as distinct from duty, to undertake jury service or under any anti-discrimination legislation,⁵⁹ but because such inclusiveness is a mark of a modern, civilised, society.

⁵⁸ see *Goby v Wetherill* [1915] 2KB 674; *R v McNeil* [1967] Crim LR 540, CACD; *Re Osman* [1996] 1 Cr App R 126 (Sir Lawrence Verney, the Reorder of London)

⁵⁹ although the courts are 'providers of services' under section 19 of the Disability Discrimination Act 1995, selection as a juror is not a service provided by them, as distinct from the services they should provide to jurors once selected

- 47 In the United States a policy of automatic exclusion of blind or deaf persons from jury service would violate the Federal Anti-Discrimination legislation.⁶⁰ The experience of the American Courts where deaf people have sat on juries is that they have not been a hindrance. On the contrary, the need for juries to work at their pace, although lengthening the deliberations somewhat, has tended to make them more structured, with the advantage, if nothing else, of only one person talking at a time.
- 48 Regardless, of the outcome on that particular issue, I consider that more needs to be done than at present to inform all people with disabilities summoned for jury service that they will be considered for it, if they wish. I know that the Central Summoning Bureau is alert to identify and, in liaison with the courts, to meet these needs. But I think it could do more by way of positive encouragement. Given the Home Office's current review of the whole subject, I consider that, apart from a general exhortation to make proper provision at all Crown Court centres for people with disabilities to serve as jurors, it would be wrong for me to attempt any specific recommendation in advance of the Home Office's completion of its review.

Discharge of jury summons because of incapacity to understand English

- 49 As to command of and literacy in English, the Morris Committee considered and rejected a number of proposals variously calling for educational, intelligence or literacy tests as a requirement for inclusion on the list for jury service.⁶¹ However, it recommended that no-one should be qualified to serve on a jury who found it difficult to read, write, speak or understand English. The Roskill Committee doubted whether the formula in the 1974 Act of "insufficient understanding of English" sufficiently met those recommendations as to literacy. Whilst the Committee noted a judicial readiness to excuse jurors who acknowledged a difficulty in reading and writing in cases involving documentary evidence, it regarded it as no guarantee of excluding them in such cases. It was of the view that, either by amendment of the statutory formula or by leaving it to those responsible for the administration of the courts, it should be ensured that only literate persons should serve as jurors in fraud cases.⁶²
- 50 To impose literacy as a qualification for jury service would exclude a significant section of the community who, despite that inability, have much to

⁶⁰ see eg *People v Caldwell* 603 N.Y.S. 2d. 713 (NY Crim. Ct, 1993) and *Galloway v Superior Court of District of Columbia* 816 F Supp 12 D.D C 1993; see also 57 Albany L Rev 289, 296-305

⁶¹ The Morris Report, paras 76-80

⁶² The Fraud Trials Committee Report (HMSO, 1986), paras 7.9 -7.11

contribute to the broad range of experience and common-sense that is required in a jury. However, in my view, it is becoming increasingly necessary for jurors to have a reasonable command of written English. Even in the simplest case, there are usually exhibited documents that they must be capable of understanding. If, as I recommend, there is a move to more use of visual aids in court, to written summaries of the issues and of admitted facts and to more wide-spread use of written directions, the need will become greater. I have sympathy with the Roskill Committee's concern that there should be a means of ensuring that illiterate persons do not sit as jurors in fraud trials or any case that involves critical documentary evidence. It would be difficult to entrust the matter to the Central Summoning Bureau to sort out by way of discretionary excusal at the summoning stage. It would not be known then whether the illiterate person summoned would be required to sit as a juror in a case with critical documentary evidence. And to leave it to discreet enquiries by court staff when organising panels of jurors for particular cases is both chancy and offends the principle of randomness. The present system of leaving the judge as the final filter during the process of jury selection is probably the best that can be achieved. By then the nature of the case for trial and its likely demands on the literacy of potential jurors can be assessed. The judge should give the panel of potential jurors an ample and tactfully expressed warning of what they are in for, and offer them a formula that would enable them to seek excusal without embarrassment. As a very last resort, there is always the option for the prosecution to 'stand by' a potential juror who clearly has difficulty, when being sworn, in reading the oath.

RANDOM SELECTION

The principle

- 51 I have mentioned the principle of random selection and how its application to the process of selecting names from the electoral register is skewed by the latter's incompleteness, tending to exclude many from the poorer and more mobile sections of society, including ethnic minorities. The principle is further damaged by the removal from the pool of a large swathe of those who are presently ineligible or excused as of right or for good reason. If and when those distortions are reduced by enlarging the sources for jury qualification, removing the main categories of ineligibility and of excusal as of right and introducing a scheme of flexible deferral, there should be a significant improvement in the quality of juries and a general reduction in the burden of jury service. But juries will still not include many of the less fortunate in society who, for one reason or another, would not be found on any list from which potential jurors could be drawn. Not only does randomness not equal representativeness, but it can result in juries in individual cases being grossly unrepresentative. This is not ideal, but I share the Runciman Royal Commission's reluctance to interfere with the general principle of random

selection.⁶³ There are, however, two candidates for some modification - ethnic and linguistic.

Ethnic minority representation on juries

- 52 The Crown Court study undertaken during 1992 on behalf of the Runciman Royal Commission⁶⁴ indicated that, nationally, ethnic minority communities were not seriously under-represented on juries. There has been no comprehensive monitoring since then of the national or local ethnic make-up of juries and, in the absence of a similar national study, I cannot, therefore, say that the position remains the same. A fundamental problem is that ethnic minorities are among the highest categories of persons who, though entitled to serve on juries, do not qualify because they are not registered as electors. Recent Home Office research⁶⁵ indicates that about 24% of black, 15% from the Indian sub-continent and 24% of other ethnic minorities are not registered. A limited and relatively unscientific survey undertaken for the Review in Liverpool, Nottingham and Durham in August and September last year showed a noticeable lack of ethnic mix in jury trials at all three centres.
- 53 The Court of Appeal in 1989 held that a judge has no power to influence the composition of the jury by directing that a multi-racial jury be empanelled or by the use of his power of discretionary discharge, or by directing that the panel should be drawn from another jury catchment area. The Runciman Royal Commission agreed with that as a general proposition. But it recommended that, in exceptional cases with “a racial dimension” involving an ethnic minority defendant or victim, the judge could, if persuaded that one or other reasonably believed there would not be a fair trial from an all-white jury, direct the selection of a jury consisting of up to three people from ethnic minority groups. It also recommended that in an appropriate case he should be able to direct that one or more of the three jurors should be drawn from the same ethnic minority as the defendant or the victim. It suggested that either variation could be achieved by the jury bailiff continuing to draw names randomly selected from the panel available at court until the three requisite persons were drawn.⁶⁶ The Government of the day did not adopt the recommendation because it considered it offended the principle of random selection from a cross-section of the population as a whole.
- 54 The Law Society, the Race Relations Committee of the Bar Council, The Commission for Racial Equality and others have sought to revive the

⁶³ *Royal Commission on Criminal Justice*, Chapter 8, para 62

⁶⁴ *The Royal Commission on Criminal Justice, Research Study No 19*, Professor Michael Zander and Paul Henderson (1993)

⁶⁵ *Research Findings No 102*, (Home Office Research, Development and Statistics Directorate, 1999)

⁶⁶ *Royal Commission on Criminal Justice*, Chapter 8, paras 63 and 64

Runciman Royal Commission recommendations. They have suggested two further alternatives. The first, also mentioned by the Commission, was that the judge could direct transfer of the case to a court centre in another locality where the ethnic mix would give a better chance of drawing a multi-racial jury. The second was that, in order to create a better chance of ethnic minority representation on a jury, the panel from which it is drawn could be amalgamated with that from another court area or drawn from that other panel.

- 55 As to the Runciman Royal Commission's proposal, the arguments against it are the familiar one of principle - the importance of random selection - and practicality, the difficulty of early identification of cases calling for a multi-racial jury so as to provide panels with sufficient members of ethnic minorities to ensure the availability of at least three of them for selection in such cases. The suggestion of moving cases to another court centre, initially appealed to me as a pragmatic solution to an otherwise difficult question. There would be no legal obstacle to it⁶⁷ and little practical difficulty (save for those who might have to travel longer distances to court). But, on reflection, it smacks of forum shopping and could cause grave upset, say when the victim and the defendant are of different ethnicity and/or are at odds as to where the matter should be tried. The suggestion of drawing potential jurors, or amalgamating panels with those, from areas of higher ethnic minority populations would be equally unacceptable for similar reasons, and would be inefficient.
- 56 Dr. Penny Darbyshire's analysis for the Review of jury research⁶⁸ indicates, unsurprisingly, that the race of jurors can affect the verdict in cases where either the defendant or the victim or witnesses on one side or another are of a different race from those on the jury. This is of some significance when put against the 1995 British Crime Survey's figure for that year of nearly 400,000 crimes in England and Wales considered by the victim to be racially motivated. Where there is evidence of racial bias on the part of jurors, it is clearly capable of affecting the fairness of the trial. So, is the principle of random selection a sufficient answer to the problem when considered against the following factors: the emergence of a large number of racially aggravated offences coupled with recent statutory recognition of them;⁶⁹ the relatively recent loss of the right of peremptory challenge; the inability to challenge for cause without a prima facie case of its existence; and the newly applicable Article 6 principle of 'objective impartiality', namely a requirement of sufficient guarantees to exclude any objectively justified or legitimate doubts

⁶⁷ see Supreme Court Act 1981, s76

⁶⁸ see Appendix V to the Report

⁶⁹ see eg Crime and Disorder Act 1998, s 28 and Powers of Criminal Courts (Sentencing) Act 2000, s 153.

as to the impartiality of the tribunal?⁷⁰ Dr Darbyshire, in her analysis, posed a similar question:

“For over five centuries, until 1870, members of minorities such as Jews, Germans and Italians had the right to be tried by a jury comprised half of foreigners. It was called the jury ‘de mediate linguae’. This right was abolished on the ground that “no foreigner need fear for a fair trial in England”. Given the trial data, reported cases and research findings, can we in England and Wales believe this to be true now?”

- 57 I have found this a difficult question both on the principle of randomness and on the practicalities of change.
- 58 However, randomness is not an end in itself. It is, so far, the best means we have, absent some system of investigation or examination of potential jurors as in the United States, of trying to secure an impartial and fair jury. A move towards the Runciman Royal Commission’s proposals would be a danger to that aim if it were to amount to special pleading, that is to say, for representation on a jury of those from the same background or sympathetic to the defendant or victim. That would clearly be unacceptable. But, as a means of widening the range of backgrounds and experience on the jury in appropriate cases, it could be a positive aid to over-all fairness in cases of particular ethnic sensitivity.
- 59 That still leaves the question: what makes race so special in the sense that any changes of the sort proposed should not also be made for other special interest groups? The answer may be as follows. Our randomly selected and uninvestigated juries are clearly at risk of one or more of their number bringing prejudice of one sort or another to their task. Such prejudice is usually invisible, and we are content to assume that it will be overcome or cancelled by differing views of the other members. But membership of a particular racial group is usually visible, and, as Dr Darbyshire’s research and other studies suggest, white juries are, or are perceived to be, less fair to black than to white people. It is this quality of visible difference and the prejudice that it may engender that singles out race for different treatment from other special interest groups in the courtroom. In my view, that is not a problem that can be solved by a North American style jury examination, which would not, in any event, be well supported in this country for all the obvious practical reasons as well as serious reservations about its efficacy.
- 60 What then is to be done about the potential for racial prejudice in all-white juries in our system? I believe that the practical problems, in devising a

⁷⁰ see *Gregory v UK*, 25 EHRR 577, ECHR; and cf *Incal v Turkey*, 29 EHRR 449, ECHR, and *Sander v UK*, Case 34129/96 [2000] Crim L R 767

procedure, in appropriate cases, to ensure a wider racial mix and to balance any competing interests of defendant and complainant, are not insurmountable. The Central Summoning Bureau could ask potential jurors to state their ethnic origins, a question asked in the census. If they don't want to say, they need not do so. The parties could be required to indicate early in their preparation for the pre-trial assessment⁷¹ whether race is likely to be a relevant issue and, if so, whether steps should be taken to attempt to secure some ethnic minority representation on the jury. This could be done by the empanelment of a larger number of jurors than normal from which the jury for the case is to be selected, some of whom would be identified by their juror cards as from ethnic minorities. It may be necessary to allow a longer period of notice in such cases than the standard summons period of eight weeks ahead. The first nine selected would be called to serve and, if they did not include a minimum of – say three – ethnic minority jurors, the remainder would be stood down until the minimum was reached. My recommendations for widening the pool of potential jurors so as to include better ethnic minority representation country-wide, if adopted, should go some way to assist in securing sufficient ethnic minority members of court panels to make such a scheme feasible.

- 61 As to the suggested difficulty where the defendant and the complainant are of different ethnic origin, the judge's ruling would be for a racially diverse jury in the form that I have suggested, not that it should contain representatives of the particular ethnic background on either side. Any question as to who would qualify as an ethnic minority for this purpose should be an implementation issue to be resolved in consultation with the Commission for Racial Equality and other relevant groups.
- 62 I do not suggest a parallel process for magistrates' courts constituted by a bench of lay magistrates. Apart from my recommendations directed to secure a lay magistracy more reflective of the local communities it serves, their semi-professionalism, coupled with their sharing of their jurisdiction with professional judges, would make it unnecessary and, on a case by case basis, wholly impracticable.

Accordingly, I recommend that a scheme should be devised, along the lines that I have outlined, for cases in which the court considers that race is likely to be relevant to an issue of importance in the case, for the selection of a jury consisting of, say, up to three people from any ethnic minority group.

⁷¹ see Chapter 10, paras 221 - 228

Linguistic composition of juries - Wales⁷²

- 63 There are particular problems about the composition of juries in Wales. They are not new. They concern the Welsh language, looked at from the perspective of jurors whose only or main language is English, or the English language, for jurors whose only or main language is Welsh or who simply prefer to have the evidence in their own language. Over the last 10 to 15 years there has been a renaissance of the Welsh language. It is still very much a ‘minority’ language, but about half million - about 20% - of those in Wales now speak it. Their numbers are increasing and there will clearly be greater use of it in public life, including in the courts. However, the distribution of Welsh speakers throughout the Principality is not even. In some areas, in particular, the north west, the majority speak it. In others, for example the south east, only a minority do; but even within that area it is variable. According to the 1991 census results, the percentage of those three years old and over able to speak Welsh in the then counties was: Gwent 2.4%; South Glamorgan 6.5%; Mid Glamorgan 8.5%; and West Glamorgan 15%.⁷³
- 64 The Welsh Language Act 1993 requires that in the administration of justice in Wales and Monmouthshire, both languages are to be treated on a basis of equality, and provides that in any legal proceeding any party, witness or other person may speak in Welsh if he wishes to do so. Where Welsh is spoken and not everyone in the case speaks it, simultaneous professional interpretation is provided. Practice Directions require that cases in which Welsh may be used should, wherever practicable, be listed before a Welsh speaking judge and in a court with simultaneous translation facilities. However, because of the system of random selection of jurors, there is no mechanism to ensure that all or, indeed, any of a jury’s members are bilingual, thus requiring simultaneous translation in almost all cases where Welsh is used.
- 65 Mr Justice Roderick Evans, when the Resident Judge of Cardiff, suggested in a paper prepared for the Review that a witness, including a defendant, who has to give evidence to a jury through an interpreter is at a disadvantage, and so are the jury in their assessment of him and of what he says. He suggested that the only way to overcome those disadvantages is by introducing some mechanism to ensure bilingual juries in all Crown Court trials where Welsh is spoken. He went further and maintained that the underlying principle of the 1993 Act requires it to accommodate Welsh-only speakers by amendment of section 10 of the Juries Act 1974 which requires the discharge of any potential juror with insufficient understanding of English to act as a juror.

“The present inability to select a jury whose members are bilingual is inconsistent with the principle that English and

⁷² I am particularly indebted to Lord Justice Pill, Mr Justice Thomas and Mr Justice Roderick Evans for much of my treatment of this topic

⁷³ the Welsh Household Interview Survey showed a small increase on these figures, *Digest of Welsh Local Area Statistics, 2001*

Welsh should be treated on a basis of equality, militates against the exercise of the right to use Welsh in court, draws an inappropriate distinction between citizens who choose to use Welsh rather than English and has the potential to work injustice.”

- 66 In 1973, Lord Justice Edmund Davies, as he then was, in a report to the Lord Chancellor of an informal study on the use of Welsh in courts in Wales,⁷⁴ concluded that selecting bilingual juries would offend against the principle of random selection. I understand that Welshmen may differ about that. But assuming that it is so, Mr Justice Roderick Evans questioned:

“whether adherence to a tenet of English law developed in a monolingual England is a good reason for perpetuating an injustice in an officially bilingual Wales.”

- 67 Mr. Justice Thomas, a Presiding Judge of the Wales and Chester Circuit, and Mr Justice Roderick Evans, drawing on the experience of the Canadian Federal Courts and the Provincial Court of New Brunswick in the use of both French and English, urge the introduction of a system of bilingual juries in Wales in any case in which the Welsh language is likely to be used and in which a bilingual judge would be required to preside. They do not identify who should determine that, or by what criteria. They suggest that a jury panel of bilingual speakers should be drawn from those identified as such on a new register or that a bilingual jury should be selected in court from a panel summoned as now. The latter procedure, which is that in use in Canada, would be lengthy and expensive since it would involve bringing to court much larger panels than now to ensure a jury of 12 bilingual speakers. There would still have to be provision for simultaneous interpretation of the evidence of those witnesses who wish to give their evidence in English, as happens in Canada in French language trials.⁷⁵ But that is a feature of any trial in England and Wales where witnesses are unable or unwilling for good reason to give their evidence in English. All this would require amendment of the Juries Act 1974 to put English and Welsh on an equal footing, in particular in the provision enabling discharge of a potential juror on the ground of insufficient understanding of English, rather than Welsh, to be an effective juror.

- 68 However, there are others of great experience in the administration of criminal justice in Wales who, while acknowledging the importance of removing any inhibition on speaking Welsh in court in the Principality, take a different view. In a submission to the Review, Lord Justice Pill, a former

⁷⁴ see Hansard, HL, 12 June 1973, cols 534R to 537L for a summary of Lord Justice Edmund Davies' recommendations, referred to in a statement by the Lord Chancellor, Lord Hailsham of St Marylebone

⁷⁵ in Canada the preferred method is phrase by phrase consecutive interpretation, which is lengthier and tends to interrupt the flow of evidence

Presiding Judge of the Wales and Chester Circuit, has expressed a number of concerns about the proposal.

- 69 As to the principle of random selection, Lord Justice Pill has pointed out that, to require bilingual juries in every case in which the Welsh language is likely to be used, would clearly violate it in its exclusion of 75% or 80% of the Principality's population (increasing to over 90% in the heavily populated south east) from the privilege, as well as the civic duty, of jury service. That privilege – cherished by the supporters of the jury system – was also of concern to Lord Justice Edmund Davies. He stated in his Report:

“... while jury service is often regarded merely as a duty, it is in fact one of the important privileges of citizenship. To take steps to ensure that 75% of the population of the Principality should be debarred from jury service in a particular case on the sole ground that they cannot understand Welsh would involve a radical departure from that random formation of the jury panel which Blackstone described as a ‘palladium’ of our liberties”.

- 70 As to the suggestion that the principle of random selection is a tenet of English law no longer applicable in a bilingual Wales, Lord Justice Pill has observed, “[t]here is nothing particularly English about it”, it is of general application throughout the common law world and “[d]eparture from it, whether on linguistic or other grounds, inevitably amounts to a fundamental attack upon it”:

“Quite apart from the privileges of citizenship, there is a potential for injustice in excluding from the pool from which the jury is selected 90% of the defendant's peers. Moreover, in South East Wales ability to speak Welsh rightly has important social and cultural associations and a defendant may be deprived of a trial by a jury including members of that monoglot majority with which he has most in common.”

- 71 There are other difficulties in the proposal to which Lord Justice Pill has also referred. They include the important and difficult questions of who should determine in any case whether there should be a bilingual jury and by reference to what criteria, and how to identify potential jurors with sufficient knowledge of Welsh for the subtleties and rigours of a criminal trial.

- 72 As a non Welshman, I approach this debate with timidity. My view, for what it is worth, is that the proposal of a power to order bilingual juries in particular cases is worthy of further consideration - but not by me. It should be developed and examined, with appropriate consultation, in Wales. The aims should be: to secure a solution that would encourage the greater use of the Welsh language whilst recognising the balance of English and Welsh

speakers in the Principality and the importance of maintaining the privilege and civic duty of jury service for the population as a whole; to preserve, so far as possible, the principle of random selection; to provide an efficient procedure for jury selection; and, most important of all, to ensure that each defendant has a fair trial. Among the matters that will require detailed attention are: the criteria for exercise of the power of directing bilingual juries; who should exercise it and how; how it should be administered so as to secure efficiency and sensitivity to the interests of all concerned; and, in the light of what emerges, whether any, and if so, what amendment is necessary to section 10 of the 1974 Act.

Jury challenge

73 The right of jury challenge is very limited in England and Wales in comparison with that in the United States of America. There is no longer a right to peremptory challenge. It was abolished in 1988,⁷⁶ no doubt in the light of the Roskill Committee's Report. The Committee saw it as an erosion of the principle of random selection and, in its general use, an abuse that was on the way to bringing the whole jury system into public disrepute. It recommended its abolition in fraud cases, making plain that, had it been within its terms of reference, it would have recommended its general abolition.⁷⁷ The prosecution still has the right to 'stand by' a juror, notwithstanding a similar recommendation by the Roskill Committee, again because it eroded the principle of random selection. However, its use is now tightly restricted by guidelines issued by the Attorney General in 1988.⁷⁸ Challenge for cause also remains, but the burden of proof is on the person who seeks to make it. And before it can be explored by examination of a potential juror there must be some factual foundation for it. The Roskill Committee, before recommending the removal of the peremptory challenge, considered whether there would be pressure to extend the challenge for cause in the form common in the United States. It forecast correctly that English and Welsh judges would stand firm against any such attempts at fishing challenges.

74 There have been very few proposals in the Review for change as to jury challenge and much support for resisting any move to the United States system. I make no recommendations for change either by restoring the right to peremptory challenge or by opening the present limited challenge for cause procedure to permit fishing examination of jurors. The latter would bring with it a considerable threat to the principle of random selection and much expense and prolongation of criminal proceedings. I add that the lack of

⁷⁶ Criminal Justice Act 1988, s 118(1)

⁷⁷ *The Fraud Trials Committee Report*, paras 7.37-7.38

⁷⁸ 88 Cr App R 123

opportunity here to investigate the possibility of bias in individual jurors has to be put alongside our provision for majority verdicts (which are unknown or unusual in the USA), which prevents individuals thwarting the otherwise general consensus of the jury.

VERDICTS

Unanimous and majority verdicts

- 75 The verdict of an English or Welsh jury in a criminal case should normally be unanimous. But since 1967⁷⁹ majority verdicts are permitted, of at least ten when there are 11 or 12 jurors and of at least nine when the jury has been reduced to ten. The system has worked well over the years. Its strength is that it requires an overwhelming majority⁸⁰ and yet prevents the odd crank or possibly biased juror insisting on a disagreement and thereby frustrating the process. The Review has produced little support for change either in the levels of the required majorities or for reversion to unanimity in all cases or for any form of intermediate verdict, such as that of ‘not proven’ in use in Scotland.

Jury research

- 76 There are two possible and overlapping purposes of jury research. The first would be to determine whether juries, in their present form, should continue as fact finders in serious cases. The second would be to learn whether there are better ways of enabling them to do their job. Dr Glanville Williams has said that if one proceeds by the light of reason, there are formidable arguments against the jury system.⁸¹ It is a randomly picked and legally untrained body of men and women trying to cope with inconvenience, discomfort and artificialities of a criminal trial. On the other hand, as he acknowledged, drawing on two of Stephen’s three claimed advantages of jury trial, juries’ verdicts are, in the main, accepted more readily than those of judges and they bring ordinary citizens into the administration of justice.⁸² Implicit in both of those advantages is a widespread public acceptance that a number of heads are better than one and that, in the case of most serious crime, they trump any conceivable alternative. Certainly, very few contributors to the Review have suggested that I should recommend the general abolition of trial by jury and leave the entirety of the criminal process

⁷⁹ Criminal Justice Act 1967, s 13; see now Juries Act 1974, s 17

⁸⁰ of the Scottish criminal jury of 15, where a simple majority of 8 to 7 will suffice for guilt

⁸¹ *The Proof of Guilt: A Study of the English Criminal Trial.*, pp 207-214;

⁸² Stephen, *History of the Criminal Law*, I, pp 566; the third was that the jury relieves the judge of part of the responsibility of his office

to professional judges.⁸³ And many of those who are agnostic about juries and/or favour their reform, urge some research first into the way in which they work. I have some sympathy with ‘the need to know’ argument.

77 Despite many advances in the last few decades in administrative arrangements for, and forensic assistance to, jurors, once they are in the jury box we still subject them to archaic and artificial procedures that impede them in their task. They are given very little objective or conveniently summarised guidance at the start of a trial as to the issues they are there to decide and as to what evidence is and is not agreed. They are expected to have prodigious powers of concentration and memory both as to the, mostly oral, evidence and the advocates’ submissions. And, at the end of the trial, the judge orally gives them complex directions on the law and a summarised regurgitation of the evidence, much of which must become a blur for many of them by the time they are considering their verdict. In the more complex or serious cases judges increasingly provide them with a brief written list or summary of the questions they have to decide, but that is about as far as it goes.

78 Some might say, given the way juries have to work, it is just as well that we do not know how they reach their verdicts, in particular, whether they are loyal to their oaths or affirmations “to give a true verdict according to the evidence”. It was for long undeclared law that jurors should not tell and no-one should ask them what went on in the jury room. This mutual constraint became formalised, in very wide terms, in section 8 of the Contempt of Court Act 1981, which also made breach of it a contempt of court.⁸⁴

79 The main evils that would flow from disclosure of jurors’ deliberations seem to be that publicity might engender doubt in the validity of their verdicts and/or might deter them from expressing their views frankly for fear of exposure to intimidation or acts of revenge from disgruntled parties. The latter is understandable, but should the ban be so wide as to prevent legitimate and discreetly conducted research? Is the view of Lord Hewart CJ expressed in 1922⁸⁵ defensible today, namely that the value of a jury’s verdict lies only in its unanimity, not in the process by which they arrived at it? As Dr Glanville Williams has said, it suggests that “the real reason for keeping the jury’s deliberations secret is to preserve confidence in a system which more intimate knowledge might destroy.”⁸⁶

80 If jurors in a significant number of cases are not returning verdicts on the evidence and are influenced by other considerations, should we find out about

⁸³ as has always been the case in Holland, save for a short period during the French Revolution

⁸⁴ Contempt of Court Act 1981, s 8

⁸⁵ *R v Armstrong* [1922] 2 KB 555, at 568; see also *Ellis v Deheer* [1922] 2 KB 113, per Bankes LJ at 118

⁸⁶ *The Proof of Guilt: A Study of the English Criminal Trial*, p 205

it? Should section 8 of the 1981 Act be amended to permit legitimate research (and, while we are about it, to enable the Court of Appeal, Criminal Division, to examine conduct in the jury room the subject of appeal)?⁸⁷ Or is public confidence in juries' oracular verdicts so precious to our legal system that we should not put it at risk? Many fear that the very undertaking of intrusive research - that is, into how individual juries reach their decisions - could damage public confidence by sowing doubt as to the integrity of verdicts. That is important, not only for those verdicts that might be vulnerable to challenge, but also to those, guilty and not guilty alike, which examination might eventually show to have been justified. The process, which might take some years, could result in a clean bill of health for juries, but would it justify the possible damage done in the meantime?

- 81 On the other hand, such research might show that all is not well and that changes are needed. That would be worthwhile, subject to three considerations. First, still assuming the sort of research for which amendment of the 1981 Act would be necessary, it would be essential to find an effective machinery for it. Jurors under observation, or speaking after verdict of how they reached it, may not give an accurate picture, respectively, of how an unobserved jury would have behaved or of how they did behave. Shadow juries must be suspect too because they are not subject to the same responsibility or stresses of the true jury. Second, there would be no point in such research unless we could be reasonably sure of devising a significantly better system, either without a jury or to ensure that jurors can and do their job properly. Third, the outcome of intrusive research might be inconclusive, no more than that juries are infinitely variable in their make-up and in their responses to the individual circumstances of each case and to the competence and personalities of those involved, including the judge and the advocates.
- 82 As to the validity of jury trial in principle, I am much of the same view as previous review bodies and the vast majority of those who have made submissions on the point to the Review. I share their instinct to accept the jury system unless and until it is found so wanting that we should seek to replace it with some other mode of trial. I would go further in accepting the powerfully symbolic effect of the jury as a means of enabling citizens to participate in the trial process and the public confidence that, rightly or wrongly, it engenders in the system. However, I also agree with the Runciman Royal Commission that some research could be of value. For the reasons I have given, I have grave doubt whether intrusive research of the sort requiring amendment of the 1981 Act would be wise, or that it would produce any definitive answer or one that would enable us with confidence to substitute some other system.

⁸⁷ see eg *R v Thompson* [1962] 1 All E R 65; and *R. v Young* [1995] 2 Cr App R 379

- 83 As to improvement of the jury system, there is already a wealth of well-documented research throughout the common law world. Most of it is of a non-intrusive kind that would not require amendment of the 1981 Act. Dr Penny Darbyshire of the Kingston Law School has undertaken for the Review an analysis of the major pieces of research in the twentieth century. I have listed them in Appendix V, just to indicate the volume and breadth of the material available. Much of this research has been, and is now being, put to good use in improving trial by judge and jury in the various jurisdictions where it has been undertaken.
- 84 In all or most common law jurisdictions the law prevents observation of or listening to a jury's deliberations and considerably restricts what jurors can be asked afterwards.⁸⁸ Research has, in the main, taken one of three forms: interviews of jurors before and/or after their deliberations; comparison of their verdicts with those of other participants in the trial, including the judge and the advocates; and use of shadow or mock juries either present at the trial or in viewing re-enactments or video-films of the trial.⁸⁹
- 85 Most of the research has been in the United States of America,⁹⁰ which has a different form of jury trial from ours. For that reason, it should be approached with care. But it has much to teach us, in particular, as to the composition and treatment of juries and as to how courts should assist them in their task.⁹¹ I have already mentioned the pioneering work of the 1994 New York Jury Project, which has been influential in jury reform throughout the United States, and much of which is relevant to our system. There has also been a great deal of valuable research in Commonwealth countries, one of the most recent and impressive of which is a study of a sample of trials for a Review by the Law Commission of New Zealand of Juries in Criminal Trials.⁹² The study consisted of questioning jurors before trial as to their knowledge, if any, of the case, observing the trial, interviewing the trial judge and questioning jurors after verdict on the adequacy and clarity of pre-trial information, their reactions to the trial process, their understanding of the law, their decision-making process, the nature of and basis for their verdict and the impact of pre-trial and trial publicity.⁹³ As I have said, and as the authors of the New Zealand study have acknowledged,⁹⁴ its value depends on the accuracy and

⁸⁸ Dr Darbyshire's analysis for the Review indicates that there was some intrusive research in Kansas but that it was very quickly outlawed in most of the States of the USA

⁸⁹ see Cornish, *The Jury*, 1970

⁹⁰ starting in the late 50s and early 60s (no apostrophes), in particular, the Chicago Jury Project which, as Dr Darbyshire has indicated, resulted in over 70 publications, the most famous and quoted of which was *The American Jury* by Kalven & Zeisel (1966) Boston, Little, Brown & Co

⁹¹ see, in particular, the pioneering *The Jury Project*, a report commissioned by the Chief Judge Judith Kaye of the State of New York

⁹² see Preliminary Paper 37, Vols. 1 and 2, November 1999; and Report 69, "Juries in Criminal Trials", February 2001, Wellington, New Zealand, Chapter 14

⁹³ *ibid* Vol. 2, para 1.6

⁹⁴ *ibid* Vol. 2, paras 1.12-1.16

honesty of jurors in recounting their reasoning processes and/or on the possible effect on their behaviour of the knowledge that it was taking place.

- 86 In framing my recommendation on the treatment of jurors in this chapter and on procedure in jury trials in Chapter 11, I have drawn heavily on Dr Darbyshire's analysis of existing research, on the wealth of material I have been provided by other common law jurisdictions and on the many authoritative submissions in the Review on the subject. To the extent that further research of the non-intrusive New York or New Zealand variety may be necessary for our system of trial by judge and jury, I would commend it.
- 87 What I have in mind is an enquiry of jurors and others for their general views on the conditions and manner of their service and on the assistance that they are given by court staff, the judge and advocates. Work of this nature, if carefully conducted, should not require amendment of the law or damage public confidence in the jury system pending attempts to improve it. Those who have read Trevor Grove's entertaining and revealing account of his service on a jury, *The Jurymen's Tale*, or have looked at research elsewhere will have some idea of the possibilities.

I recommend:

- **no amendment of section 8 of the Contempt of Court Act 1981 to enable research into individual juries' deliberations;**
- **careful consideration of existing research material throughout the common law world on jury trial in criminal cases with a view to identifying and responding appropriately to all *available* information about how juries arrive at their verdicts; and**
- **if and to the extent that such research material is insufficient, consideration of jury research of a general nature that does not violate the 1981 Act.**

The unreasoned verdict

- 88 The jury is unique among decision-makers in the English criminal trial process in not having to explain its decision. There is a question whether its oracular verdict satisfies Article 6 of the European Convention of Human Rights in its requirement of a reasoned decision. The Strasbourg Court has not, so far, had to consider the point directly,⁹⁵ but the English courts may

⁹⁵ but see the discussion on *Condron v UK* [2000] 31 EHRR1, para 95 below

well have to do so soon. Those who are sanguine about a finding of compliance rely on the argument that the English judge's public directions of law and summing-up of the evidence stand proxy for the jury's reasons. But such an argument depends upon an assumption that they follow and understand his directions on the law and reach their verdict in accordance with the evidence, applying to their findings of fact those directions. Such an argument would be flawed if it included the proposition that, for the purpose of acquittal, though not for conviction, juries are free to do as they like and without explanation. It appears likely that the argument will be tested. If it were to fail and, jurors were required publicly to reason their verdicts, perhaps by answering a short series of questions, as some civil juries do, the courts could not stand powerless in the face of overtly perverse acquittals any more than of perverse verdicts of guilty.

89 Independently of Article 6, it is a function of due process in the common law that a professional judge⁹⁶ when determining issues of law or fact should normally give reasons for his decision. A reasoned judgment tells the parties why they have won or lost; it is more likely to be soundly based on the evidence than an unreasoned one;⁹⁷ and, by its openness is more likely to engender public confidence in the decision-making system.⁹⁸ Until recently no such general duty applied to other decision-makers, including lay magistrates and many administrative tribunals and, of course, juries. However, the general trend has been towards the giving of reasons by decision-makers. In recent years lay magistrates have increasingly been expected to explain their findings, in addition to their long-standing obligation to do so on appeal from their decision by way of case stated to the High Court. But the precise impact of Article 6 on this trend and the continuing exception of the jury verdict is uncertain. The Judicial Committee of the Privy Council have suggested the need for some general appraisal in the light of its provisions.⁹⁹

90 Before considering the possible effect of Article 6, it is important to note that there is no absolute test in English law for the adequacy of reasons. The degree of detail depends, in general, on the nature of the case and the issues in it. In certain types of case it is necessary for the courts, not only to identify the evidence they have accepted or rejected, but also why they have done so. In others it may be sufficient simply to record the acceptance or rejection of evidence without explanation.

⁹⁶ in recent years stipendiary magistrates have increasingly given reasons for their decisions, despite the absence of any formally expressed legal duty to do so

⁹⁷ see *Flannery v Halifax Estate Agencies Ltd. (trading as Colleys Professional Services)* [2000] 1 WLR 377, per Henry LJ at 381G

⁹⁸ PM Craig, *The common law, reasons and administrative justice* [1994] Cambridge Law Journal, 283

⁹⁹ *Stefan v GMC* [1999] 1 WLR 1293, at 1300 G-1301D

- 91 What is, what should be, the future for the English jury's unreasoned verdict, given the Article 6 requirement of a fair trial that there should be a public pronouncement - a publicly reasoned - decision in criminal cases? It is said that the English draftsmen of the provision some 50 years ago did not intend it to apply to jury verdicts. Presumably, they felt that it could be assumed that juries would loyally abide by the directions of law and decide issues of fact in the light of them and according to the evidence.
- 92 For a number of reasons, I incline to the view of a number of eminent British commentators that the Strasbourg Court, in taking account of the way in which our system of jury trial works as a whole, would not consider our juries' unreasoned verdicts to breach Article 6.¹⁰⁰ First, the Strasbourg case law is not precise about the content of reasons required to satisfy the fair trial test. The Court has said that it varies according to the nature of the decision and the circumstances of each case,¹⁰¹ though it has identified as an important requirement a sufficiency of reasoning to enable the decision to be reviewed by a higher court.¹⁰² Second, as Professor John Spencer has commented in the Review, the Strasbourg case law "is not particularly exacting". As well as allowing for different national traditions, the Court has stressed in a number of cases that the general duty to give reasons does not require a detailed answer to every question. Third, the case law does not suggest that courts must identify the pieces of evidence that they have accepted and why. Fourth, the Court has expressly ruled that the publicly unreasoned determination of a Danish jury was not contrary to the Convention.¹⁰³ And, fifth, in considering whether there has been a fair trial, the Court looks at the trial and any appeal together. In England the Court of Appeal (Criminal Division) has some, albeit limited, ability to quash a conviction if it considers that it was contrary to the evidence,¹⁰⁴ but the absence of reasoned decisions limits its ability to remedy unfairness which may have resulted from a defect in, or misunderstanding of, a judge's summing-up.
- 93 As to the Strasbourg Court's respect for individual national traditions, the Review's Cambridge conference with European Judges and Jurists¹⁰⁵ illustrated the variety of modes of trial that it has to accommodate. Just as some member countries have no jury or other lay involvement in their criminal process,¹⁰⁶ others have very different jury systems, both in their composition and in the way in which they function. Unsurprisingly, there is

¹⁰⁰ Professor Spencer in his advice to the Review; Harris, O'Boyle and Warbrick, *The Law of the European Convention on Human Rights* (1995) p 215

¹⁰¹ see eg *Van De Herk v Netherlands* (1994) 18 EHRR 481, para.61; *Ruiz Torija v Spain* (1994) 19 EHRR 553, para 29; and *Hiro Balani v. Spain* (1995) 19 EHRR 566, para. 27

¹⁰² *Hadjianastassiou v Greece* (1992) 16 EHRR 219

¹⁰³ *Saric v Denmark*, application number 31913/96 (decision on 2/2/1999)

¹⁰⁴ but see *Condron v UK* (2000) 31 EHRR 1, at para 46 where the Court commented that jury verdicts in England "are not accompanied by reasons which are amenable to review on appeal".

¹⁰⁵ see Foreword, para 13

¹⁰⁶ e.g. Holland

no general continental consensus as to what is meant by the reasoning, ‘motivation’, of a judicial decision. In France, for example, it can mean, depending on the context, no more than an identification of the legal principles by reference to which the court has reached its decision on the facts.

94 However, many contributors to the Review have suggested that the system may not, as a matter of English law, withstand a challenge, that the unreasoned jury verdict violates Article 6. And a number of members of the Bar have indicated at Review seminars that they intend to make such a challenge. There is some encouragement for it in the Strasbourg Court’s decision in *Murray v UK*¹⁰⁷ where it held that inferences from silence in a Diplock court complied with Article 6 because the judge fully and openly reasoned his decision. Some have inferred that the absence of the opportunity for such reasoning by a jury would lead to a different result.

95 However, the *Murray* judgment does not say that it is *only* by way of a reasoned judgment that such an inference can be justified or that a verdict following a proper direction on the law and summing-up of the material evidence on the issue is not a reasoned verdict.¹⁰⁸ That this is so is indicated by the Strasbourg Court’s recent decision in *Condrón v UK*,¹⁰⁹ another adverse inference from silence case, but this time before a jury where the complaint was of the inadequacy of the judge’s direction to them on the point.¹¹⁰ The Court, taking *Murray* as the starting point, but noting that jury trial was different, said that “the fact that the issue of the applicant[s]’ silence was left to a jury cannot of itself be incompatible with the requirement of a fair trial”.¹¹¹ Such reasoning suggests that the Court is amenable to accepting the jury’s verdict as the final word in a judgment of which the summing-up furnishes the overt reasoning process. The Commission, however, has considered the related but different point whether a Belgian jury’s answers ‘yes’ or ‘no’ to each of a series of questions put to them by the judge satisfied Article 6. It held that they did since they formed “a framework for the jury’s verdict”,¹¹² a mechanism to which I return in Chapter 11 when considering judges’ directions to juries.

96 There are a number of reasons why the English courts may be more determinative than the Strasbourg Court on the effect in England and Wales of Article 6 on our unreasoned jury verdict. I believe that their approach should not simply be to shield us from possible criticism in Strasbourg, but to

¹⁰⁷ (1996) 22 EHRR 29

¹⁰⁸ I am indebted to Lord Justice Sedley for the analysis in this paragraph

¹⁰⁹ *Condrón v United Kingdom* (2000) 31 EHRR1

¹¹⁰ at para 46

¹¹¹ at para 57

¹¹² Application 15957/90; DR 72, p 195

ensure that our criminal process, however long established and cherished, meets our own present requirements of a fair trial. Over the last two or three decades we have demanded much more of all in the criminal justice process than we previously found acceptable, particularly in the formulation of judicial reasons and in the volume and sophistication of judicial directions to the jury. Yet the jury, in the way in which it is expected to do its job, has barely changed at all. There is also the broader point made by Sir Louis Blom-Cooper, QC,¹¹³ that a publicly unaccountable jury is a ‘curiosity’ in today's democratic society.

97 Whilst it is certainly arguable that a judge's direction, coupled with a jury's verdict, amounts to a reasoned judicial decision, it falls short of what English law expects from a court composed only of a judge who is required to give one. Unlike the judge, a jury do not have to identify the evidence that they have accepted or rejected or, where there is more than one route to conviction, which route they have taken. These features can cause difficulty where there are a number of ingredients in the offence alleged, and various pieces of evidence that may constitute them, or different routes by which a jury can arrive at their verdict, for there is no means of ensuring or knowing that they were unanimous in the way they reached it. This is a common problem in complex fraud and other cases where the prosecution case is of a course of conduct, but it also arises frequently in more straightforward cases. The way in which the, often, many and complex alternatives are put to juries must be very difficult for them, untrained as many of them are for such close analysis. It is fertile ground for error and injustice that are, in the main, undetectable by way of appeal. The dilemma for the trial judge in directing juries in such cases, and for an appellate court in examining the validity of jury verdicts in them, has given rise to a plethora of conflicting and otherwise unsatisfactory jurisprudence.¹¹⁴ In my view, the time has come for the trial judge in each case to give the jury a series of written factual questions, tailored to the law as he knows it to be and to the issues and evidence in the case. The answers to these questions should logically lead only to a verdict of guilty or not guilty. I discuss this again in more detail, and make a recommendation on it, in Chapter 11. I go on to recommend that, where the judge considers it appropriate, he should be permitted to require a jury to answer publicly each of his questions.

98 There is also the wider problem of the secrecy of the jury's deliberations insofar as it prevents any effective enquiry by the Court of Appeal into possible misconduct in the jury room. The jurisprudence of the Court, in its laudable attempt to overcome the unduly restrictive prohibition in section 8 of the 1981 Act, is logically hard to justify. It will not enquire into what jurors

¹¹³ (2001) EHRLR, p 5

¹¹⁴ see *R v Brown (K.)* (1984) 79 Cr App R 115, CA; and the many differing applications of it over the years set out in *Archbold, Criminal Pleading, Evidence and Practice, 2001*, paras. 4-391-393; and for a recent and helpful discussion of the difficulties in such cases, see per Otton LJ, giving the judgment of the Court in *R v Boreman* [2000] 1 All E.R. 307, CA

have done or said in the course of their deliberations in the jury room, but it will do if they are elsewhere, say while in a hotel overnight.¹¹⁵ In my view, the effective bar that section 8 puts on an appellate court inquiring into and remedying possible bias or other impropriety in the course of a jury's deliberations is indefensible and capable of causing serious injustice. Recent Strasbourg case law suggests that, for those reasons, it is also highly vulnerable under Article 6.¹¹⁶ If, as I shall recommend, Parliament should amend section 8 to permit the Court of Appeal to investigate such matters, it is hard to see why the scope of its investigation should not also extend to allegations of impropriety of reasoning or lack of any reasoning, for example, that some jurors ignored or slept through the deliberations or that the jury decided one way or other on some irrational prejudice or whim, deliberately ignoring the evidence. In making the recommendation I should record that I have considered and rejected a suggestion made by a number of contributors to the Review that the trial judge should retire with the jury to 'police' them in their deliberations. Such a proposition is alien to our criminal process and would, if anything, be more vulnerable to the open reasoning requirements of Article 6 than our present system.

I recommend that section 8 of the Contempt of Court Act 1981 should be amended to permit, where appropriate, enquiry by the trial judge and/or the Court of Appeal (Criminal Division) into alleged impropriety by a jury, whether in the course of its deliberations or otherwise.

Perverse verdicts

- 99 There are many, in particular the Bar, who fervently support what they regard as the right of the jury to ignore their duty to return a verdict according to the evidence and to acquit where they disapprove of the law or of the prosecution in seeking to enforce it. Lord Devlin attributed this notion to a later misapplication or hardening of the Magna Carta provision to which I have referred. Nevertheless, he saw it as a protection against laws that the ordinary man might regard as "harsh and oppressive" and an insurance "that the criminal law will conform to the ordinary man's idea of what is fair and just".¹¹⁷ EP Thompson, expressed a similar view in a memorable passage in 1980:

"The English common law rests upon a bargain between the Law and the People. The jury box is where people come into the court; the judge watches them and the jury watches back. A jury is the place where the bargain is struck. The jury

¹¹⁵ see eg *R v Young* (S) [1995] 2 Cr App R 379, CA

¹¹⁶ See *Remli v France* (1996) 22 EHRR 253 and *Sander v UK* [2000] Crim LR.767 but cf *Gregory v UK* (1998) EHRR 577

¹¹⁷ *Trial by Jury*, p 160

attends in judgment, not only upon the accused, but also upon the justice and humanity of the law....”¹¹⁸

100 The *Clive Ponting*, and *Randle and Pottle* cases and, more recently, a number of acquittals in cases of alleged criminal damage by anti-war and environmental campaigners cases may be modern examples of juries exercising such ‘dispensing’ ability. But not all perverse verdicts have the attractive notion of a ‘blow for freedom’ that many attach to them. There are other prejudices in the jury room that may lead to perverse acquittals, for example, in sexual offences where the issue is consent or in cases of serious violence where a lesser verdict than that clearly merited on the evidence may be returned. There may also be perverse convictions based, for example, on irrelevant factors or irrational argument which, because of their undetectability, are not capable of being corrected on appeal.

101 However, although juries may have the ability to dispense with or nullify the law, they have no right to do so. Indeed, it is contrary to their oath or affirmation “faithfully [to] try the defendant and give a true verdict according to the evidence”. But, at present there is no procedural means of stopping them exercising their ability to return what in law may be a perverse verdict of not guilty¹¹⁹ or, to the extent that it is undetectably perverse, of guilty.

102 Dr Glanville Williams has pointed out that, though juries had long had this ability, there was no evidence of their wide use of it:

“Most of the great pronouncements on constitutional liberty, from the eighteenth century onwards, have been the work of judges, either sitting in appellate courts or giving directions to juries. The assumption that political liberty at the present day depends upon the institution of the jury ... is in truth merely folklore.

The notion that an English jury will, as anything like a regular matter, take the law into its own hands and acquit in defiance of the judge’s direction upon the law rests on a misapprehension of its function. The English jury is a trier of fact only

A lawyer, if he is true to his calling, must have some reservations about any instance whereby jurymen gain applause by disregarding their oath to give a true verdict

¹¹⁸ *Writing by Candlelight*

¹¹⁹ see Sir Patrick Devlin, *Trial by Jury*, pp 84 and 90-91, citing Sankey LC in *Woolmington v DPP* [1935] AC 462, at 480, and Lord Mansfield CJ and Willes J in *R v Shipley* (1764) 4 Doug 171, at 176 and 178 respectively; and see Holmes J, giving the judgment for the majority of the US Supreme Court in *Hornig v District of Columbia* 1254 US 135, at 138 (1920): “The jury has the power to bring in a verdict in the teeth of both law and facts”

according to the evidence. If we really wish juries to give untrue verdicts, why do we require them to be sworn?"¹²⁰

103 Other distinguished jurists have spoken in similar vein. Mr Justice Holmes, writing in 1897, spoke of "growing disbelief in the jury as an instrument for the discovery of truth" and described its use as "to let a little popular prejudice into the administration of law - (in violation of their oath)".¹²¹ Hermann Mannheim, a leading criminologist of the last century, was more forthright, opining that jury trial had in modern times replaced the tyranny of the judge by that of the juror:

"... flagrant mistakes, in particular unjustifiable verdicts of 'not guilty', are bound to occur only too often. The layman may be inclined to regard this as one of the chief advantages of the system that it can act as an unofficial pardoning agency. However, if this is the idea it should be clearly expressed, instead of being disguised as justice".¹²²

104 Despite the illogicality of this 'dispensing' ability of juries, I can understand why there is such an emotional attachment to it. It has been an accepted feature of our jury system for a long time and is seen as a useful long-stop against oppression by the State and as an agent, on occasion, of law reform. And illogicality is not necessarily an obstacle to the retention of deeply entrenched institutions, especially where, as here, there may be infrequent recourse to them. There is the further point that under our present procedures the courts cannot prevent juries from acquitting perversely; as yet their verdicts are unreasoned and there is no appeal against an acquittal.

105 However, I regard the ability of jurors to acquit, and it also follows, convict,¹²³ in defiance of the law and in disregard of their oaths, as more than illogicality. It is a blatant affront to the legal process and the main purpose of the criminal justice system - the control of crime - of which they are so important a part. With respect to Lord Devlin, I think it unreal to regard the random selection, not election, of 12 jurors from one small area as an exercise in democracy, 'a little parliament', to set against the national will. Their role is to find the facts and, applying the law to those facts, to determine guilt or no. They are not there to substitute their view of the propriety of the law for that of Parliament or its enforcement for that of its appointed Executive, still less on what may be irrational, secret and unchallengeable grounds. Moreover, I do not see why this form of lay justice, responsible for only about 1% of criminal cases, should be distinguished in this way from the lay justice administered by

¹²⁰ *The proof of guilt*, p 197, and see generally at pp 195-200

¹²¹ Holmes-Pollock Letters, Vol I, p 74, Belknap Press, Harvard

¹²² *Criminal Justice and Social Reconstruction*, p 246, Kegan Paul, Trench, Trubner & Co Ltd, [1946]; see also Sir Louis Blom Cooper, QC, *Article 6 and Modes of Criminal Trial*, pp 1-19

¹²³ see Baldwin and McConville, *Jury Trials*, at 128

magistrates who, like their professional colleagues, are accountable for any perversity revealed on appeal by way of case stated.

- 106 Finally, the ability of juries to ignore their oaths by entering perverse and publicly unreasoned verdicts of acquittal, or guilty, is vulnerable to Article 6 and our own independent move towards reasoned judgments. If, as I have mentioned and consider again in Chapter 11, judges were able to require juries to give reasoned verdicts, the scope for perverse verdicts, one way or the other, could be significantly and justly reduced by opening them up to appeal, a matter that I consider in Chapter 12.
- 107 In the meantime, I consider that the law should be declared, by statute if need be, that juries have no right to acquit in defiance of the law or in disregard of the evidence. I consider also that judges and practitioners in their conduct of criminal cases should acknowledge that truth and not invoke the ability of a jury to defy the law or breach their oath in that way.

I recommend that the law should be declared, by statute if need be, that juries have no right to acquit defendants in defiance of the law or in disregard of the evidence, and that judges and advocates should conduct criminal cases accordingly.

- 108 If that is too great a shock to the system, then should the law— and the juror’s oath - be more honest in their form and application? Should we provide juries with an express power of dispensation or nullification, instead of just letting them get away with it,¹²⁴ and should jurors undertake to give a verdict according to the evidence or their conscience? In at least two States in the United States, Indiana¹²⁵ and Maryland,¹²⁶ their respective Constitutions come close to it in conferring upon the jury the right to determine the law and the facts. To appreciate the full impact of such a step, one has only to consider the sort of direction that it would require judges to give to juries, namely that they need not convict if they disagree with the law or with the decision to prosecute. Just articulating the direction brings home the enormity of such a possible clarification of the law, but as one distinguished academic has asked,¹²⁷ “what other way is there for an honest system to behave?”

¹²⁴ for a useful discussion of the arguments in favour of an express power of nullification, see MDA Freeman, *Why Not a Jury Nullification Statute Here Too?*, (1981) 131 New Law Journal 304, referring to the Indiana and Maryland Statutes

¹²⁵ Indiana Code Title 35, Art 37, Ch 2, s 2(5)

¹²⁶ Maryland State Constitution, Declaration of Rights, Art 23

¹²⁷ Professor Edward Griew, *Summing Up the Law*, [1989] Crim LR 768, at 779-780

TRIAL OF CASES ON INDICTMENT WITHOUT A JURY

109 I have considered a number of proposals affecting the trial of cases presently triable by judge and jury. In doing so, I have, as I have already said, taken as given the distinction between what are presently known as indictable offences (offences triable by judge and jury), and summary offences (offences triable in the magistrates' court by a District Judge or magistrates). I have also accepted the need for continuance of a broad group of hybrid or 'either-way' offences (offences that may be tried on indictment or summarily). The following are the main proposals for change:

- Defendant's option for trial by judge alone - to enable the defendant to opt for trial by judge alone, 'jury-waiver' or 'bench trial' as it is known in the United States and Canada;
- 'Either-way' offences - in cases triable either on indictment or summarily – to empower the court, instead of the defendant, to decide where and how he is to be tried;
- Fraud and other complex cases – in serious and complex fraud cases - to enable the court to provide for their determination without a jury;
- Young defendants – in cases against young defendants - to extend the existing provision for trial without jury; and
- Fitness to plead – to amend the law to require a judge, instead of a jury, to determine the issue of fitness to plead.

Defendant's option for trial by judge alone

110 The Runciman Royal Commission did not mention 'jury waiver' in its Report, that is, permitting defendants, with the consent of the court after hearing from both sides, to opt for trial by judge alone. Although it has not figured prominently in contributions to the Review, I have been struck by its widespread use in other common law jurisdictions modelled on our system of trial by judge and jury. Its popularity lies, in part in its provision of a simpler, speedier and cheaper procedure than trial by jury, and in part in what trial by judge and jury can never provide, a fully reasoned decision. It is widely used in the United States and also, in various forms in Canada, New Zealand and a number of Australian States.

111 In the United States, where all defendants charged with an offence carrying more than 6 months' imprisonment have a constitutional right to trial by jury, most jurisdictions, including the federal courts, permit them to waive jury trial with the agreement of the court and prosecutor. It is estimated, on patchy and imperfect data, that in 1988, expressed as percentages of the total numbers of felony trials in different states, non-jury trials accounted for between 2% to

over 70% and that in 1993 14% of all serious federal cases were tried without a jury.¹²⁸

- 112 Different jurisdictions and local cultures may have provided their own imperatives for this form of trial. For example, the well-developed systems of plea bargaining in United States have encouraged its use where no bargain is achievable and the parties are content that a judge should be left to determine the issue of guilt and assess the seriousness of the case and the appropriate sentence – sometimes called the slow plea of guilty”.¹²⁹ But in the United States and in the Commonwealth jurisdictions I have mentioned there are a number of other reasons for defendants opting for such a mode of trial over a wide range of offences. These include:
- those who believe themselves to be innocent of the offence charged, often in serious and factually or legally complex cases, and who are anxious that the tribunal will be able to understand their case;
 - defendants with ‘technical’ defences who wish a verdict to be accompanied by appealable reasoning or who, in any event, want a fully reasoned decision;
 - defendants who are charged with offences that attract particular public opprobrium, such as sexual and/or particularly brutal violence, or from minorities or sects who may consider a judge to be a more objective tribunal than a jury;
 - where there has been much publicity adverse to the defence;
 - defendants in cases turning on alleged confessions or identification, where judges tend to be more rigorous in the exclusion of alleged confession than when trying cases with a jury, and in the rejection of evidence of purported identification than juries tend to be; and
 - lower tier professional judges, for example, the Provincial Judge in Canada, are local and well-known to practitioners who can judge their ability or otherwise to try cases on their own both competently and fairly.
- 113 The Diplock Courts in Northern Ireland and their counterparts south of the border are nearby examples of how trial by judge alone can work and earn a fair degree of public acceptance, albeit as a necessary measure to overcome the threat of intimidation of juries in the trial of terrorists.¹³⁰ The Diplock Courts stem from the recommendations of the “Commission on Legal Procedures to Deal with Terrorist Activities” under the chairmanship of Lord Diplock which, in 1972, recommended the abandonment of trial by judge and jury for serious terrorist crimes.¹³¹ The Northern Ireland (Emergency

¹²⁸ *Rethinking Adversariness in Nonjury Criminal Trials*, Doran, Jackson and Seigel, *American Journal of Criminal Law*, (1995) Vol 23, 1, at pp 8-11

¹²⁹ in particular, in Philadelphia; see *Is Plea Bargaining Inevitable*, Stephen J Shulhofer, 97 *Harvard L R.* 1037

¹³⁰ see Jackson and Doran, *Judge without Jury: Diplock Trials in the Adversary System*, 1995, Clarendon Press

¹³¹ Cmnd 5185

Provisions) Act 1973¹³² introduced a system of ‘scheduled’ - terrorist - offences in respect of which the court may direct trial by judge without jury. With some amendments the system has operated now for nearly 30 years and, despite the public commitment to return to trial by judge and jury in all cases,¹³³ looks likely to continue at least until the emergency is lifted.¹³⁴ I say ‘at least’ because Professors John Jackson and Sean Doran, in their seminal study in 1995, *Judge without Jury*,¹³⁵ have presented a strong case for optional trial without jury to become a permanent part of the criminal justice system, not just a temporary and necessary response to terrorist intimidation.

114 I am not concerned with the reason for suspension of jury trial in certain cases in Northern Ireland, but as to how the system operates with a judge alone. There are two important ways in which it provides safeguards not found in the unreasoned, and, therefore, not readily appealable, verdict of the jury. The first is that the trial judge, if he convicts, is required, to give a reasoned judgment identifying the principles of law that he has applied and his findings on the evidence leading to conviction. If he acquits he also normally provides such a judgment. The second is that the person convicted has an absolute right of appeal to the Northern Ireland Court of Appeal against both conviction and sentence. There is a further important feature, namely that the trial process, so far as it can, follows the normal rules of procedure and evidence in a jury trial.¹³⁶

115 Whilst the quality of justice dispensed by the Diplock judges has not been without criticism, Doran and Jackson, have noted that its non-partisan focus has been more on their handling of the law than on their findings on the evidence.¹³⁷ There is also the phenomenon similar to that noted in North American jurisdictions that judges tend to be more rigorous in the exclusion of alleged confession statements than when trying cases with a jury and in the rejection of evidence of purported identification than juries seem to be from what some gather from their verdicts.

116 In my view, there is a strong case for the introduction of a system permitting defendants to opt for trial by judge alone, both in cases in the Crown Court and in those which, if my recommendations in Chapter 7 are adopted, would be tried in the District Division. It is for consideration whether it should apply to all indictable offences as it has done in Canada since 1985,¹³⁸ or

¹³² see now the Northern Ireland (Emergency Provisions) Act 1996, in particular, ss 10 and 11

¹³³ see *Review of the Criminal Justice System in Northern Ireland*, March 2000, HMSO, para 7.3

¹³⁴ see now the Terrorism Act 2000 which, by section 75, preserves the trial by judge alone for scheduled offences in Northern Ireland

¹³⁵ (Clarendon Press, 1995); see also *The Judicial Role in Criminal Proceedings*, a collection of essays edited by Jackson and Doran (Hart Publishing, 2000)

¹³⁶ though the Northern Ireland Office has recently recommended some changes in the rules of evidence before Diplock Courts

¹³⁷ see footnote 130

¹³⁸ Canadian Criminal Code, RSC 1985, C-46, ss 473, 476

exclude the most serious as in New Zealand where offences carrying a maximum of 14 years imprisonment or a mandatory life term are excluded.¹³⁹ It seems to me that the interest of the public¹⁴⁰ as well as that of the defendant would be better protected by letting the judge decide on a case by case basis whether to accede to a defendant's option for trial without jury rather than by imposing some general statutory limit on offences to which the option could apply. The judge should decide only after hearing representations from both sides; I would not go further and make the defendant's option subject to the consent of the prosecution as in most United States jurisdictions, including the Federal Courts, or even for the most serious offences, as in Canada. By the same token, as in New Zealand,¹⁴¹ the judge should be entitled to override the defendant's wish for trial by judge alone if he (the judge) considers that the public interest requires a jury, for example, in cases of certain offences against the State or public order.

117 In short, trial by judge alone, if defendants wish it, has a potential for providing a simpler, more efficient, fairer and more open form of procedure than is now available in many jury trials, with the added advantage of a fully reasoned judgment. I should add that under such a system, in the event of a conviction by a jury where the defendant has not opted for trial without jury, I can see no basis for any Article 6 challenge that he might wish to make based on the lack of public reasoning in the jury's verdict.

118 There are, no doubt, all sorts of practical questions that would require careful attention if such a system were adopted. One of them is the time at which the defendant should exercise the option, so as to prevent 'judge-shopping'. In Western Australia, for example, he is required to opt before allocation of the trial judge.¹⁴² In the system that I have in mind for trial of indictable offences,¹⁴³ whether for trial in the Crown or District Divisions of a new unified Criminal Court, this should be early in the preparation for trial, by the pre-trial assessment at the latest. Procedures would have to be introduced to ensure that defendants are fully advised beforehand of the significance of opting for trial by judge alone. They should also be allowed a short period after doing so within which they could change their minds, as in Canada.¹⁴⁴ There is also the problem of co-defendants opting for different modes of trial. There are at least three possible solutions: first, the New Zealand solution, that all must opt for trial by judge alone before the judge can consider it; second, the judge can deal with it on a defendant by defendant basis, ordering separate trials as necessary; and third, give the judge a general discretion after

¹³⁹ Crimes Act 1961, ss 361 A-C and 361B(5); and see generally the New Zealand Law Commission's Report 69, *Juries in Criminal Trials*, Wellington, NZ February 2001, paras 58-71

¹⁴⁰ see *Brown v R* (1986) 160 CLR 171, cited in Doran & Jackson, *The Case for Jury Waiver* [1997] Crim LR 155, at 164

¹⁴¹ though the New Zealand courts generally assume that the defence is the best judge of the interests of justice as far as the accused is concerned; see *R v Narain* [1988] INZLR 580, at 589

¹⁴² Western Australia Criminal Code, s651A

¹⁴³ see Chapter 10, paras 198 - 235

¹⁴⁴ Canadian Criminal Code

hearing representations from all the parties. The principled and practical answer, it seems to me, is most likely to be the New Zealand rule, all or none, unless independently of the question of choice of forum, there is a good case for separate trials. This is all part of the topic of allocation of cases to the appropriate level of court, to which I return in Chapter 7.¹⁴⁵

I recommend that defendants, with the consent of the court after hearing representations from both sides, should be able to opt for trial by judge alone in all cases now tried on indictment (whether as now, in the Crown Court or, if my recommendations in Chapter 7 for a new unified Criminal Court are adopted, in the Crown or District Divisions).

‘Either-way’ offences

119 One of the major issues in the Review has been the trial of ‘either-way’ cases, those triable either by a judge and jury or summarily. There are two competing and strongly held views. The first is that too many trivial cases not meriting trial by judge and jury are taking up the resources of the Crown Court when they could be tried more speedily and economically, and just as fairly in the magistrates’ courts. The second is that trial by judge and jury is the fairest, if not the only fair, form of trial in our system of criminal justice and that no inroads should be made on defendants’ present right to it; some have even suggested that it should be extended to all criminal offences carrying a custodial sentence, however short. This conflict has given rise to a number of questions:

- whether the ‘either-way’ regime should be replaced by one in which all or some offences presently subject to it are dealt with by one form of process, whether by judge and jury or by magistrates sitting summarily with enhanced jurisdiction¹⁴⁶ or in a new intermediate jurisdiction consisting, say, of a District Judge sitting on his own or with magistrates;
- whether, if the present system is to continue, it should be modified by re-classifying some of the present ‘either-way’ offences as indictable only or as summary offences;
- whether, in addition or as an alternative to re-classification by offence, there could be re-classification of some offences according to their seriousness, say, by reference to the value of property stolen or damaged;¹⁴⁷ and

¹⁴⁵ paras 36 - 40

¹⁴⁶ say, as in the case of the youth court

¹⁴⁷ as has recently been done in relation to a few offences; see below, paras 127 and 132

- whether the present system should be modified so as to make the courts, not defendants, the arbiters of how they shall be tried, that is, to remove defendants' right to opt for trial by judge and jury in 'either-way' cases.
- 120 The main focus of the debate has been the last of these issues. It is plain that trial by judge and jury cannot reasonably be extended to all offences however trivial, even though conviction of some summary offences could, according to an accused's circumstances, be very damaging to his reputation or livelihood.¹⁴⁸ Some system of allocation must be made according to, among other matters, the seriousness of the offence. And in many of them, for example, theft, handling, obtaining by deception, various forms of assault, the range of seriousness is great. The need for a system of allocation remains and is distinct from the introduction of an intermediate tier of jurisdiction in the form of a District Division of a new unified Criminal Court that I recommend in Chapter 7. As to re-classification in whatever form, the historical emergence of the present category of either way offences shows it can be done,¹⁴⁹ and there might be scope for some reconsideration of the present list. But it would still be a rough and ready division that would not provide a definitive solution to the main debate on a case by case basis for those offences remaining on the list. In my view, both principle and practicality dictate that the fourth issue, who should decide how these either way cases are tried, is the critical one for determination.
- 121 There are three possibilities: the prosecution, as in a few common law jurisdictions, including Scotland and Canada; the court, as in most common law jurisdictions; or the accused, as in England and Wales - possibly, the only common law jurisdiction to accord him that privilege.
- 122 Few, if any, have suggested in the Review that the Crown Prosecution Service should determine the matter. Any analogy with the Scottish system would be misleading, given its great differences from ours. There, neither the court nor the defendant has any say in the matter. The prosecutor, as "the master of the instance", decides on the mode and venue of trial (save in cases of very serious offences such as murder or rape which must go to the High Court or minor offences which are reserved for the Sheriff Court). The judge of the lower court is a professional judge, a sheriff whose custodial sentencing jurisdiction in summary matters is normally limited to 3 months; and who has no power, on summary conviction of a defendant, to commit him to a higher court for sentence. The Crown Prosecution Service, by contrast, lacks the authority of the Procurator Fiscal, both legally, historically and popularly; it shares its decisions as to prosecution with local police forces, its function being essentially one of review of charges initially preferred by them. The

¹⁴⁸ eg assault on a police officer, keeping a brothel, cruelty to animals, cruelty to or neglect of children, driving when unfit to drive through drink, unauthorised taking of a vehicle

¹⁴⁹ see paras 123 – 132 below

question is, therefore, whether the court should decide the matter on an objective basis or the accused should continue to be permitted to do so on a subjective basis.

The history of 'either-way' offences

123 Contrary to popular belief, including that of a number of distinguished legal practitioners who have contributed to the debate, until 1855 there was no right to claim trial by jury.¹⁵⁰ Before then there were just two categories of offence for this purpose, those triable on indictment and those triable summarily. The accused had no choice in the matter. The Administration of Justice Act of that year, the long title of which was “An Act for diminishing expense and delay in the administration of criminal justice in certain cases”, began the process of blurring the line between the two. It permitted magistrates to try simple larcenies. In the Summary Jurisdiction Act 1879 provision was made for summary trial of a range of indictable petty larcenies and like offences if the court thought it expedient to do so “having regard to the character and antecedents of the person charged, the nature of the offence, and all the circumstances of the case”, and if the accused consented.¹⁵¹

124 There were further considerable increases in the categories of indictable offences that might be tried summarily. The Criminal Justice Act 1925 so provided in a wide range of offences, for example, serious offences of larceny, offences against the person, including inflicting bodily harm, certain forgery offences and indecent assault on a person under 16. It followed the 1879 Act in including in the mode of trial criteria the circumstances of both the offence and of the accused:

“... the character and antecedents of the accused, the nature of the offence, the absence of circumstances which would render the offence one of a grave or serious character and all the other circumstances of the case (including the adequacy of the punishment which a court of summary jurisdiction has power to inflict) ...”¹⁵²

125 And subsequent statutes over the next forty or so years added more categories, including non dwelling house burglary and related offences, certain offences of forgery and indecent assault in 1962,¹⁵³ gross indecency between men in 1967¹⁵⁴ and dwelling house burglary other than where entry was obtained by

¹⁵⁰ save for children under the age of 16 charged with simple larceny; see Further Extension of Summary Jurisdiction in Cases of Larceny Act 1850, s 2

¹⁵¹ s 12 and Sch. 1

¹⁵² s 24

¹⁵³ Criminal Justice Administration Act 1962

¹⁵⁴ Sexual Offences Act 1967

force or deception in 1968.¹⁵⁵ Thus, there was a progressive growth throughout the last century of the number of indictable offences for which the option of summary trial was provided and, consequently, a corresponding statutory increase in the defendant's elective right to trial by jury in such cases.

126 The 1879 Act had also given the accused a right to claim jury trial in summary offences other than assault punishable with more than 3 months imprisonment.¹⁵⁶ And other statutes made certain offences triable either summarily or on indictment, some carrying a right to trial by jury and some not.

127 This muddle of various forms of hybrid offences persisted until the 1970s when the Home Secretary and Lord Chancellor appointed Lord Justice James to chair an Interdepartmental Committee on the Distribution of Criminal Business between the Crown Court and the magistrates courts. The Committee reported in 1975,¹⁵⁷ recommending that the unstructured legislative mix, largely directed to granting or extending summary jurisdiction to magistrates, should be replaced with the threefold classification of offences as summary, indictable and triable 'either-way' - now found in the magistrates' Courts Act 1980.¹⁵⁸ It also recommended a reduction in the number of Crown Court cases by re-classification of various 'trivial' offences as triable only summarily and certain indictable only offences as triable either way. The James Report in this respect was much criticised as an attack on civil liberties. Nevertheless, it led to some further changes, for example, some public order offences and criminal damage to a value of less than £200 became summary only offences. Petty dishonesty, however, remained triable either way. Later, the Criminal Justice Act 1988 downgraded a further three 'either-way' offences to summary only, namely common assault, taking a vehicle without consent and driving whilst disqualified, and raised the summary only level of value for criminal damage to £2,000.¹⁵⁹

The present law

128 The 1980 Act, as amended, lists about 30 species of 'either-way' offences, comprising about 700 individual crimes, ranging from public nuisance, a number of offences of violence, including threats to kill and inflicting grievous bodily harm, unlawful sexual intercourse with a girl under 16,

¹⁵⁵ Theft Act 1968

¹⁵⁶ s 17

¹⁵⁷ Cmnd 6323

¹⁵⁸ s 17 and Sched I

¹⁵⁹ the effect of which, as Professor Ashworth noted, was to reduce the Crown Court workload by about 6%; *The Criminal Process: An Evaluation Study*, p.259; see *Criminal Statistics for England and Wales (1989)*, para 6.12

indecent assault, theft, handling and related offences, most burglaries and thefts, certain frauds and forgery offences, violent disorder and affray, arson not endangering life and causing death by aggravated vehicle-taking. Even where, under the procedure that I outline in the next paragraph, an accused is tried and convicted summarily, the magistrates still have power to commit him for sentence to the Crown Court if then of the view that the proper sentence for it is beyond their powers.¹⁶⁰ Those are 6 months' custody and/or a fine of £5,000 for a single offence or 12 months for concurrent or consecutive sentences for two or more 'either-way' offences.¹⁶¹

129 Charges of 'either-way' offences must first be brought before the magistrates. In summary, the accused may elect trial on indictment and, if he does, they are bound to commit him for trial to the Crown Court. However, the legislative scheme is a little more complicated than that. Since the introduction of the plea before venue procedure in October 1997,¹⁶² the defendant is first asked whether he intends to plead guilty. If he so indicates, he has no right to elect trial in the Crown Court, but the magistrates may still commit him there for sentence if they consider their sentencing powers inadequate. In considering those powers they are required to take into account as a mitigating factor that he has pleaded guilty at that early stage.¹⁶³

130 If the defendant does not indicate a plea of guilty, magistrates must first consider, after hearing representations from both sides, whether they or the Crown Court should try the accused. In doing so, the Act gives them a broad discretion as to what is relevant. They are required to have regard to:¹⁶⁴

“...the nature of the case; whether the circumstances make the offence one of serious character; whether the punishment which a magistrates' court would have power to inflict for it is adequate; and any other circumstances which appear to the court to make it more suitable for the offence to be fixed in one way rather than the other”.

131 National Mode of Trial Guidelines originally issued by Lord Lane, Chief Justice, in 1990¹⁶⁵ indicated that the defendant's antecedents and personal mitigating circumstances were irrelevant to the decision. But the current (1995) version of those Guidelines for some unexplained reason, has removed the prohibition on taking account of previous convictions and personal

¹⁶⁰ originally in section 38 of the 1988 Act; now in section 3 of the Powers of Criminal Courts (Sentencing) Act 2000

¹⁶¹ ie for one 'either-way' offence and one summary the maximum aggregate would be 6 months; see generally the 1980 Act, ss 31 and 133

¹⁶² Criminal Procedure and Investigations Act 1996, s 49

¹⁶³ Powers of Criminal Courts (Sentencing) Act 2000, s 152, reflecting prior judicial practice; see *R v Rafferty* [1999] 1 Cr App R 235, CA

¹⁶⁴ s 199(3)

¹⁶⁵ (1991) 92 Cr App R 142

mitigation.¹⁶⁶ They now advise magistrates to assume that the prosecution version of the facts is correct, to consider committal for trial in cases involving complex questions of fact or difficult questions of law, and to consider their powers to commit for sentence if information emerges in the hearing leading them to conclude that they are inadequate. However, the practice is still to keep a defendant's criminal record, if he has one, from the magistrates at this stage. In the event of their learning of previous convictions and deciding, with his consent, on a summary trial, the matter would be listed before another bench.

- 132 If the magistrates decide that the alleged offence is more suitable for trial on indictment, the defendant has no further say in the matter and they then proceed to consider it as examining justices with a view to committal for trial.¹⁶⁷ If they decide that summary trial appears to be more suitable, they must inform the defendant, tell him that he has the option of summary trial or trial by jury and warn him that, even if he does consent to summary trial and is convicted, they may still commit him to the Crown Court for sentence.¹⁶⁸ Thus, it is only at that stage and in respect of those cases that the magistrates do not consider warrant trial by jury that the right of election arises. There are also two 'either-way' offences, criminal damage and aggravated vehicle-taking, where, if the damage caused does not exceed £5,000, the matter must be tried summarily.¹⁶⁹

Proposals for reform

- 133 As the James Committee noted,¹⁷⁰ the English system is unusual in allowing a defendant to choose his court of trial for certain offences. The Committee also observed that, although it was not possible to gauge the views of the public,¹⁷¹ the defendant's right of election had strong support from legal practitioners and organisations expressing a wider interest in the criminal justice system. The same is true today. The support is based principally on what has been variously described as a constitutional or fundamental right of the citizen to trial by jury. The other view, which is held by many judges and those closely involved in the administration of the criminal justice system, is that defendants' exercise of their right to elect trial by jury, for whatever reasons, brings to the Crown Court relatively minor cases that do not belong there. The result, it is claimed, is unjustifiable expense to the public, because trial in the Crown Court is much more expensive than before magistrates, and

¹⁶⁶ see Ashworth, *The Criminal Process: An Evaluation Study*, 260; the current edition of Blackstone, para D 37, and see S

White *The Antecedents of the Mode of Trial Guidelines* [1996] *Crim LR* 471

¹⁶⁷ s 21

¹⁶⁸ ss 19 and 20

¹⁶⁹ s 22 and Sched 2, as amended by the Criminal Justice and Public Order Act 1994

¹⁷⁰ Report, para 60

¹⁷¹ Report, para. 61

delay in the trial of other and more serious cases properly there. Like the James Committee, I have been unable to gauge from my Review what the public at large think about the issue.

134 It is instructive to see how the James Committee and the Runciman Royal Commission grappled with the question of who should decide where this intermediate class of cases should be tried, and why the former considered that the defendant should have the last word and the latter recommended that that the court should have it.

135 The James Committee, while acknowledging “weighty support” for the proposal that the magistrates’ court should take the decision, rejected it because: first, the difficulty it saw in devising criteria and their consistent application; second, it was unlikely to be acceptable to a wide section of the public; third, it would engender hostility of defendants towards magistrates; fourth, the proposed mode of trial procedure, including an appellate process, would be a potential cause of delay; fifth, most defendants who elected trial by jury did so because they thought they would get a fairer trial; and sixth, that, for the system to work at all, magistrates determining mode of trial would have to know whether the defendant was of good or bad character, which would be discriminatory.¹⁷² As Lord Ackner observed in the second reading of the Mode of Trial (No. 2) Bill in the House of Lords,¹⁷³ those considerations encapsulate the main arguments of the opponents of the Mode of Trial Bills 25 years later.

136 However, there have been some changes since the James Committee’s consideration of the matter. First, the statutory scheme subsequently introduced, and now found in the 1980 Act and in the National Mode of Trial Guidelines, establish detailed criteria and guidance for magistrates’ courts throughout the country. Second, the Committee, like the Review, was faced with two competing lobbies, but it is plain from its Report that, despite being unable to assess the weight of public opinion on the matter, it was strongly influenced by the importance that defendants attached to their right. On that somewhat one-sided basis it concluded that there was a risk of loss of public confidence in the system if so ‘highly prized’ a right were to be removed. Third as to the embarrassment for magistrates trying summarily a case in which they had refused a request for jury trial, I do not understand the problem. I cannot see why magistrates would be placed in an invidious position because defendants object generally to their courts, or to a magistrate personally unless there is a reasonable case making it undesirable for him or her to adjudicate in the case. Fourth, as to delay from multiplicity of procedures, all the procedures mentioned, save appeal, are a feature of the

¹⁷² James Committee Report, para 59

¹⁷³ Hansard, HL, 28 September 2000, cols 977-981

system now found in the 1980 Act. And, fifth, as to ‘two-tier’ justice, from 1855, until at least 1980¹⁷⁴ both as a statutory requirement and as a matter of practicality, a defendant’s character, good or bad, was a relevant consideration in magistrates’ decisions whether to commit a defendant for trial by jury, regardless of his wish for summary trial.

137 By the early 1990s when the Runciman Royal Commission was at work, over 35,000 defendants elected jury trial - about 37% of all the ‘either-way’ cases then committed to the Crown Court. The Commission, assisted by research commissioned by the Home Office¹⁷⁵ found that those electing jury trial had one or more of three main objectives: first, a wish to put off trial with a view to securing in the meantime the advantages of a more liberal prison regime which would count towards a sentence if convicted and imprisoned; second, a well-founded belief that there was better chance of acquittal in the Crown Court than before magistrates; and third, a mistaken belief that, if convicted, the sentence would be lighter.¹⁷⁶ Of those three the most prominent in the debate was the belief that there was a better chance of acquittal before a jury. However, the Commission noted, in mistaken reliance on the Home Office research, that most of those who elected trial eventually pleaded guilty in the Crown Court - 70% to all charges and a further 13% to some charges. I say ‘mistaken’ reliance on that research because, as Professor Lee Bridges of Warwick University has pointed out,¹⁷⁷ the sample upon which it was based did not include those who elected trial in the Crown Court and were eventually acquitted.

138 The Runciman Royal Commission recommended the removal of the defendant’s entitlement to insist on jury trial in ‘either-way’ cases, though retaining his right to make representations on the matter. It did so as a matter of principle:

“...We do not think that defendants should be able to choose their court of trial solely on the basis that they think that they will get a fairer hearing at one level than the other...Nor in our view should defendants be entitled to choose the mode of trial which they think will offer them a better chance of acquittal any more than they should be able to choose the judge who they think will give them the most lenient sentence”.

As to loss of reputation, the Commission regarded it as relevant, though often only to alleged first offenders, and as only one of the factors to be taken into account.

¹⁷⁴ see para 123 above

¹⁷⁵ Carol Hedderman and David Moxon, *Magistrates Court or Crown Court? Mode of Trial Decisions and Sentencing*, Home Office Research Study No. 125, (HMSO 1992)

¹⁷⁶ *Royal Commission on Criminal Justice*, Ch 6, paras 6 - 8

¹⁷⁷ in *Limiting the right to jury trial – half truths and false assumptions*, a paper submitted to the Review in February 2000, p 2

139 The Runciman Royal Commission's proposed solution was that, where both sides agreed on summary trial, the magistrates should try it, and similarly, where both sides agreed on trial by jury, it should go to the Crown Court. When there was a dispute, it said that the magistrates should determine the venue, having regard to the existing statutory criteria and, in addition, such matters as the defendant's reputation and record, the gravity of the offence, the complexity of the case and its likely effect on the defendant. The result, the Commission expected, would be fewer mode of trial hearings and fewer cases going to the Crown Court, allowing it to concentrate on more serious cases.¹⁷⁸

140 There was much hostile reaction to these recommendations, based mainly on the belief that they represented a threat to a constitutional right to trial by jury. In the result, the Government of the day took no action on the matter. However, there continued to be much discontent from many involved in the criminal justice process about the perceived waste of public time and money on comparatively trivial 'either-way' cases in the Crown Court, and also about the consequent delays to other more serious work awaiting trial there. In 1997 Martin Narey, a senior Home Office civil servant, looked at the issue again as part of his Review of Delay in the Criminal Justice System. His view was similar to that of the Runciman Royal Commission, though more robust. It was that magistrates, not a defendant, should decide his court of trial, albeit after hearing representations from both sides. He differed from the Runciman Commission over its recommendation that magistrates should be bound by any agreement between the parties:

“A large majority of defendants electing trial plead guilty at the Crown Court. A substantial proportion of elections are little more than an expensive manipulation of the criminal justice system and are not concerned with any wish to establish innocence in front of a jury. Those defendants who have a valid reason for electing, such as the potential damage to their reputation, should be able to make their case to magistrates who should be free to commit the case to the Crown Court. But the automatic defendant veto on the magistrates' decision on mode of trial should be removed”.¹⁷⁹

141 The present Government, supported by the then Lord Chief Justice, Lord Bingham of Cornhill, the former Master of the Rolls, Lord Donaldson of Lynton, almost all the High Court Judges who try crime, the Magistrates' Association and the Police, accepted the broad thrust of the Runciman and Narey recommendations that courts, not defendants, should decide where all 'either-way' cases should be tried.¹⁸⁰ In November 1999, just

¹⁷⁸ *Royal Commission on Criminal Justice*, Chapter 6, paras 13 and 14

¹⁷⁹ *Review of Delay in the Criminal Justice System*, Chapter 1, p 2 and Chapter 8, p 33

¹⁸⁰ see Hansard, 20th January 2000, p 1256, col 1

before establishing this Review, the Government introduced in the House of Lords the first of two unsuccessful legislative attempts to remove the defendant's ability to elect trial in the Crown Court, the Criminal Justice (Mode of Trial) Bill. In the explanatory notes to the Bill, it estimated its likely financial effects as an annual reduction of about 12,000 Crown Court trials producing a net yearly saving of £105 million. By this time, probably as a result of the introduction of the plea before venue system in 1997 and the courts' increased use of their long established practice of reflecting such early pleas of guilty in their sentences,¹⁸¹ the annual number of those electing trial in the Crown Court had reduced from about 35,000 at the time of the Runciman Royal Commission to about 18,500.

142 The Government's proposal was that magistrates should determine mode of trial (subject to a right of appeal to the Crown Court) in the light of representations from both sides and of a number of familiar, if not all previously so explicitly identified, considerations. These were the nature and seriousness of the case, their powers of punishment, the effect of conviction and sentence on the defendant's livelihood and reputation and on any other relevant circumstances. It did not specifically include in this list consideration of a defendant's record, as previous Acts had done, for example, the 1879 and 1925 Acts. But it appears from the explanatory notes to the Bill that its draftsman envisaged that previous convictions would be relevant to the issue of a defendant's livelihood and reputation by way of rebuttal or explanation of anything that he might say about that. The only new thing about those two criteria was their express mention, for they had been implicit in the various formulations since at least 1879 of matters for magistrates to consider when determining, *inter alia*, the adequacy of their sentencing powers in the event of conviction.

143 The Bill and its successor were hotly opposed by the majority of legal practitioners undertaking criminal work,¹⁸² major civil liberties organisations¹⁸³ and ethnic minority groups.¹⁸⁴ The express mention of a defendant's livelihood and reputation was a particular target for criticism in the House of Lords as creating 'two-tier justice', the argument being that it would lead to magistrates' courts discriminating against the poor or unemployed and in favour of defendants with higher economic or social status. The Bill had two other features that were to add to the controversy. First, it contained no proposal to abolish magistrates' power to commit defendants for sentence in 'either-way' cases after trying and convicting them summarily. It was argued that if defendants know they are at risk of ending up in the Crown Court anyway, it is likely to discourage a significant number

¹⁸¹ see also Criminal Justice and Public Order Act 1994, s 48(1) and (2); now in Powers of Criminal Courts (Sentencing) Act 2000, s 152(1) and (2)

¹⁸² including the General Council of the Bar, the Law Society, the Black Lawyers' Association, the Legal Action Group

¹⁸³ including JUSTICE, Liberty and NACRO

¹⁸⁴ including the Commission for Racial Equality

of them from consenting to summary trial. Second, the Government, whilst disclaiming any great reliance on the £105 million savings that it claimed would result from its proposed reform, nevertheless engendered much debate about them. It transpired that the Government attributed about two thirds – (then about £66m) of the estimated savings to lower custodial costs because, it claimed, magistrates tend to sentence less heavily than the Crown Court for like offences.¹⁸⁵

- 144 The Bill failed in the House of Lords, largely on the central and vehement argument of its opponents that it would remove a long established and fundamental right of the citizen to trial by jury, but also on the complaint that it would create a ‘two-tier’ system of justice, unfairly favouring those of good position and reputation and, therefore, with much to lose, over others without those advantages. There was also much criticism of the proposed retention of magistrates’ right to commit for sentence and considerable questioning of the claimed cost savings.
- 145 Undaunted by that defeat, the Government, in February 2000, introduced, this time in the House of Commons, a further and modified version of the Bill, the Criminal Justice (Mode of Trial) (No. 2) Bill. There were four main changes.
- 146 The first was that, in an attempt to meet the criticism of ‘two-tier’ justice, the Government, not only removed the formerly proposed criteria of the defendant’s livelihood and reputation, but it also expressly excluded a discretion to consider any of his circumstances.¹⁸⁶ It did so by substituting for the various criteria in the first Bill “the nature of the case” “any of the circumstances of the offence (but not of the accused) which appears to the court to be relevant” and whether, having regard to those circumstances, “the punishment which a magistrates’ court would have power to impose for the offence would be adequate”. The second difference was that the new Bill did not speak of the seriousness of the offence, as both the first Bill had done and the 1980 Act does, only of its “circumstances”. The third was that it removed the mention of any other relevant circumstances, also present in the first Bill and the 1980 Act. And the fourth was that it introduced a new requirement that magistrates should give reasons for their decision. In short, the proposal, despite the welcome newcomer requiring reasons, was for a drastic reduction in the discretionary powers of magistrates in making mode of trial decisions, not only in comparison with the current statutory criteria but also with those introduced over 120 years before in the 1879 Act.

¹⁸⁵ the claim, which was based on a Home Office model of costs and flows developed in collaboration with the Lord Chancellor's Department and the CPS, was that those who elected trial were three times more likely to receive a custodial sentence than before magistrates and that Crown Court custodial sentences were two and half times as long as those imposed by magistrates

¹⁸⁶ thus, departing from the Runciman Commission's recommendation; see para 138 - 139 above

147 As before, the Government continued to rely, though with less emphasis, on the savings in custody costs that it claimed would result from more lenient sentencing in magistrates' courts than in the Crown Court. It also increased from 12,000 to 14,000, its estimate of the number of cases with which magistrates would deal instead of the Crown Court, presumably because of the narrower mode of trial criteria now proposed. As a result, it increased its total claim of savings from £105 million to £128 million and the custody savings component from £66 million to £84 million. It also emphasised, as it had done from the outset, the savings in other resources, principally Crown Court time, that would flow from enactment of its proposals.

148 This Bill was the subject of even more vociferous opposition, both in and outside Parliament. By dint only of a three line whip and the guillotine in the House of Commons, it made its way to the House of Lords, who again defeated it. Its opponents, and many of the first Bill's supporters, regarded it as even more flawed than the first in its specific exclusion from the mode of trial criteria of any of a defendant's personal circumstances. Some argued that, paradoxically, it would achieve the reverse of the first Bill that good reputation and bad character alike, depending on the circumstances, could be relevant to the mode of trial decision. Whereas, it was argued, the provisions of the first Bill would have been likely to discriminate in favour of those with an apparently good character, these could operate unfairly against those with a previous good or bad character, as neither was permitted to be a relevant consideration for magistrates in deciding whether, on summary conviction, their powers of sentencing powers would be adequate. The result, they maintained, would have been to deprive trial by judge and jury to many of those who, whether by election or not, are now committed to the Crown Court for trial. The reality, as Professor Lee Bridges has commented, would have been a dilemma for all concerned.¹⁸⁷

149 Again, undaunted by the Parliamentary reverse, the Government indicated that it would include the same or similar proposals in its future programme of legislation for introduction in the House of Commons and that it intended, if necessary, to use the Parliament Act 1911 to secure its enactment. However, such a Bill does not figure in the Government's present legislative programme.

Current committals to the Crown Court

150 Before turning to what I regard as the real issues in the Mode of Trial debate, I pause to attempt to put them in context. I say 'attempt' because there is a disturbing lack of current, comprehensive or well-based data bearing on the

¹⁸⁷ in *Jury Trial - a Challenge to Parliament*, p 3, a further paper submitted to the Review in March 2000

issue, a fruitful ground in itself for academic criticism.¹⁸⁸ I set out in Appendix IV to the Report the basic workload figures available to me during the Review. These indicate that ‘either-way’ cases are approximately one quarter of the total workload of the criminal courts and that around 11% of ‘either-way’ cases are committed to the Crown Court for trial. The Crown Prosecution Service estimates that about 30% of committals for trial take place are elective. 55% of defendants convicted by the Crown Court after committal for trial receive sentences which are within the powers of the magistrates’ courts.

- 151 Under the present statutory regime, it is not surprising that magistrates commit for trial many cases that they can try themselves. They are required under the Mode of Trial Guidelines to assume that the prosecution version of the facts is correct. They tend to be cautious as to the adequacy of their sentencing powers, and are more likely to be so where they may suspect but do not know that the defendant has a bad record. There are thus, as the Runciman Royal Commission observed,¹⁸⁹ already considerable inroads on the need for defendants to exercise their right of election and the contribution of that right to the Crown Court load.
- 152 There are a number of reasons why defendants opt for trial and, in the case of each, there is much dispute on inadequate statistics as to how important it is. I list the main reasons without attempting to express a view on the conflicting claims as to their relative importance.
- 153 Some defendants believe that they have a better chance of acquittal before a jury than before magistrates. This may be because they think Crown Court procedures and juries to be more favourable to the defence than magistrates. There are suggestions based on disputed statistics, that such belief is well-founded, namely that magistrates convict more readily than juries, or because juries are more gullible or sympathetic to them than magistrates would be. Why this should be so, it is difficult to understand unless, as a generality, magistrates are to be regarded as case-hardened and cynical in their work, in which case they should not be entrusted with summary cases either. Professor Michael Zander undertook for the Review a study of the minimum percentage required by magistrates and others involved in the criminal justice system of the standard of proof of sureness in criminal trials. Of those sampled, it showed that three quarters of both the general public sample and the magistrates’ sample indicated that they would need to be at least 90% sure before convicting. His conclusion was that “most people, whatever their role

¹⁸⁸ see, in particular, the many powerful criticisms of Professor Lee Bridges of Warwick University, of the Government's various figures in support of the savings it claims would result from its proposals, set out in various papers, including those referred to in footnotes 177 and 187 above

¹⁸⁹ Chapter 6, paras 4-19

and experience, take the business of convicting very seriously”, a view well supported in the case of magistrates by most contributors to the Review.

- 154 Defendants may hope that the prosecution will weaken with time or not proceed, say as the result of prosecution witnesses changing their mind or, for one reason or another, failing to attend the trial to give evidence. This is a particular and well-known hazard of Crown Court trials in certain areas, for example, in Liverpool and Manchester.
- 155 Some elect trial because they believe that they have been over-charged and that there is a better chance of pleading guilty to fewer or lesser charges after the Crown Prosecution Service have reviewed the indictment and the strength of its case in the Crown Court. There has undoubtedly been a good deal of overcharging leading to defendants electing to go to the Crown Court when otherwise they might have consented to summary trial. This is in part due to the difficulties that the Crown Prosecution Service has undergone in its first ten years, identified in, and now being remedied, as a result of, the Glidewell Report.
- 156 There are other factors. Some defendants, particularly those with bad records, elect trial in the Crown Court because they believe that the magistrates, if they convict them, are likely to commit them to the Crown Court for sentence in any event.¹⁹⁰ The availability of paper committal proceedings in which the prosecution case need not be tested encourages delay in defence preparation that election can accommodate. The structure of the present legal aid system perversely encourages such delay.¹⁹¹ Until recently, defendants have had an incentive to elect trial in the Crown Court because of the better procedures that it provided for advance disclosure of the prosecution case and of any unused material. However, this disparity has now been eroded by recent guidelines on prosecution disclosure issued by the Attorney General.¹⁹² Some defendants, in the exercise of their undoubted legal right to elect trial in the Crown Court, abuse the system in order to delay the trial or a plea of guilty, either to remain on bail or, where they are remanded in custody, in order to secure for as long as possible a more liberal prison regime than would otherwise have been permitted. While there will always be some who, for short-sighted reasons, want to put off the evil day, the sentence discount for early pleas made possible under the plea before venue system is likely to continue to reduce their number.¹⁹³

¹⁹⁰ see Home Office Research commissioned for the Runciman Commission

¹⁹¹ see Chapter 10 paras 13 - 27

¹⁹² November 2000

¹⁹³ there seem to be no national standards of privilege granted to remand prisoners; the nature and extent of them vary from prison to prison.

The issues

- 157 The debate in which parliamentarians, many of them experienced criminal practitioners, distinguished academics and persons from all walks of life, have engaged over the last year or so has been mired by a number of features.
- 158 First, many of those opposing the legislative proposals relied on over-emotive and legally and historically mistaken arguments exaggerating the status, longevity and extent of a defendant's elective right to trial by jury. Second, the form of the proposals distracted attention from the central issue of principle, namely who should decide where and how a defendant is to be tried. The express introduction of potential damage to livelihood and reputation to the mode of trial criteria in the first Bill followed by their exclusion, as part of any of the defendant's circumstances, in the second Bill was, to say the least, maladroit.
- 159 Third, the Government's claims of the financial and other savings its proposals would bring in the main lacked principle and in their entirety were highly speculative. They fell into two main categories. The first was savings in unnecessary cost and delay involved in committal and preparation for Crown Court trials which often resulted in sentences that the magistrates could have imposed. Second, there were the savings in the additional cost of custodial and other sentences that the Government claimed would otherwise have resulted from heavier sentencing by Crown Court judges than magistrates for like offences.
- 160 As to savings in remand time by avoiding unnecessary committals for trial, the Home Office claimed, in reliance on national figures for 1999, that, on average, it took three months longer for the Crown Court than magistrates' courts to deal with 'either-way' contested cases and that further improvements in the latter's performance were expected as a result of the Narey proposals which came into force in November 2000. Professor Lee Bridges has suggested¹⁹⁴ various inaccuracies and incorrect conclusions drawn by the Home Office as to likely savings in remand custody time. In particular, he has pointed out that getting rid of elective cases in the Crown Court would not make much of a dent in the remand costs resulting from late pleas of guilty because most of them come from the much higher proportion of non-elective cases that go there.
- 161 As to the claimed savings in custody costs, the Home Office relied on ten year old Home Office research before the Runciman Royal Commission that Crown Court Judges sentence far more heavily than magistrates in like

¹⁹⁴ in his paper submitted in the Review

cases.¹⁹⁵ Professor Bridges has also criticised this research as flawed in a number of important respects because of its authors' misunderstanding, or unfamiliarity with the workings of, the criminal justice system, and also because of the considerable reduction in numbers and proportion of 'either-way' defendants who now elect trial in the Crown Court.

- 162 There may be some differential in sentencing levels between the Crown Court and magistrates' courts for like offences committed by similar defendants in similar circumstances; that certainly seems to be the impression of many legal practitioners. But the extent of it today, in the absence of recent and well-based research must be speculative. In any event, I doubt whether the claimed savings of some £84m in additional custody costs is more than marginal when compared with the custody costs of all those convicted by the Crown Court for 'either-way' offences.
- 163 But, whatever the scope for debate about such matters, there is a fundamental flaw in the Government's reliance on arguments, well founded or not, that magistrates sentence less heavily than the Crown Court in like cases. The premise of the argument is that one or other part of the criminal justice system is not working properly; either Crown Court judges are sentencing too heavily or magistrates' courts are sentencing too leniently. The financial implications of this premise may be weakened by the suggestions of others that Crown Court juries are acquitting when they should convict and/or that magistrates are convicting when they should acquit. But whichever it is, the Government, in its abortive legislative attempts, clearly saw some advantage in what it perceived to be the cheaper option. The proper and principled approach would have been to investigate the extent, if any, of the claimed or assumed disparities in conviction and sentencing and to devise proposals to remove them rather than attempt to 're-arrange' the system to take advantage of them.
- 164 Fourth, the Government's proposals and various estimates of the likely effect of them were also flawed because they were advanced without regard to possibilities for wider reform, many known to be under consideration in this Review. Most important of these is the fundamental view urged by many, and which I recommend in Chapter 10, that all cases should start and finish in the same court (subject to appeal). Its application in this context would be the removal of committals for trial in 'either-way' cases, (as has now been done in indictable-only cases,) and abolition of committal for sentence in those tried summarily, replacing them with a procedure of initial allocation to the court that will both try and, if it convicts, sentence. Abolition of the committal for trial procedure would improve justice by reducing over-charging and shortening remand times, also saving money, including remand costs. Abolition of committal for sentence would remove the reason why

¹⁹⁵ Carol Hedderman and David Moxon, *Magistrates Court or Crown Court? Mode of Trial Decisions and Sentencing*, Home Office Research Study No. 125, (HMSO 1992)

many defendants presently elect trial in the Crown Court, namely because they feel that is where they will be sent for sentence in any event.

- 165 Other candidates for reform which affect the debate are: the sitting patterns of magistrates; making summary justice less summary by enabling them to examine cases more thoroughly, for example through better disclosure provisions; and possible reform of a perversely structured legal aid system that favours delay in getting to grips with a case.

Conclusions

- 166 In my view, a court, not a defendant, should decide how he is to be tried. For the following reasons, I agree with the main thrust of the Runciman and Narey recommendations to that effect. First, as I have said, “the right to trial by jury”, upon which opponents of the Government’s proposals stand, is not some ancient, constitutional, fundamental or even broad right of the citizen to jury trial. It began in the 19th century as an elective right to avoid the obligation of trial by jury in a limited number of indictable cases. It was a right to avoid, by consenting to summary trial in those cases, all the panoply, delay, risk of unjust conviction and heavy penalties that then went with trial on indictment. The development has to be seen in the context of the harsher criminal law and justice process of the day, in which most crimes were indictable and subject to severe punishment and in which the trial process provided very few of the protections currently afforded to defendants.
- 167 Second, in drawing a line between the two forms of trial the public has a legitimate interest in the financial and human cost of the criminal justice system and how best to apply its finite resources and with justice to all. It is a policy decision, according to the nature and seriousness of the offence, and in the light of the public interest, how different offences should be tried. Even if it can be said that those at risk of being sentenced to more than the maximum set by Parliament for magistrates courts are entitled to the ‘fairest’ form of trial,¹⁹⁶ there is still the question of where and how should Parliament draw the line. Some cases by their very nature justify the facilities and more searching pre-trial and trial procedures than magistrates’ courts can provide. Others do not. Similarly, it is implicit in a scheme of ‘either-way’ offences – whoever has the ultimate say as to venue – that, depending on the seriousness and other circumstances of the case, some cases do not merit the more elaborate, costly and time-taking procedures of the Crown Court. But

¹⁹⁶ eg Professor Lee Bridges in *Modernising Criminal Justice - Reform without Principle*, a talk given at the Bar Millennium Conference, London, 14th October 2000, p 10

permitting the law or courts to decide where defendants are to be tried would not, in itself, deprive defendants of a fair trial.¹⁹⁷

168 As to defendant's perceptions that juries acquit more readily than magistrates, even if that is so, it does not mean that juries' verdicts are 'correct' and decisions of magistrates are not. Nor, in itself, is it a sound reason for enabling defendants to opt for jury trial whenever they want. There are all sorts of reasons why, if it is the case, that juries may be more inclined to acquit. Just as it is said that magistrates may be case-hardened, so juries may be more gullible because they are new to the process. Their respective tasks are likely to be affected by the seriousness of the type and circumstances, and the degree of *mens rea*, of the offences with which they respectively deal. Before any firm conclusions on this issue¹⁹⁸ could be drawn there would need to be much more comprehensive and thorough research, with appropriately weighted comparisons according to offences and their circumstances than there has been so far.

169 I accept that perceptions matter if there is to be public confidence in the criminal justice system. But that works both ways. Many involved in or exposed to the criminal process consider that valuable time and resources of the Crown Court are being wasted on cases more suitable for trial by a District Judge or magistrates. Ethnic and other minorities, rightly or wrongly,¹⁹⁹ perceive themselves to have a better chance of acquittal in the Crown Court than before magistrates, because of initial overcharging²⁰⁰ and/or because they believe magistrates to be case-hardened and unsympathetic to them.²⁰¹ Young men also feel that juries, with their different social mix and age range, are more likely to understand and empathise with them. But, in my view, the proper response to such perceptions, if they can be justified, is to remedy any unfairness in the magistrates' courts, not to skew the system by providing a right to avoid them on the basis that they are unfair. As Professor Ashworth and others have urged, the focus should be to remedy any deficiencies in magistrates' justice through their selection, training and courtroom procedures, not in abandoning them for the Crown Court.²⁰² Public confidence in the system should be regarded as an outcome, not as a goal of a good criminal justice system. That, I take to be the thrust of the Macpherson Report in its identification of the need of every part of the criminal justice

¹⁹⁷ see Dr Penny Darbyshire, *The lamp that shows that freedom lives – is it worth the candle?*, [1991] Crim LR 740, at 741

¹⁹⁸ Ashworth, *The Criminal Process: An Evaluation Study*, pp 256-6

¹⁹⁹ as to which there is dispute on the statistics; see, eg, Roger Hood, *Race and Sentencing* (Oxford, Clarendon Press, 1992) and the Home Office 1999 publication under section 95 of the Criminal Justice Act 1991, *Statistics on Race and the Criminal Justice System*

²⁰⁰ see McConville, Sanders and Leng, *The Case for the Prosecution*, (Routledge, 1991); and Phillips and Brown, *Entry into the criminal justice system: a survey of police arrests and their outcome*, Home Office Research Study No 185, (1998)

²⁰¹ see eg *Ethnic Minority Defendants and the Right to Elect Jury Trial*, an examination by Lee Bridges, Satnam Choongh and Mike McConville of limited sample data from an Economic and Social Research Council study of decision making of ethnic minority defendants in the criminal justice system, prepared at the request of the Commission for Racial Equality

²⁰² *The Criminal Process: An Evaluation Study*, p.262; and see also Dr Penny Darbyshire *For the new Lord Chancellor – some causes for concern about magistrates* [1997] Crim L R 861-869

system to examine its policies and practices to assess whether their outcomes create or sustain patterns of discrimination.²⁰³

- 170 Third, I regard it as a matter of principle that the decision where a defendant should be tried is one for a court, not for the defendant. This is a decision in which the public as well as the accused have an interest, and the decision should be an objective one, bearing both in mind, not a subjective choice of the defendant based solely on his own self-interest. I respectfully adopt the following proposition of Lord Hardie, then the Lord Advocate, in the Committee stage of the first Mode of Trial Bill in the House of Lords:

“...in determining the appropriate forum for trial, an objective assessment founded on relevant and specified criteria would appear to be more just and equitable than one dependent on the subjective views and considerations of an accused. The objective approach balances the interests of the accused against the interests of society in general and victims and witnesses in particular.

What is essential in any system is that the various interests are balanced; that society’s interests, as represented by victims and witnesses, are balanced against the interests of the accused. But what must be ensured is that the accused is protected from the effect of arbitrary decisions. Who better to perform such task than an independent judiciary?”²⁰⁴

- 171 Accepting, as I do, the need for continuance of the broad division between indictable and summary offences and for an overlapping category of ‘either-way’, medium range, offences between the two, I consider that a magistrates’ court, not an accused, should decide which mode of trial is suitable for his case. However, given my recommendations in Chapter 7 for the replacement of the present dual system of courts with a unified Criminal Court consisting of three levels of jurisdiction, I consider that, where there is an issue between the parties as to venue, a District Judge should be entrusted with the decision; otherwise lay magistrates could deal with it. Both sides should have a right of appeal from the mode of trial decision to the Crown Court. It should be brisk and on paper and dealt with by a small panel of experienced Crown Court judges at each court centre, possibly nominated for the purpose. Though an appeal may add some cost and a day or two’s delay, it is valuable in two respects. First, it is a safeguard, particularly in borderline cases. Second, it should improve the quality and consistency of District Judges’ decisions. I return in more detail to the system of allocation in Chapter 7 when describing the new court structure that I have in mind.

²⁰³ para.45.24; see also para. 46.27

²⁰⁴ Hansard, HL, 20 January 2000, col 1285

172 Such a change, if accompanied by other reforms that I propose elsewhere in this Report, should provide a more just, expeditious and otherwise efficient criminal justice system. It should not significantly increase the potential number of proceedings or consign defendants to longer delays in disposal of their cases in any level of jurisdiction, as the critics of the Mode of Trial Bills claimed they would have done. It should achieve savings in the system overall and remove any need to continue the speculative and arid debate on the accuracy, adequacy and interpretation of statistics that the narrow focus of the Mode of Trial Bills engendered.

I recommend that:

- **in all ‘either-way’ cases magistrates’ courts, not defendants, should determine venue after representation from the parties;**
- **in the event of a dispute on the issue, a District Judge should decide;**
- **the defence and the prosecution should have a right of appeal on paper from any mode of trial decision on which they were at issue to a Circuit Judge nominated for the purpose, and provision should be made for the speedy hearing of such appeals;**
- **the procedure of committal of ‘either-way’ cases to the Crown Court for trial should be abolished and, pending the introduction of a system of allocation as part of my recommendations in Chapter 7 for a new unified Criminal Court, such cases should be ‘sent’ to the Crown Court in the same way as indictable-only cases; and**
- **the procedure of committal for sentence should be abolished.**

Fraud and other complex cases

The issues and the options

173 There has long been concern about the special problems posed for trial by jury in cases of serious and complex fraud. In recent years the increasing sophistication and complications of commercial and international fraud have

added to that concern. There are well-founded anxieties about possible injustice in the difficulties they pose for juries in understanding them and the enormous financial and other demands that jury trial imposes on the system and on all involved in it. This is not just a matter of expense and toil flowing from the use of procedures peculiar to jury trial in such difficult cases. The remorseless increase in the length of such trials over recent years has become a severe intrusion on jurors' working and private lives.²⁰⁵ It cannot be good for them or for justice.

- 174 At present the problem is compounded by the unrepresentative nature of juries, particularly in serious fraud and other complex cases. Judges are reluctant to require busy working people to prejudice their livelihoods or their employers' businesses by taking them from their work, frequently for months at a time. The Bar Council, while opposing any move away from jury trial in such cases, has acknowledged in its submission in the Review that it is difficult to find a juries for them which are a true cross-section of society. If, as I have recommended, steps are taken to ensure that juries generally are more representative of the broad range of skills and experience of the community, the hardships that such cases impose on many jurors would be greater.
- 175 Long serious fraud and other complex cases, or their prospect, are also often too much for defendants. As the Serious Fraud Office has commented in a paper submitted in the Review, ill health, or claimed ill health, is a particularly troublesome cause of substantial delay and, often severance. Such delay, when added to the already long incubation periods for these cases can then lead to applications to stay the proceedings for abuse of process.
- 176 In 1983 Lord Roskill was appointed to chair a Fraud Trials Committee to consider how more justly, expeditiously and economically these cases could be conducted. In 1986 the Committee reported, recommending a number of procedural changes in the trial of serious and complex fraud, many of which were implemented the following year in the Criminal Justice Act 1987.²⁰⁶ These included the establishment of the Serious Fraud Office and procedural and evidential reforms. In addition, a new regulatory framework, including the introduction of the Financial Services Tribunal, was introduced by the Financial Services Act 1986.
- 177 The majority of the Roskill Committee also recommended the replacement of juries for trials of serious and complex fraud by a Fraud Trials Tribunal

²⁰⁵ cf the comments of the New Zealand Law Commission on this aspect in its Report 69, *Juries in Criminal Trials*, February 2001, para 93, and its recommendation on p 54 that in all, save 'high tier' offences a judge should be empowered to order trial by judge alone in cases likely to exceed 30 days

²⁰⁶ *Fraud Trials Committee Report*, Chairman, Lord Roskill, PC, (HMSO, 1986)

consisting of a judge and a small number of specially qualified lay members.²⁰⁷ It was the most widely supported proposal of those who gave evidence to the Committee, the other three being special juries, trial by judge alone and trial by a panel of judges. One of its members, Walter Merricks,²⁰⁸ in a powerfully reasoned dissenting note, argued that there was no firm basis for removing the established right to jury trial in such cases. He said that, in the absence of general research into the workings of juries, the way forward was to simplify and otherwise improve trial procedures.

- 178 Mr. Merricks' dissent on this point was strongly taken up by the Criminal Bar, and the Government of the day put to one side the majority's proposal. It did so in part to see how far the recommended procedural changes would go in remedying the problems of handling these cases. But a number of ensuing high profile trials drew attention to continuing problems of manageability caused by their complexity and length. In more than one case that reached the Court of Appeal, the Court commented that such problems put at risk the fairness of trial, imposed great personal burdens on all those involved and made great demands on limited and expensive resources.
- 179 In 1993 the Runciman Royal Commission, whilst implicitly acknowledging the continuing problems, felt unable to make recommendations on the matter without the benefit of jury research which, it considered, was barred by section 8 of the Contempt of Court Act 1981.²⁰⁹
- 180 Since then, the debate has rumbled on, prompting the Home Office, in February 1998,²¹⁰ to issue a consultation document setting out four possible alternatives to jury trial in serious and complex fraud cases. These were special juries, a judge or judges alone or sitting with expert assessors, a 'Roskill' style tribunal and a single judge sitting with a jury on key issues for decision.
- 181 The arguments for and against the present form of jury trial in cases of serious and complex fraud have been canvassed many times. Arguments for, include:
- jury trial is a hallowed democratic institution and a citizen's right in all serious cases which necessarily include serious and complex frauds;
 - the random nature of selection of juries ensures their fairness and independence;

²⁰⁷ paras 8.47-8.51

²⁰⁸ Solicitor, then Secretary, Professional and Public Relations Committee of the Law Society

²⁰⁹ *Royal Commission on Criminal Justice*, Chapter 8, paras 76-81

²¹⁰ *Juries in Serious Fraud Trials*, February 1998

- mostly the question is one of dishonesty, which is essentially a matter for a jury who, by reason of their number and mix, are as well as, or better equipped than, a smaller tribunal, however professional, to assess the reliability and credibility of witnesses;
- there is no evidence, for example in the form of jury research, that juries cannot cope with long and complex cases or that their decisions in them are contrary to the evidence; on the contrary, most judges and legal practitioners' assessment, based on their trial experience, is that their verdicts are in the main 'correct'; and
- there is an openness and public intelligibility in the parties having to accommodate the jury's newness to the subject matter by presenting their respective cases in a simple and easily digestible form, and that there is scope for improvements in such presentation.

Arguments against, include:

- if jurors are truly to be regarded as the defendant's peers, they should be experienced in the professional or commercial discipline in which the alleged offence occurred;
- although the issue of dishonesty is essentially a matter for a jury, the volume and complexities of the issues and the evidence, especially in specialist market frauds, may be too difficult for them to understand or analyse so as to enable them to determine whether there has been dishonesty;
- the length of such trials, sometimes of several months, is an unreasonable intrusion on jurors' personal and, where they are in employment, working lives, going way beyond the conventional requirement for such duty of about two weeks' service;
- that has the effect of making juries even less representative of the community than they are already, since the court excuses many who would otherwise be able and willing to make short-term arrangements to do their civic duty;
- such long trials are also a great personal strain and burden on everyone else involved, not least the defendant, the victim and witnesses;
- judges, with their legal and forensic experience, and/or specialist assessors would be better equipped to deal justly and more expeditiously with such cases;
- that would also have the benefit of greater openness, since there would then be a publicly reasoned and appealable decision instead of the present inscrutable and largely unappealable verdict of the jury; and
- the length of jury trials in fraud cases is very costly to the public and also, because of limited judicial and court resources, unduly delays the efficient disposal of other cases waiting for trial.

182 I have considered these conflicting arguments with care. Like the Roskill Committee, I have concluded that those for replacing trial by judge and jury with some other form of tribunal in serious and complex fraud cases are the more persuasive. Indeed, they have become more pressing since the Committee reported, given the ever lengthening and complexity of fraud trials and their increasingly specialised nature and international ramifications. Moreover, the main basis for not implementing the Roskill Committee's recommendation for a Fraud Trials Tribunal, the hope that the procedural and evidential reforms in the 1987 Act would significantly reduce the problems of jury trial, has not been realised.

183 If I had to pick two of the most compelling factors in favour of reform, I would settle on the burdensome length and increasing speciality and complexity of these cases, with which jurors, largely or wholly strangers to the subject matter, are expected to cope. Both put justice at risk. The Director of the Serious Fraud Office has recently said that the average length of a serious fraud prosecuted by it is six months, which would come largely before a jury of "the unemployed or unemployable".²¹¹ I have considered the thoughtful submissions of the Criminal Bar Association, the Law Society, the Fraud Advisory Panel and some others that further improvements in the conduct and presentation of the issues and evidence in fraud trials could ease those difficulties.²¹² But, as the Criminal Bar Association has acknowledged in putting them forward, they are "no more than scratching the surface" on the general issue of the use of juries in such trials. The fact is that many fraud and other cases, by reason of their length, complexity and speciality, now demand much more of the traditional English jury than it is equipped to provide. The point that juries have not kept pace with modern requirements of the criminal justice system in this respect has been made in a number of recent writings and submissions to the Review.

184 I am firmly of the view that we should wait no longer before introducing a more just and efficient form of trial in serious and complex fraud cases. The main candidates are those considered by the Roskill Committee, namely: special juries, trial by judge alone, trial by a panel of judges and trial by a tribunal of a judge and lay members. As I have said, the Committee opted for a 'Fraud Trials Tribunal', which they recommended should consist of a High Court or Circuit Judge and two lay members drawn from a panel of persons with general expertise in business and experience of complex transactions.²¹³

²¹¹ The Times, 5th March 2001

²¹² ie proposals similar to those advanced by the Fraud Advisory Panel in October 1998 in response to the Home Office February 1998 Consultation Document (see para. [181] above), all or most of which I adopt in my recommendations in Chapter 11 for the conduct of jury trials generally

²¹³ paras 8.53-74

Special juries

185 This proposal would revive for a special category of criminal case an institution that was abolished in criminal and most civil cases in 1949,²¹⁴ and had been little used in crime for several decades before that. Although originally ‘special’ in the sense of being composed of persons with special qualifications, it had become by the early 19th century a jury with special social or property qualifications. If the institution were to be revived for fraud and, possibly, other complex cases, the first question would be the nature of the qualifications required for selection as a potential special juror. Presumably, in the context of fraud, they would need to include wide experience of business and finance. In other contexts, they could involve familiarity with medical and/or other scientific disciplines. But, as the Roskill Committee pointed out in rejecting this option,²¹⁵ it would be difficult to empanel a jury, even from such a restricted category, who would collegiately have the degree of specialist knowledge or expertise which, by definition, they would be required to have for the particular subject matter in each case. And, even if suitably qualified juries, maybe smaller than 12, could be found, it would be unreasonable to expect them to serve the length of time that many such fraud trials now take.

Judge alone

186 The Roskill Committee, whilst acknowledging that trial by judge alone is feasible in complex cases and that it would be the most economic way of dealing with them, was of the view that it would be burdensome to judges:

“... we think it would be desirable to avoid placing a judge in this position if, as we believe, there is a more suitable alternative. We should add that very few of those who submitted evidence to us supported the proposal that a judge alone should try complex frauds”.²¹⁶

187 It is difficult to understand why the Roskill Committee felt this way. It is a role to which judges are well accustomed in their civil jurisdiction,

²¹⁴ Juries Act 1949 s 18

²¹⁵ para 8.44

²¹⁶ para 8.46

particularly in commercial and chancery cases where they have to determine allegations of fraud and when the outcome of their findings, though not immediately causing loss of liberty, may be as or more catastrophic for the victim or fraudsman. It is true that the civil burden of proof is less than that in crime,²¹⁷ but that is an argument in favour, rather than against, reform in criminal cases. The criminal test of sureness of guilt is far less intellectually testing for the judge than the more finely balanced civil test of preponderance of probability.

- 188 Even when judges are sitting in crime they frequently have to make findings and reach value judgments on matters of fact that are critical to the outcome of the case. For example, they may have to rule on applications to stay the prosecution for abuse of process, or on the fairness of evidence on the question of its admissibility or, at the close of the prosecution case, on the sufficiency of evidence for it to continue. There is also long experience of judges as fact finders in terrorist cases in the Diplock Courts in Northern Ireland, and their counterparts in Republic of Ireland. When talking of the burden for judges of acting as fact finders in criminal cases, I do not believe the Roskill Committee can have had in mind the preparation of written judgments. The detailed directions of law and summary of the issues and evidence that such cases require are, or should be, a ready framework for judgment. It is only a short step, and one that should not cause any or any significant delay, for judges to turn them into reasoned judgments. Many judges who have made submissions to, or expressed views in, the Review have said that they would find their task in long and complex cases less burdensome without a jury. It is true that many also say that they enjoy the present luxury of not having to decide the issue of fact for themselves. But loss of luxury is one thing; treating its loss as a sufficient burden to hold back in appropriate cases from fixing on a more just and efficient system of trial is another.

Panel of judges

- 189 There has been little or no support for this option. I would not recommend it for the practical reasons identified by the Roskill Committee.²¹⁸ It would strain valuable and limited judicial resources. And to introduce a panel of judges would merely increase judicial expertise without, in the main, providing the specialist knowledge and experience required of fact-finders in such cases.

²¹⁷ though the more serious the allegation the more cogent must be the evidence to overcome the unlikelihood of what is alleged and thus to prove it; see per Ungood-Thomas J in *In re Dellow's Will Trusts* [1964] 1 WLR 451, at 455, cited with approval by Lord Nicholls in *In re H (Minors)* [1996] AC 563, at 586D-G

²¹⁸ para 8.47

Judge and lay members

- 190 The Roskill Committee favoured this model of a judge sitting with lay members²¹⁹ drawn from a panel of persons experienced in the world of business and finance. As I have said, it was the option most widely supported by those who gave evidence to the Committee. It envisaged that the judge would, in the main, sit and rule on his own on matters of law, procedure and the admissibility of evidence. On matters of fact he and each of the lay members would have the same vote; their decision could be by a majority, but the judge would give a single reasoned judgment of the tribunal.²²⁰
- 191 In my view, there is much to be said for a proposal of this sort. However, I share the ambivalence of many contributors to the Review who have looked for an alternative to jury trial, as to whether it should be trial by judge alone or sitting with lay members drawn from a panel of persons with financial expertise. The Serious Fraud Office,²²¹ the Crown Prosecution Service, the police, including the Association of Chief Police Officers, and a number of departmental investigation and prosecution bodies²²² favoured some sort of combined tribunal. The Serious Fraud Office has cautioned, however, that lay members selected for any particular trial should be drawn from a different discipline from that in issue, otherwise they might assume the role of untested expert witnesses. This caution seems to run counter to the Roskill Committee's intention that lay members should be selected for their specialist knowledge of the business or financial activity the subject matter of the case, not simply for their general business and financial experience.²²³ In my view, the caution is well-founded. There could be difficulties where lay members' views are possibly conditioned by their own out of date or narrow experience, or by a 'bee in their bonnet' about the norms of professional conduct in the area of speciality in issue. In such circumstances, it is doubtful what proper role they could perform in assisting a judge to assess conflicting expert evidence in the case. That is not to say that specialists in the particular discipline or market concerned should never be part of the tribunal, simply to note the need to avoid too close a connection where working practices and norms are likely to be an issue as distinct from an understanding of the system and mechanics of the alleged fraud.
- 192 My first instinct had been to recommend that the court could direct trial by judge and jury or by judge and lay members or by judge alone, as he considered appropriate. However, after considerable thought, I consider that

²¹⁹ as distinct from assessors

²²⁰ paras 8.50-51; cf Crown Court when sitting as an appeal court from a magistrates' court

²²¹ in its response of 27th May 1998 to the Home Office Consultation Document; the Director has recently suggested that it should be judge and 'expert assessors', *The Times*, 5th March 2001

²²² including the National Crime Squad, National Investigations Service (Customs and Excise) National Criminal Intelligence Service, the Department of Trade and Industry; Customs and Excise and Inland Revenue

²²³ see para 8.50, and cf para 8.61

the need for reform would be best met by a combination of enabling the court to direct trial by judge and jury or by judge and lay members. It seems to me that if a defendant in such cases is deprived against his wish of trial by jury, he should be entitled, if he wishes, to trial by a tribunal comprised in part of persons with appropriate business and financial experience. However, it should also be open for a defendant to opt, with the court's consent, to trial by judge alone under the general provisions for doing so that I have recommended.

- 193 The first step would be to allocate the case to a judge, whether a High Court Judge or Circuit Judge, with experience of trying serious and complex fraud. He should decide, after hearing representations from both sides, whether it should be heard with a jury or by himself and lay members or, if the defendant has opted for trial by judge alone, by himself. If he decides on trial with lay members, he should determine, again after hearing representations from both sides, from what, if any, speciality(ies) they should be drawn.²²⁴ Consistently with my recommendations on mode of trial decisions in either-way and jury "waiver" cases, I do not suggest that an agreement of the parties as to any of these modes of trial should bind the judge, but such agreement would no doubt be an important factor for him in reaching his decision.
- 194 Where the judge has a choice between directing trial by himself and lay members or, at the defendant's option, of trial by himself alone, one factor that may influence the decision is the extent to which the case requires some knowledge of a specialist market or other commercial discipline. Another may be whether the issue is likely to turn on a factual understanding and analysis of the evidence or on conflicting contentions on professional or commercial norms and, if so, whether expert evidence is to be called. There may be other considerations depending on the individual circumstances of the case. All these mode of trial decisions should, in my view, be subject to a right of speedy appeal by either side to the Court of Appeal (Criminal Division).
- 195 The lynch-pin of all three potential forms of trial in serious and complex frauds is the judge. It is vital that he or she is of a high level of judicial competence with a good knowledge and experience of commercial and financial matters. At present there are 51 Circuit Judges nominated to try cases that meet current criteria for 'serious frauds'.²²⁵ Those criteria are broadly those which meet the Serious Fraud Office's definition of seriousness and complexity for it to undertake the prosecution, to which I refer in more detail below.²²⁶ In addition, particularly 'heavy' cases of serious and complex

²²⁴ cf the recommendation of George Staple, CB, QC, the former Director of the SFO, that a judge alone should try long and complex trials and that a special juries should be brought in for specialised cases

²²⁵ agreed by the Senior Presiding Judge, the SFO, the CPS and other prosecuting agencies

²²⁶ see para.201 below

fraud with a high degree of public interest, are tried by High Court Judges, usually drawn from the Commercial Court and nominated on a case by case basis by the Lord Chief Justice.

- 196 As to procedure at the trial, I envisage something similar to that of the District Court Division of the new unified Criminal Court that I recommend²²⁷ in Chapter 7. I would expect the judge normally to sit on his own in pre-trial hearings and when ruling on law and such matters as the admissibility of evidence. However, as the Roskill Committee noted,²²⁸ the lay members could be of assistance in discussions as to the manner in which certain evidence could most helpfully be presented. I also agree with the Roskill Committee²²⁹ that the judge and lay members should retire to consider their decision without any prior public direction from the judge on the law, and that, once they have reached their decision, he should express it in a publicly and fully reasoned judgment of the court. The judge should be the sole judge of law, but on matters of fact, each would have an equal vote, and, as the Roskill Committee recommended, a majority of any two could suffice for conviction.²³⁰ As to sentence, this should be left entirely to the judge, since the lay members are not selected for any expertise in that field. Appeal should lie to the Court of Appeal (Criminal Division), against conviction and/or sentence on the same basis as appeals after conviction by a jury.
- 197 I have given anxious consideration to a number of other practical considerations that should be borne in mind by those responsible for deciding whether and how to undertake such a radical reform.

Allocation

- 198 Many of the anxieties about jury trial in serious and complex fraud cases are applicable to the whole range of cases that fall to be tried by judge and jury; they are simply more pronounced in fraud cases. For example, in trials for murder or other violence there are frequently difficult medical or other scientific issues where jurors are expected to follow and evaluate competing expert evidence. The Home Office, in its 1998 Consultation Document, drew attention to this aspect of the problem.²³¹ Mr. Merricks, in his note of dissent to the Roskill Committee's Report, argued that, before starting to chop away at jury trial in particular types of cases, it would be wise to evaluate the performance of juries across the whole range of their work in order to see

²²⁷ see Chapters 7, paras 21 - 35 and 11, paras 57 - 58

²²⁸ para 8.67

²²⁹ para 8.68

²³⁰ para 8.69

²³¹ para 2.35

whether jurors in fraud cases understand more or less than jurors in other types of cases.²³² But, as I have said, there is already a wealth of research work on juries throughout the common law world.²³³ The preponderance of it, in its emphasis on the need to simplify their task, only underlines what is already obvious, the more complicated the issue the more difficult is for them. As I have noted in summarising the arguments in favour of reform, whilst the central issue in many fraud cases may be one of dishonesty, an ability to understand and analyse conflicting highly complex and/or technical evidence is vital for their determination of that issue. Often there is no need for any value judgment as to the dishonesty of the defendant, for example, where the only issue is whether he is factually responsible for, or a party to, whatever conduct is alleged, and where analysis of the evidence one way or another effectively determines the issue of dishonesty. In many cases of complexity, for example, cases where the issue turns on medical or other scientific evidence, the issue is not one of dishonesty at all, or even of assessment of the reliability or credibility of witnesses or the defendant. It is simply one that requires a jury to understand and to evaluate conflicting expert views.

199 Lord Roskill intended that his proposed Fraud Trials Tribunal should be limited to a relatively small number of complex frauds, the focus in his suggested guidelines,²³⁴ being on ‘City’ frauds. If, as I have suggested in the preceding paragraph, the need for reform is not confined to fraud cases, but should apply to any case of complexity, what should the criteria be? Some might argue that, even with the loosest of guidelines, it will be difficult to justify, generally or on a case by case basis, putting one defendant in charge of a jury and another in front of some other form of tribunal when, the difference between them is not as to complexity but as to the type of offence.

200 One course would be to adopt similar criteria to those for determination whether there should be trial by jury in civil proceedings for fraud, libel, slander, malicious prosecution or false imprisonment. Such cases are to be tried with a jury “unless the court is of the opinion that the trial requires prolonged examination of documents or accounts or any scientific or local investigation which cannot conveniently be made with a jury”.²³⁵ On the question whether the matter can ‘conveniently’ be heard with a jury, the civil courts have four criteria: first, the physical problem of handling the documentation; second, prolongation of the trial, since jury trial takes much longer than with judge alone; third, expense, since jury trial is much more expensive, both as a result of prolongation and its very nature; and fourth, and the most important, the jury may not understand the case.²³⁶ There is no way of knowing whether a jury has misunderstood the issues and/or the evidence

²³² p 194, para C17

²³³ see Appendix II

²³⁴ para 8.55 and Annex

²³⁵ Supreme Court Act 1981, s 69

²³⁶ *Beta Construction Ltd. v Channel 4 TV Ltd.*[1990] 1 WLR 1042, per Stuart-Smith LJ at 1049B

since the trial judge or the Court of Appeal has little or no means of discovering that. Even if, as I recommend in Chapter 11, juries in criminal cases might be asked to answer specific questions on certain issues, as happens in civil jury trials, jury misunderstandings may still be difficult to unearth. By contrast, in trial by judge alone or with lay members, he would be required to give a fully reasoned judgment, and mistakes, if any, are open to full scrutiny on appeal.

- 201 A simpler, but more limited, solution would be to confine the option for dispensing with juries to cases prosecuted by the Serious Fraud Office and like cases prosecuted by other government prosecuting departments. These are cases that satisfy criteria of the sort presently justifying ‘transfer’ and/or call for a preparatory hearing under sections 4 and 7 respectively of the Criminal Justice Act 1987, namely frauds of great “seriousness or complexity”.²³⁷ The Home Office, in its 1998 Consultation Document,²³⁸ favoured such criteria, estimating that they would produce a total of 80-85 cases a year potentially suitable for trial without jury. That estimate is considerably higher than the number of references accepted annually by the Serious Fraud Office, exercising its own stringent criteria for that purpose.²³⁹ In 1999/2000 it accepted about 30 new references and completed 8 trials.²⁴⁰ As Parliament has already provided a rigorous procedure for this relatively small category of cases, it seems to me that it would be a good starting point for identifying prosecutions in which a judge could order trial by judge and lay members or, in the event of the defendant’s option for trial by judge alone, the latter.
- 202 I say ‘starting point’, despite a strong logical case for, at the same time, extending the reform to other serious and complex cases. There is something to be said for establishing and developing these new procedures first on a limited and readily identifiable category of cases where there is urgent need for a more just and efficient process. If the reform is a success then consideration can be given to extending it in the light of the experience gained.
- 203 Whatever the breadth of the allocation criteria adopted, I consider that the overriding criterion in each case should be expressed as “the interests of justice”, which itself should include factors of the sort applicable to the

²³⁷ see also, more generally, cases of complexity or length under ss 29-31 and 34 of the Criminal Procedure and Investigations Act 1996

²³⁸ paras.3.3-3.7

²³⁹ including: a value of at least £1 million; likely attraction of national publicity and widespread public concern; requiring a highly specialised knowledge, for example of financial markets and their practices; a significant international dimension; and requiring a combination of legal and accountancy skills; see SFO Annual Report 1999/2000, p 3

²⁴⁰ in the year April 1999 to April 2000 the SFO worked on a total of 95 cases (excluding appeals); by the year end it had 81 continuing cases with an aggregate value of alleged sums at risk of £1.38 billion; eight trials were concluded within the year, involving 12 defendants of whom 11 were convicted and one acquitted. See SFO Annual Report 1999/2000 p 21

present mode of trial decision in civil cases. They are, in this context, that the case requires an ability to understand a specialised financial discipline, consideration of complex and voluminous evidence, including prolonged consideration of accounts and/or other documents, and which is likely to take a long time.

The allocation decision

204 Then there is the question who should make the mode of trial decision. The Roskill Committee recommended that it should be a High Court judge other than the nominated trial judge, after hearing representations from both sides.²⁴¹ The Home Office, in its 1998 Consultation Document,²⁴² proposed that the decision should be taken by the nominated trial judge before or at the preparatory hearing (or, as it may become under my recommendations in Chapter 10,²⁴³ the pre-trial hearing). In my view, the nominated trial judge, whether High Court Judge or Circuit Judge, should be best placed for the decision. He will be required to master the essentials of the case at an early stage to prepare himself for the pre-trial assessment²⁴⁴ and hearing(s). In doing so, he can equip himself to form a view on the mode of trial that provisionally he considers it will require. He will have the papers, which may already be voluminous; he will have to give the parties an opportunity to make representations on the matter. To impose such a time-consuming task on a judge who will not try the case would, in my view, be an unnecessary and potentially inconvenient duplication of work. And, if my recommendation for a right of appeal is adopted, the decision will be subject to review by the Court of Appeal, (Criminal Division).

205 The nominated ‘Serious Fraud Judges’ and Commercial Judges of the High Court are, by definition, men and women of great knowledge and experience in this class of work. But their skills, in the main, have only been acquired incrementally by exposure in the course of their practice as advocates and of their judicial career to fraud cases of various levels of seriousness and complexity. The Judicial Studies Board has attempted over the years to provide some training for judges in this field. But it has been sporadic and of a very limited nature, in the main, restricted to single day conferences or as one of many topics in short residential seminars every three or four years. I share the view of the Fraud Advisory Panel²⁴⁵ that there is an urgent need for more extensive, structured and continuing training of judges for this task. Such training should include, where necessary, familiarising them with

²⁴¹ paras 8.55 and 8.59

²⁴² paras 3.15-3.17

²⁴³ paras 204 - 220

²⁴⁴ see Chapter 10, paras 221 - 228

²⁴⁵ see paras 15.1-2 of the Panel's response of October 1998 to the Lord Chancellor's consultation in that year on pre-trial procedures on serious fraud cases

information technology, including computer transcription of proceedings, basic accounting and company documents, financial systems of markets prone to fraud, financial practices commonly encountered in serious fraud cases, forensic handling of such cases and the preparation and form of summings-up or judgments in them. There is a correspondingly urgent need for the establishment of formal criteria for nomination to and retention on the panel of judges doing such work. There may also be a case for providing serious fraud judges with additional facilities, according to their workload generally or on a case by case basis, for example, specialised information technology and suitably qualified judicial assistants.

206 As to the panel from which lay members might be drawn, I envisage the sort of arrangements proposed by the Roskill Committee.²⁴⁶ These could include the establishment and maintenance by the Lord Chancellor, in consultation with professional and other bodies, of a panel of persons drawn from various specialities. In order to secure and retain persons of high quality for the task, they should be paid appropriately; the Roskill Committee suggested a daily rate equivalent to that of a Circuit Judge, which seems to me a reasonable level for the purpose. The nominated trial judge should select the lay members, after affording the parties an opportunity to make written representations as to their suitability.

I recommend that:

- **as an alternative to trial by judge and jury in serious and complex fraud cases, the nominated trial judge should be empowered to direct trial by himself sitting with lay members or, where the defendant has opted for trial by judge alone, by himself alone;**
- **the category of cases to which such a direction might apply should, in the first instance, be frauds of seriousness or complexity within sections 4 and 7 of the Criminal Justice Act 1987;**
- **the overriding criterion for directing trial without jury should be the interests of justice;**
- **either party should have a right of appeal against such decision to the Court of Appeal, (Criminal Division);**
- **judges trying such cases, by whatever form of procedure, should be specially nominated for the purpose as now, and provided with a thorough, structured and continuing training for it;**

²⁴⁶ paras 8.61-65

- **there should be a panel of experts, established and maintained by the Lord Chancellor in consultation with professional and other bodies, from which lay members may be selected for trials;**
- **the nominated trial judge should select the lay members after affording the parties an opportunity to make written representations as to their suitability;**
- **lay members should be paid appropriately for their service;**
- **in a court consisting of a judge and lay members, the judge should be the sole judge of law, procedure, admissibility of evidence and as to sentence; as to conviction, all three should be the judges of fact;**
- **the decision of a court so constituted should wherever possible be unanimous, but a majority of any two could suffice for a conviction; and**
- **the judge should give the court's decision by a public and fully reasoned judgment.**

Young defendants

- 207 Young defendants, that is, those under 18 charged with an indictable offence other than murder must be tried summarily unless the offence is one of certain grave crimes for which they may be sentenced to detention for a long period, or where they are charged with a person of 18 or over and magistrates consider it necessary in the interests of justice that all should be tried together.²⁴⁷ Young defendants, therefore, have no right of election for jury trial. A significant number of young defendants do, however, end up in the Crown Court. In 1999 4718 were committed there for trial and 851 were committed for sentence.²⁴⁸
- 208 There are strong arguments that, even for grave crimes, a different form of tribunal should be provided. The younger the young defendant, the stronger the case for it, and the more it overlaps with arguments for raising the criminal age of liability in England and Wales above the age of 10. The judgment of the Strasbourg Court in *T and V v UK*,²⁴⁹ raised a number of issues about the inappropriateness of the public, formal and otherwise intimidating procedure of a Crown Court trial for young children charged with the sort of offences that take them there. In the light of that judgment, Lord Bingham, the then Lord Chief Justice, issued a practice direction in February

²⁴⁷ Magistrates' Courts Act 1980, s 24, and Powers of Criminal Courts (Sentencing) Act 2000, s 91

²⁴⁸ the figures for 2000 are, apparently, not yet available

²⁴⁹ (1999) 30 EHRR 121

2000 designed to reduce the scope for avoidable intimidation, humiliation or distress to young defendants on trial in the Crown Court.²⁵⁰ Whilst that practice direction contained valuable guidance for minimising many of those features, there is still the question whether the Crown Court is appropriate either for the trial or sentencing of young defendants. Most other European and Commonwealth countries have separate adult and youth criminal justice systems, and there appears to be wide agreement here that they should be treated differently from adults in this respect. Many contributors to the Review have urged that they should not be tried in the Crown Court or before a jury, whatever the seriousness of the charge. In my view, there is a strong case for removal of all such cases to the youth court. As Professor Andrew Ashworth has observed,²⁵¹ their seriousness could be appropriately marked in that court, where necessary, by constituting it with a judge and magistrates. In the more flexible three tiered court structure that I recommend in Chapter 7, the District Division could provide such a tribunal presided over by a judge, from High Court to Recorder level, appropriate to the seriousness and importance of the case. Lord Warner, the Chairman of the Youth Justice Board, has supported the use of such a tribunal in the more serious juvenile cases.

209 There are two other factors. The first is a matter of judicial training and experience of cases involving young defendants. District Judges and magistrates who sit in youth courts receive specialist training. Judges who try young defendants in the cases that reach the Crown Court are usually the more senior and experienced, many of them also having received special training and authorisation to sit in County Court and High Court cases involving children. It is strange, therefore, that trials of grave cases against young defendants should be consigned to a random selection of jurors all or most of whom will be unfamiliar, not only with the court and their role in it, but also with the trial and evidence of young persons. No doubt they bring to the task their own knowledge and experience of young people; as do magistrates and judges, but that in itself is not considered a sufficient qualification for the latter in these cases.

210 The second factor - and it is a priority in young offender cases - is the particular need for speed and efficiency in bringing them to trial and sentence. It is an important aim of the Youth Justice Board, which is charged by the Government with the task of reducing the average time between arrest and sentence of persistent young offenders. Although these only account for a proportion of young defendants who appear before the courts, average waiting times give a good indication of how speedily each of the two court systems deal with young offenders. In May 2001, for example, the national average

²⁵⁰ [2000] 1 Cr App R 483

²⁵¹ in a commentary on *T & V v UK* in [2000] Crim LR, at 188

from arrest to sentence was 73 days.²⁵² In the Crown Court, where 40% of all youth cases involve persistent young offenders, the average time from arrest to sentence was 197 days as against 66 days in the Youth Court.²⁵³

211 I consider, therefore, that young defendants charged with murder or other grave offences that may merit a sentence of greater severity than is presently available to the youth court should no longer be tried by judge and jury in the Crown Court or be committed there for sentence. Instead, they should go to a youth court consisting, as appropriate, of a High Court Judge, Circuit Judge or Recorder sitting with at least two experienced youth panel magistrates and exercising the full jurisdiction of the present Crown Court for this purpose. Under the structure of the new unified Criminal Court that I propose in Chapter 7, the youth court, so constituted, could be regarded as part of the District Division. Notwithstanding the public notoriety that such cases now attract through intense media coverage, I consider that the court proceedings should normally be entitled to the same privacy as those in the present youth court. The only exception to this course should be for those young defendants who are presently brought before the Crown Court only because they are charged jointly with a person who has attained the age of 18 and it is considered necessary in the interests of justice that they should be tried together. In that event, Lord Bingham's practice direction should be observed. And, in the event of the adult co-defendant pleading guilty in the Crown Court there should be power to remit the case against the young defendant to the youth court.

Accordingly, I recommend that:

- **all cases involving young defendants who are presently committed to the Crown Court for trial or for sentence should in future be put before the youth court consisting, as appropriate, of a High Court Judge, Circuit Judge or Recorder sitting with at least two experienced magistrates and exercising the full jurisdiction of the present Crown Court for this purpose;**
- **the only possible exception should be those cases in which the young defendant is charged jointly with an adult and it is considered necessary in the interests of justice for them to be tried together; and**
- **the youth court so constituted should be entitled, save where it considers that public interest demands**

²⁵² *Lord Chancellor's Department Statistical Bulletin No. 8/2001*, August 2001

²⁵³ in the first six months of 1999, 11% of all persistent young offenders were sentenced in the Crown Court, taking an average of 206 days from arrest to sentence

otherwise, to hear such cases in private, as in the youth court exercising its present jurisdiction.

Fitness to plead

- 212 There is a strong case for transferring from the jury to the judge determination of the issue of fitness to plead. By statute²⁵⁴ the issue must presently be determined by a jury either on arraignment or, if the court so decides, at any time during the trial until the opening of the defence, and only on the written or oral evidence of two registered medical practitioners at least one of whom is approved for the purpose. The question for the jury is whether the defendant is under such a disability that, apart from the statute, “it would constitute a bar to his being tried”. If they do so find, a jury then has to determine whether he did the act or made the omission charged against him as the offence. If the verdict of unfitness to plead is returned on the arraignment, a second jury must be empanelled to try this secondary factual issue; if it is returned in the course of the trial, the jury trying him also determines this issue. The test of disability upon which the courts rely is still to be found in the early 19th century case of *R v Pritchard*.²⁵⁵ It is broadly whether the defendant has sufficient intellect to instruct his advocate, to plead to the indictment, to follow and understand the evidence and to give evidence. If the defence raises the issue, the defendant has to prove it on a balance of probabilities; if the prosecution raises it, it must prove it to the criminal standard.
- 213 In the majority of cases the jury’s role on the issue of unfitness to plead is little more than a formality because there is usually no dispute between the prosecution and the defence that the defendant is unfit to plead.²⁵⁶ However, the procedure is still cumbrous, especially when the issue is raised, as it mostly is, on the arraignment, because it can then require the empanelling of two juries. More importantly, it is difficult to see what a jury can bring to the determination of the issue that a judge cannot. He decides similar questions determinative of whether there should be a trial, for example, whether a defendant is physically or mentally fit to stand or continue trial in applications to stay the prosecution or for discharge of the defendant. The consequences of a finding of unfitness to plead are now much more flexible than they were,²⁵⁷ ranging from a hospital order with restrictions to an absolute discharge; and the judge is entrusted with the often very difficult task of what to do with the defendant, with the assistance of medical evidence. In my view, he, not the

²⁵⁴ Criminal Procedure (Insanity) Act 1964, as amended by the Criminal Procedure (Insanity and Unfitness to Plead) Act 1991

²⁵⁵ (1836) 7 C & 303

²⁵⁶ R D Mackay and Gerry Kearns, *An Upturn in Unfitness to Plead? Disability in Relation to the Trial under the 1991 Act* [2000] Crim L R 532, at 536

²⁵⁷ as a result of the 1991 Act’s amendments; see fn 254 above

jury, should determine the issue of fitness to plead at whatever stage it is raised, leaving, where it arises, the jury to determine whether the defendant did the act or made the omission charged.

I recommend that legislation should be introduced to require a judge, not a jury, to determine the issue of fitness to plead.

INFORMATION FOR AND TREATMENT OF JURORS

- 214 It is vital for the criminal justice system and public confidence in it that everyone qualified for jury service does it with a good will and regards it as time well spent. Jurors who are unhappy with their lot may lack the will or the ability to do their job properly; and, as the largest section of the public closely exposed to the workings of the Crown Court, they are likely to make poor ambassadors for it. For many it is a new, exciting and rewarding experience. But for some, it can be intimidating and frustrating; they may find it physically, intellectually or socially arduous; for others, it can also be emotionally disturbing. And, for all, it is an interruption of the normal rhythm of their lives, causing variously inconvenience, disruption of their family and/or working routines and financial loss. Potential jurors should be adequately informed of what jury service involves and of the court and local facilities available to enable them perform it and to keep an eye on of their own affairs the while. At court the processes of selection and of serving on a jury should be as short, efficiently conducted and as considerate to them as possible, make the best use of their time and minimise the financial and other costs that service may cause them. And, after jury service is over, they should know, not only that their service is appreciated, but also that they will not be required to repeat it, unless they wish, for a long time.
- 215 A Court Service survey undertaken in early 2000 of juror satisfaction as to information, facilities and treatment indicated that 95% of jurors who had served as jurors or who had merely attended court were either “satisfied” or “very satisfied” by the court’s over-all treatment of them.²⁵⁸ However, the level of satisfaction of court facilities, looked at individually was lower, 82%; and nearly half of those who expressed dissatisfaction underlined their view with specific comments.
- 216 I find these reported levels of jurors’ satisfaction with their service surprising. It has been a repeated refrain from former jurors in their contributions to the Review, and in the jury research collated by Dr Penny Darbyshire, how

²⁵⁸ Court Service *Juror Survey 2000*; based on a 48% response rate out of 3926

unsatisfactory many jurors find the experience. I share her view that the complaints are too common to be dismissed as merely anecdotal. They include:

- inconvenience and hardship as a result of the short notice given (eight weeks);
- boredom and irritation with endless waiting at court without being selected to serve on a jury;
- inadequate facilities in jury assembly and waiting rooms;
- inadequacy of jury boxes and other facilities in court;
- officious and/or inconsiderate treatment by court staff;
- lack of objective information at the start of the case about the essential issues and the law applicable to them;
- artificial and repetitious trial procedures and the frequent interruption of them for discussions between the judge and advocates on matters of law;
- insufficient use of visual and written aids both by the parties and the judge; and
- lengthy and arduous trials, with too long or inconsiderately structured working days.

Information

217 Recommendations of the Morris Committee and the Runciman Royal Commission have led to considerable improvements in information provided to those summoned for jury service. They are told about qualifications for and exclusions from service, the trial process, their role and responsibilities and brief details of the court's location and facilities. On their first day at court they are given an introductory briefing by a bailiff and shown a video. All of this is good and the Court Service, in recent years, has introduced a number of thoughtful additions to the information provided. However, there is room for further improvement.

218 First, the jury summons, when summarising the bases of qualification for jury service, should do so in a number of languages so as to inform recipients of the need for a good understanding of English and the need to inform the Central Summoning Bureau at an early stage if there is thought to be any difficulty about that. Second, the summons should deal rather more fully than it does at present with the possibility of deferral instead of excusal. Subject to the precise form of change that might be made to the present system, potential jurors could be invited to suggest dates for their service - whether as an original proposal or as an alternative to those mentioned in the summons - within a period, say, of six months, after receipt of it. As to excusal, the form should set out clearly the criteria and how to apply for excusal, doing so in a

more informal and friendly way than the present summons, whilst making clear that the criteria will be rigorously applied. To accommodate those who may be dischargeable on account of physical disability, but who may yet wish to do jury service, the form should indicate in outline what support facilities the courts can provide. My general impression of the present summons is that it is a bleak and somewhat off-putting document for persons whom it is hoped to encourage to do their jury service.

- 219 There is also much more information that the courts should give potential jurors once they have received the lists from the Central Summoning Bureau. In my view, it is important to do this in writing and well before the start of jury service so that the potential jurors can take time to see what it involves and what, if any, arrangements to make with regard to their work, families, pets and any other commitments that may be affected. As I have mentioned, courts provide an introductory video on the first day that potential jurors report for service and supplement it with instructions from the jury bailiff. Nevertheless, the strangeness of the surroundings, domestic and other distractions of the first day and, often lateness or reporting to the wrong court, result in much of it not being taken in or missed.
- 220 If and to the extent that courts do not already do it, I consider that each court should produce a booklet or briefing pack expressed, as the New Zealand Law Commission has emphasised,²⁵⁹ in an informal and friendly tone. It should start, as is the practice in many other common law jurisdictions, with a short account of the nature and importance of jury service and a warm appreciation of the task about to be undertaken. This part of the booklet or pack could be in the form of a personal communication from the Resident Judge of the court. The information could also usefully include: an explanation of the process of random selection from the qualifying list(s); the likely length of service; the arrangements for and on first reporting for duty; plans of the location of the court and of the layout of the court-building; an account of its facilities for enabling them to manage their own affairs while waiting to serve on a jury, for example, desks, telephone and fax machines and e-mail points; beepers, on-call telephone arrangements etc.; arrangements for smokers; what to wear; some account of the process of forming sub-panels at court and selection from them to serve on a jury; confidentiality; security; the likely routine, or lack of it, of each day; what types of case they may hear; facilities for eating and shopping, car-parking, public transport to court and any other essential services (e.g. medical or social security) and telephone numbers; jurors' compensation for financial loss and expenses; and the penalty for not attending. Consideration should also be given to outlining some guidance on certain matters on which jurors are frequently unsure when sitting for the first time, including note-taking, asking questions, selection of the foreman and the

²⁵⁹ Preliminary Paper 37, Vol 1, Pt Two, para 17; see also Report 69, *Juries in Criminal Trials*, Wellington, New Zealand, Chapter 9

deliberation process and, if required, the availability of counselling after sitting on particularly distressing cases. I know that much of this information is briefly touched on in the documentation accompanying the jury summons, but it also would come well from the court itself when potential jurors are beginning to focus more clearly on their jury service. Additionally, all of this information could be included on the court's internet website.

I recommend that:

- **the essential parts of the jury summons and explanatory documents issued by the Central Summoning Bureau should be expressed in several languages, and, over-all, the documentation should be more informative and couched in a more informal and friendly tone than at present; and**
- **the Court Service should review the adequacy of information courts provide to potential jurors against the best provided by other jurisdictions.**

Length and frequency of service

221 As the authors of the New York Jury Project²⁶⁰ have said and the New York courts have demonstrated, the best way to reduce the burden of jury service is to minimise its length and frequency. In England and Wales the Central Summoning Bureau now issues all jury summonses according to the requirements notified to it by each court centre. The summonses give eight weeks' notice of the first date on which recipients are required to attend court for service. Claims of ineligibility, excusal as of right, discharge because of incapacity and requests for discretionary excusal or deferral are dealt with by the Bureau's staff and, where appropriate, referred to the court for the matter to be put before a judge. The normal period of jury service is two weeks. Where there are long trials, the period may be much longer, sometimes for several months, but the Bureau's summons gives no specific warning to recipients that they may be required to sit on a long case. Before the Bureau took over this task, each court was responsible for it, and some used to prepare for a long trial by enclosing a letter with the summons asking whether the recipient would be available for a longer period than normally required. However, it was feared that such enquiries tended to informal pre-selection of juries for such cases and, therefore, breached the principle of random selection. Under the new system such enquiries are conducted for the first time in court when the jury is being selected. The result of all this is that, when a long trial is scheduled to start, courts need a far larger pool of potential jurors available for the process of jury selection than are eventually

²⁶⁰ *The Jury Project*, p 23

required for service. Some people may have to wait several days before being selected for any trial, short or long; some may not be selected at all, partly because of the necessary surplus but also because a significant number of defendants plead guilty on the day of trial resulting in fewer trials than expected. The result is costly to the courts, wasteful of jurors' and potential jurors' time and gives the system a bad name.

- 222 Although such uncertainties are an inevitable part of any criminal justice system, subject, as it is, to the human factor, more can be done to reduce their effect on potential jurors and juries. In my view, there is an urgent need to review the machinery, as between the Bureau and the courts, for summoning jurors who may be called upon, when attending at court, to serve on long cases. This will be particularly important if my recommendations are accepted for primacy to be given to deferral rather than excusal, for introducing a system in which potential jurors may proffer dates for their service within a set period and a move to fixed lists.²⁶¹
- 223 There should also be an examination of ways and means of shortening, where possible, the present norm of two weeks' service and of lengthening the present two year cycle of entitlement to excusal from it. The New York Project is an example of what can be done. Its authors recorded that in 1994 many of the counties in the State had achieved jury terms of one week or less and that those who had served were disqualified from further service for four years except in certified 'juror shortage' counties. They recommended that the State should aim for a 'one trial or one day' system, under which jurors would be treated as having done their jury duty after only one day unless selected for a jury trial on that day, in which event they would complete it at the end of the trial. This scheme had been pioneered in Houston, Texas in about 1970. As the Project authors observed, it enables more people to serve with less inconvenience to themselves, produces fewer requests for postponement and makes it easier for courts to justify enforcement proceedings. However, I should add that it is not achievable everywhere, not even in New York State.
- 224 It is plain that a move towards such a system would involve major changes in the present practice of the Central Summoning Bureau and of the courts. The major change would be that courts would no longer have the security of the availability of a panel of jurors for two weeks, but would have to bespeak panels for shorter periods, which it is said would increase the numbers of those attending unnecessarily. The Court Service also points out that courts now make every effort to release potential jurors on days of their service when it is clear that they will not be needed, with instructions to telephone the court to check whether and when they are next required. Despite the

²⁶¹ as to the last, see Chapter 10, paras 237

complications for the Court Service of introducing a more flexible system than we now have, I believe the prizes it could bring in making better use of jurors' time, shortening the burden of their service, reducing the requests for deferrals and excusals and gaining their goodwill are worthy of consideration. In my view, the one day or one trial system or variations on it should be explored, and consideration given to testing it in local pilot projects.

I recommend :

- **urgent review of the machinery, as between the Central Summoning Bureau and the courts, for summoning jurors who may be called upon to serve on a long case;**
- **examination and piloting of options for shortening the length of jury service by introducing as an aim a 'one day or one trial' system or a variation of it; and**
- **consideration of lengthening the cycle over which it is possible to claim excusal by reason of previous jury service.**

Facilities

225 I know from my visits to Crown Court centres in the course of the Review, and earlier as Senior Presiding Judge, that the Court Service and its staff have made special efforts in recent years to improve the facilities for and working conditions of jurors. Court-buildings vary considerably in size, design and age and, for those reasons, there is often a practical limit to what can be done. There are a number of predictable priorities, for most of which there is reasonable provision throughout the country. Though in some of the older and more remote court-buildings they are seriously lacking. Those priorities include adequate eating and comfortable waiting facilities, readily accessible lavatories, provision for the disabled, a separate area for smokers, comfortable and roomy jury boxes, writing materials and a good even working temperature in the courtrooms. But the biggest and most urgent area for further improvement is in the provision of facilities to enable jurors in waiting to keep an eye on their own affairs and/or work, for example, quiet working areas, readily accessible and sufficient telephones, a fax machine, desks or carrels equipped with points for lap-top computers and e-mail, beepers to enable them to leave the court-building to do necessary shopping and return at short notice when called.

I recommend that:

- **the Court Service should press on with its present programme to improve court facilities for jurors and**

**jurors in waiting, including those who are disabled;
and**

- **as a matter of urgency, it should also institute a programme of provision at all courts of adequate working facilities and other means to enable jurors in waiting to conduct their own affairs.**

Compensation

226 Jurors are entitled to payment of compensation for financial loss, including loss of earnings and subsistence for the period of their service. The current levels of maximum compensation are £51.68 per day for the first 10 full court days and £103.39 per day thereafter, plus small sums of daily subsistence. This is less favourable than similar daily compensation throughout to employed and self-employed lay magistrates of £65.18 and £83.56 respectively. These maxima are relatively low and the payments may well not approach the full loss to a significant number of jurors or their employers, particularly on long trials. The present limits may also lead many potential jurors to claim excusal when they would not otherwise do so. For example, 20% of current excusals are to those - in the main, women - who care for young children or the elderly. In my view, there should be a general review of the allowances available to jurors with a view to securing adequate compensation for the losses they incur. I should add that, if implementation of this recommendation were to result in a significant increase in the daily amounts payable to jurors, it could be offset, at least in part, by achievable reductions in their waiting time at court.

I recommend:

- **a review of the amounts of allowances payable to jurors for their attendance at court; and**
- **consideration of an additional allowance to cover the cost to potential jurors who, but for it, could justifiably claim excusal because of caring responsibilities.**

Appreciation

227 Most judges thank juries warmly at the end of a trial, mentioning the importance of the public duty they have performed and expressing appreciation of their hard work and patience etc. In some other jurisdictions, particularly in the USA, the courts express their appreciation in a more tangible and lasting way, for example, by providing them with certificates of

their service, mementoes of the court and letters of thanks signed by the trial judge. Some courts even arrange thank you parties. Whilst I do not suggest that we should go all the American way on this, a signed, albeit standard, letter from the trial judge would be a suitable and pleasing way of recording in more permanent form what may be a memorable and unique experience for many.