



JUSTICE's response to the Auld review

January 2002

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INTRODUCTION

1. Lord Justice Auld's terms of reference were to inquire into the practices and procedures of all criminal courts with an emphasis on the fair delivery of justice, streamlining processes, and increasing efficiency and effectiveness. He was to consider the interests of all those involved, including victims and witnesses, in order to achieve more public confidence in the system. The Lord Chancellor specifically indicated that the government's aim was to provide criminal courts that would be modern; efficient; fair and responsive to the needs of all their users; co-operative with related agencies; and better managed, with a particular eye on reducing delay.
2. It was a major and ambitious programme, and there was some scepticism about how much could really be achieved by Lord Justice Auld and his relatively small team in the short period of time originally envisaged. There are a few historical comparisons. One is the work of the Criminal Law Commissioners in the 19th century. This was a larger group of leading judges, including the Lord Chief Justice. It reviewed a number of areas of the law, taking many years to complete its task. There was a rolling programme of reform for the better part of the nineteenth century. There were two Commissions in the latter part of the last century: the Philips Royal Commission, focusing on the criminal process (and with a remit that was essentially managerial), and the Runciman Royal Commission, established following the final acquittal of the Birmingham Six, which began with a view to avoiding further miscarriages of justice. The latter made numerous detailed recommendations, just as the Auld review does. Although its thinking continues to influence debate, very few were ever implemented.

3. The perceived pressing need for change; the modernising agenda of the government; Auld's own scepticism about identifying the 'overarching' aims of the criminal justice system; and insufficient time and resources combine to impede consideration of the bigger picture. While we certainly accept some recommendations of the review; we regret the absence of a conceptual framework; of principles around which arguments can be organised; and of any serious examination of the purposes and changing context of the criminal justice process.

4. The two aims that the government has defined for the system are reducing "crime and the fear of crime and their social and economic costs" and dispensing "justice fairly and efficiently and to promote confidence in the law"¹. The review sets out the supporting objectives of ensuring just processes and outcomes; dealing with cases with appropriate speed; meeting the needs of victims, witnesses and jurors; respecting the rights of defendants and treating them fairly; and promoting confidence in the criminal justice system.

5. The review does not explicitly acknowledge that our system has been moving closer to the inquisitorial procedures of our European counterparts, notably since the changes to the right of silence introduced by the Criminal Justice and Public Order Act 1994, and the more restricted disclosure to the defence introduced by the equally controversial Criminal Procedure and Investigations Act 1996. Nor does it refer to the practical difficulties caused by the EU's political agreement at Tampere for closer judicial and police co-operation. The adversarial and inquisitorial systems are based on differing principles and objectives. There is a pressing need to recognise this difference and its implications for our own changing process and its future development. The Human Rights Act has

¹ page 9 of the review, quoting from criminal justice system: strategic plan 1999 - 2002 para 1.3

highlighted this in dramatic form: decisions taken in the Strasbourg Court, which have themselves been reached in the context of mainly inquisitorial systems, must now be taken into account by our domestic courts. Thus a pan-European jurisprudence has been introduced as a direct influence on the common law. It follows that what is really needed before we start on any agenda of reform, is clear discussion and agreement regarding the framework and context of the contemporary system; what we want it to achieve; how it is likely to change; what the likely demands upon it will be; and what is the purpose of the process. The identification of a conceptual framework and some basic principles is essential if we are not to drift into experimentation with different arrangements without any examination of what underpins them; and of what consequences will result.

6. The famous US jurist Herbert Packer wrote a monograph in 1969 proposing two models of criminal justice: the crime control and due process models. His work has been disproportionately influential and it continues to affect contemporary analyses. Lord Justice Auld could be said to have adopted the crime control model. This is concerned with efficiency, (a prime objective of this Government), and has been likened to an assembly line approach. By contrast, the due process model is concerned with quality control and due process rights and has been compared to an obstacle course. The Runciman Royal Commission expressly tried to keep these models in balance, just as this review talks about the balance between efficiency and the rights of defendants. However, in our view there are flaws in this dichotomy: crime control is an objective; whereas due process is a method which may, or may not, be a means of achieving crime control. The two are not automatically in opposition. The Auld review does not appear to consider this issue and is inconsistent. It accepts that a defendant's right to a fair trial is as near to absolute as any right can be and that the notion of balance is inapplicable, but it then proceeds to consider where a balance can be justified.

7. As a consequence, the need to consider history, theory, and constitutional objectives seems to give way to the demands of pragmatism and the Treasury. The lack of theory and philosophy in favour of what are described as “modern needs” and the invocation of the mantra of “what works”, risks an overall absence of direction. The place and function of the criminal justice system in society is not clear; principles are implicitly regarded as luxuries rather than necessities; and lessons from our own and others’ experience may be lost.

8. We must avoid this reductionism at a time when the public (encouraged by governments that claim we can live in a more crime free society) may already have unrealistic ideas about what the criminal justice system can deliver. All research on the subject agrees that the public is, in fact, profoundly ignorant of the system, and that there is a duty to promote access to clear information and understanding that has, unfortunately, been lacking.

JUSTICE’s approach

9. In commenting on this review, we have had to be highly selective. Like many others, we have concentrated on its single most controversial proposal: the establishment of a middle tier, the suggested District Division of a new unified criminal court. We look at the consequences of ending jury trial for "either way" offences, and the profoundly unbalancing effects that it would have. We think these arguments are applicable to any proposed programme of reform and, therefore, that it is valid to advance them, even though there has been recent publicity about the lack of governmental support for the middle tier.

10. We argue that considerations of quality, against which this government has rightly tried to measure lawyers, should also be applied to trials. Trials in magistrates' courts are widely regarded as less fair than jury trials. This is not due entirely to the lack of a jury. There are other unsatisfactory factors, not least the lack of adequate disclosure of evidence in the magistrates' courts, and the resulting inability of lawyers to prepare cases as thoroughly as is possible in the Crown Court. Magistrates are still responsible for making decisions of law and admissibility of evidence as well as facts, despite the inherent contradictions of such a role. It is disappointing that these matters - criticised for many years - should remain unresolved. Better training and higher standards are, of course, important but, if the structural difficulties remain, they can only corrode the effectiveness of these advances.

11. Although research shows that the public may not be well informed about the workings of the system as a whole, a January 2002 MORI poll (prepared for the Bar Council, the Law Society and the Criminal Bar Association) finds that 85 % of those surveyed trust juries to come to the right decision, 82 % believe they get a fairer trial from a jury than from a judge, and 81 % believe that the quality of the justice system is better when it includes jury trials as often as possible. Perceived quality is therefore crucial to public confidence.

12. We apply the quality principle to the proposed middle tier, noting that at a time when there is considerable pressure on lawyers to improve standards, the corresponding - and equally necessary - improvement of courts and systems may not necessarily follow. Our argument that changing one aspect of the process, in this case jury trials, has a domino effect on other aspects, is generally applicable to any reform.

13. In addition, we deal with the other major procedural matters in the review: juries (exemptions, perverse verdicts, multi-racial juries, and research); double jeopardy; young

defendants; restorative justice; appeals from magistrates' courts; bail applications to High Court judges; bench trials; disclosure; and advance indication of sentence.

14. We do not deal with the management and operational aspects of the review.

THE MIDDLE TIER

15. It is estimated that the proposed middle tier would reduce the Crown Court's business by 50-60 per cent. Its establishment is, therefore, a recommendation of central importance, and of profound constitutional significance. It would presage a change in the nature of the courts; a move towards judicial empowerment and away from democratisation; and a shift in the way we think about the role of the state in protecting individual liberties.

16. That is not to say that all change is to be resisted. Our aim here is rather to urge clarity of thought about what the review is seeking to achieve; what the consequences of its proposals are and why. Significantly, Auld does not say what a middle tier could achieve - apart from removing juries - that is not already delivered by the existing structure. Nor does the review consider in any depth the effect on the nature and quality of the trial process of substituting one form of tribunal for another. There is considerable experience of mixed panels, as proposed by Auld, in other European countries; in US states like Vermont; and, indeed, in various domestic tribunals including the Crown Court when it convenes to hear an appeal from a magistrates' court. In these cases a circuit judge has sat with two magistrates since 1948. It is important that any proposals not only draw on this experience, but also take into account how such a panel would work in the particular context for which it is proposed.

17. Our purpose in this response is not to defend juries as the only just form of fact-finding tribunal but rather to argue that their removal has consequences for the dynamics of the entire trial process. These must be fully acknowledged and examined before the merits of the proposed changes can adequately be assessed.
18. There is strong evidence from the Northern Irish experience of Diplock courts that removing juries has subtle, but profound, effects on the trial process². In particular, it leads towards a more inquisitorial approach: the scope of oral arguments is narrowed; judges become more interventionist; and decisions of law and the admissibility of evidence are less starkly separated from findings of fact. Although the Northern Irish research focused on judge alone trials, in our view its findings are directly relevant to the current proposals. This is, first, because the study raises serious doubts about the feasibility of substituting one form of tribunal for another without considering the impact this will have on the trial process as a whole. Secondly, it is because, although the proposed tribunal will have lay involvement in the form of magistrates, many of the consequences observed of a judge sitting alone are also likely to flow from a mixed tribunal.
19. We set out below a consideration of the features and underlying principles of adversarial and inquisitorial systems and discuss why the removal of juries creates ‘an adversarial deficit’. In our view, analysis of these issues is critical to making sense of Auld’s proposed middle tier. If our system is to become more inquisitorial, we cannot simply eschew adversarial safeguards without adopting inquisitorial protections in their stead.

The role of the tribunal

20. It has long been acknowledged that inquisitorial and adversarial systems are based on different conceptions of the relationship between the state and the protection of individual liberties. Archetypal adversarial systems, based on scepticism of state power, have juries as the bulwark against oppressive state interference; and strong rights of defence are set up to counter the power of the status-quo. Inquisitorial systems, on the other hand, place more faith in the state as a protector of individual freedoms. Hence the trial itself becomes less important than in the adversarial system, with greater emphasis on the pre-trial, investigatory stage and on the right of appeal.
21. Adversarial trials give rise to concepts now accepted in international law: the presumption of innocence; the privilege against self incrimination; equality of arms; the right to a public and oral trial; the accusatory principle; and judicial independence from the executive or investigative agencies.
22. These principles underlie the classic separation of the powers of judge and jury. They have informed the regulation of hearsay and relevance and have led to the creation of exclusionary rules addressing prejudicial and illegally obtained evidence.
23. Inquisitorial principles differ substantially. The state (prosecution, trial judge and investigating judge) has a duty to ascertain the truth; there is a necessity to review judgments, as reflected in the requirement to provide reasons for findings of guilt or innocence; and the legality principle means that prosecution is mandatory. This last principle is antipathetic to the discretion of juries to acquit out of sympathy and to plea-bargaining. This is why juries in many European countries have largely been abolished (except for very serious offences) or converted into a form of lay participation that is more conducive to adhering to these principles.

² The following analysis draws heavily on the research of Jackson and Doran, *Judge without Jury: Diplock Trials in the*

24. This background illustrates that we are already operating in a hybrid system. We need to understand and acknowledge that this is the direction in which we are moving, and to establish whether it is appropriate.

25. There is a fundamental difference in the traditional role ascribed to fact finders in adversarial and inquisitorial systems. This is sometimes cast as a “conflict resolution approach” against a “search for the truth”³. Fact finders in inquisitorial systems are engaged in a forensic investigation of the historical facts which then feed into a more restricted trial process. On the other hand, juries on the traditional adversarial model are charged with a more merits-based approach; they swear to consider the case on the evidence presented by both sides in court and are the sole judges of fact. This leaves them constitutionally able to acquit in protest at unjust laws, what Auld refers to, controversially, as ‘perverse’ verdicts. This is not, at least in theory, simply a matter of juries acting out of prejudice, in breach of their oath, as Auld suggests, but stems from the principle that “trials are about justice as well as law”⁴. This distinction was highlighted in the debates surrounding the recent reintroduction of juries into the largely inquisitorial criminal justice systems of Spain and Russia: in both, there was serious consideration as to whether juries should be asked simply to determine the historical facts or to return a *verdict* of guilt or innocence. The rationale behind the role of the jury in going beyond a mere consideration of the factual history of the case is expressed by Jackson and Doran as follows:

Guilt is not the only issue to be decided. Criminal proceedings are taken on behalf of the community, and decisions must therefore be taken either by the community or by persons acting on its behalf. When lay triers are the decision-makers they act as the

Adversary System. Oxford Clarendon Press 1995

³ Damaska, *Two Faces of Justice and State Authority* Yale UP 1986

⁴ p.247 Hans and Vidmar, *Judging the Jury*, New York. London. Plenum 1986

community and they can afford to take a more wide-ranging view of both the merits of the proceedings and the merits of convicting the defendant as charged.⁵

26. In counter-balance to the merits-based approach, the “truth-finding” focus of inquisitorial systems has given rise to various safeguards not present in adversarial systems. For example, there is a more stringent duty on police, subject to independent judicial scrutiny, to investigate evidence that exculpates as well as that which inculpates the accused. All material uncovered in the course of the investigation is disclosed to prosecution, defence and the judge in the dossier of the case. And the judge’s decision is not accorded the same degree of deference on appeal as that of our juries because a determination of fact, guilt or innocence is theoretically value-free. There is an automatic right of appeal (for both prosecution and defence) and the higher courts will review the dossier and re-determine, if necessary, the facts as well as the application of the law to them.

27. These, broadly are some of the factors which must be taken into account in assessing any measure which seeks to mix and match elements of adversarial and inquisitorial approaches.

Why is trial without jury less adversarial?

28. The Northern Ireland study found that the scope of argument in trials without juries is significantly reduced. First, what were described as “sympathy points” are abandoned before a judge. This was found to flow from the different decision-making approaches of the judge and jury. Judges inevitably take a different approach. They are experienced lawyers; they risk being case hardened; and their job is to apply the law. The Jackson

⁵ *ibid* p.293.

and Doran study does not conclude that this is necessarily bad for defendants in all cases but it does highlight that the judge loses the safeguard provided by the jury's role in assessing the facts. Nor does the judge act so easily as a bulwark against an oppressive law. Again, there may be advantages and disadvantages of such a shift but effects of the process must be viewed as a whole: if a more inquisitorial approach is to be adopted, so too must the counter-balancing safeguards of judicial supervision at the earlier stage.

29. The approach to decision-making of a mixed bench is likely to be more akin to that of a judge than a jury. Richard Vogler, a senior academic from the University of Sussex cites "overwhelming empirical evidence " from Germany that the role of lay participants on mixed tribunals is "essentially passive and their influence negligible."⁶ These findings are repeated in experience from France, Poland, Hungary, Croatia and Russia. Auld asserts that this would not be the case in England and Wales but, as other commentators have acknowledged⁷, there is no experience or research on which to base such an assertion. Even if lay magistrates were to exert more influence here than their continental counterparts, they do not have the same constitutional standing as juries, nor do they bring the same fresh approach to the facts of each case. They do not, therefore, provide the same democratic influence.

30. A further reason observed in the Northern Ireland study for the narrowing of arguments in the absence of the jury is that trial participants become familiar with one another. Prosecution and defence counsel grow used to each other's style and with that of the judge. This highlights another aspect of the absence of the jury's fresh approach to each case and is equally applicable to lay magistrates as to judges. It is also a feature of magistrates' courts, in which local solicitors may feel handicapped for this reason.

⁶ Richard Vogler, *Mixed messages on the mixed bench*, Legal Action May 2001.

Solicitors who face the same bench time and time again may feel less able to take risks, if there are concerns that this may prejudice the bench against them in future.

31. An additional adversarial safeguard is lost in the erosion of the separation of decisions regarding fact and law which occurs with the removal of juries. Auld proposes that District Division judges should decide issues of law in the absence of the lay magistrates but then retire with them and have an equal vote on issues of fact. Although on its face, this goes some way to preserving the division between issues of admissibility and decisions of fact, in practice, it may be problematic. There is evidence from Germany⁸ and from Northern Ireland⁹ of the difficulties faced by judges in “forgetting” evidence which they have ruled inadmissible when coming to decide issues of guilt or innocence. It puts them in the same unsatisfactory position as magistrates are in at present. Whilst judges would obviously be barred from discussing with the lay members of the tribunal any inadmissible evidence, it is highly likely that experienced magistrates will be tempted to guess what evidence has been excluded. This, coupled with the evidence from other jurisdictions of the professional judge’s dominance over lay members, suggests that there is a real danger of magistrates being influenced by a judge’s view as to verdict, where it is clear that certain evidence has been excluded. Once again, while this issue is live in continental systems, it is at least balanced to some degree by the greater safeguards built into the pre-trial and appellate stages of the process. In particular, appeals are not limited to a consideration of errors of law but include a complete review of the dossier. Thus, if a judge appears to have come to a conclusion of fact based on inadmissible evidence, this may be overturned on appeal.

⁷ See Penny Derbyshire, on whose work Auld drew heavily, in *Criminal Law Review*, December 2001

⁸ Mittermaier, *Das Volksgericht in Gestalt der Schwur- und Schoffengerichte* and Christoph Rennig, *Die Entscheidungsfindung durch Schoffen und Berufsrichter in Recht-Licher und Psychologischer Sicht* both cited in Vidmar, p321 *World Jury Systems*, Oxford University Press 2000

⁹ *R v Brophy* [1980] 4 NIJB (Belfast CC)

32. No comparable safeguards are proposed in the Auld review to counteract any of these “adversarial deficits”.

33. In addition to these structural problems associated with the proposed district court, there is also the real practical problem of recruiting sufficient numbers of magistrates, representative of the general population, who would be able to sit for the extended periods necessary for the new jurisdiction. The Auld report dismisses this as a not insuperable problem. However, given the existing preponderance in the magistracy of the retired middle classes, it seems unlikely that a sufficiently diverse section of the population would be able to serve in the new jurisdiction. If magistrates are largely to replace juries, it is vital that they be genuinely representative. At present, they do not command anywhere near the level of public confidence enjoyed by juries.

The extent of the jurisdiction

34. Finally, we note that the new District Division is to try cases assessed as attracting up to two years on conviction. This is unacceptable. The quality of trial is likely to be severely prejudiced by the considerations already discussed. Nor is there any assurance that the inadequate and patchy system of disclosure in magistrates' courts will be improved at this level. Auld recognises (see later) that the Criminal Procedure and Investigations Act 1996 is regarded as unworkable by most people across the system, but some of its deficiencies are particularly apparent at the magistrates' court level. These may further diminish the quality of trial.

35. Lord Woolf¹⁰, has declared that he is totally committed to the importance of trial by jury “unless that form of trial is not manifestly disproportionate”. He would limit the powers of the new District Division to powers of punishment of nine, or possibly 12 months.

Further, where the case is sufficiently legally complex or sensitive the judge should still be able to allocate the case for jury trial even if the punishment is unlikely to exceed even magistrates' powers. These are significant comments, and reveal powerful concern over the reach of these proposals.

36. We note that the primary purpose for which mixed tribunals were recommended in the study by Sanders¹¹, on which the Auld review draws heavily, but selectively, was to replace lay magistrates sitting without District Judges, or vice versa, in contested cases in the magistrates' courts. On Sanders' proposals, mixed panels would only hear more serious, either way cases if the defendant elected such a tribunal in preference to jury trial. In this context, many of the arguments made by Sanders in favour of mixed panel decision-making are persuasive, crucially because they are being compared to tribunals comprised either entirely of lay magistrates, or of a lone District Judge. The Auld review has taken the endorsement of mixed panels in this context and simply transplanted it at a much higher level of seriousness, without any consideration of the changed context. For the reasons set out above, we consider this to be a dangerous move. The effectiveness of tribunals cannot be looked at in isolation from the context in which they operate.

MAGISTRATES' COURTS

37. Following the apparent decision not to proceed with the review's proposals for a middle tier, the question arises as to whether magistrates' courts will remain exactly as they are. There has been some discussion about extending the powers of sentencing of these courts, perhaps in view of the consensus in favour of abolishing committals for sentence as well as the loss of the potential District Division. JUSTICE opposes any increase in

¹⁰ In the Kalisher lecture delivered on 9th October 2001

¹¹ Andrew Sanders, *Community Justice: modernising the magistracy in England and Wales*, IPPR 2001

magistrates' sentencing powers. We note that the suggested middle tier originally gained some support because it was thought that, in practice, it might mean that magistrates no longer imposed custodial sentences at all.

38. We regard any enhanced powers affecting the liberty of the subject, in particular, as being unacceptable and inappropriate, given the difficulties of decision-making in magistrates' courts (see above); uncertain disclosure of evidence in cases before them; and the resulting uneven and inferior quality of trials. It is very much to be regretted that structural problems that have been identified over many years seem unlikely to be addressed. The lack of public confidence - dealt with in more detail in the section on appeals - is extremely significant in this context too.

JURIES

Composition of the jury: Selection and exemptions

39. We welcome the review's recommendation that selection for jury service should be made more representative of the population as a whole. We note with concern the review's citation of recent Home Office research showing that 24 per cent of black people and 15 per cent of people from the Indian sub-continent resident in Britain are not on the electoral register¹² and that therefore these groups are correspondingly under-represented in terms of jury service. However, we do not support the review's recommendation that this under-representation should be remedied by basing jury service on lists and directories other than the electoral roll. In our view, voting and jury service, as the two fundamental aspects of democratic participation, should be based on the same list. What is imperative is that all steps be taken to make the electoral list properly representative.

40. We support the review's recommendations that excusals as of right should be abolished in the interests of broader representation. We agree with the findings of the extensive New Zealand Law Commission study of juries in criminal cases¹³: broadening jury participation is not simply of specific benefit to the criminal justice system, in terms of making decision-making more representative; it is also one of the very few opportunities, other than voting, for citizens to play an active, democratic role in the society in which they live. As a corollary of this, the New Zealand research found that jury service has an important function in educating the public about society and the criminal justice system.

Multi-racial juries

41. We agree with the review's proposal that a scheme should be devised to enable judges to ensure a multi-racial jury in cases where race is likely to be relevant to an issue of importance in the trial. This might be achieved either by allowing judges a discretion to stand jurors by and to continue selecting jurors from the jury pool until satisfied that the jury is sufficiently representative; or by allowing cases to be transferred to another area where there is greater likelihood that the jury pool will be more ethnically diverse. We acknowledge that there are serious arguments against such a scheme: that it breaches the fundamental principle of random selection; and that it raises questions of the role of specially selected jurors, who may feel that they are being artificially placed on the jury as some form of representative of the accused. However, we agree with Auld's conclusions that these concerns are either unjustified or outweighed by the benefits of being able to address existing distortion in the system.

¹² Research Findings No 102 (Home Office Research, Development and Statistics Directorate, 1999)

¹³ Report 69 of the New Zealand Law Commission.

42. As Auld argues, the value of random selection lies in its ability to deliver representative juries. At present it does not achieve this, because the method used is not genuinely random: it is based on a list that is already weighted against ethnic minorities because of the high proportion who do not register to vote. We agree that achieving genuine ethnic minority representation through broader selection resulting from a genuinely representative electoral roll is preferable. However, until this is achieved, (both in terms of those actually serving as well as those selected), allowing judges to boost ethnic minority participation in the way proposed would help to redress the de facto imbalance. This is particularly important in view of the consistent evidence from the numerous research studies cited by Penny Darbyshire¹⁴ that the race of jurors does affect jury decision-making.

43. We are not persuaded by the argument that introducing a procedure for ensuring multi-racial juries would open the floodgates for other minorities to demand similar representation. Numerous recent studies, for example The Denman Report into race discrimination in the Crown Prosecution Service¹⁵, research for the Home Office by Dr Bonny Mhlanga¹⁶ and research by Lee Bridges, Satnam Choong and Mike McConville¹⁷ demonstrate the existence of racism in the criminal justice system. The evidence is overwhelmingly greater than that for any other form of discrimination. Therefore, we do not believe that other minority groups would be in a position to claim the need for the type of system Auld is proposing to ensure ethnic diversity. Other forms of potential bias should be dealt with by basing jury selection on an improved electoral roll that is genuinely representative.

¹⁴ *What Can the English Legal System Learn From Jury Research Published up to 2001?* Criminal Law Review December 2001

¹⁵ Sylvia Denman, July 2001

¹⁶ *Ethnic differences in decisions on young defendants dealt with by the Crown Prosecution Service – Section 95 Findings No. 1*, Home Office 2000

¹⁷ *Ethnic Minority Defendants and the Right to Elect Jury Trial: An Examination of Data drawn from ESRC Study of Decision Making of Ethnic Minority Defendants in the Criminal Justice System*

44. Finally, it has been argued by some¹⁸, that any special procedure for ensuring a multi-racial jury would threaten the integrity of the jury as a unit. It might place an uncomfortable burden on ethnic minority jurors who may feel they have been chosen to “represent” the defendant in some way, and create resentment amongst other jurors. We acknowledge that this is a common criticism of positive discrimination. However, we also agree with Penny Darbyshire that “unlike some “affirmative action plans”, those in question are not being given ... a benefit that is not afforded to white persons.” It is technically possible, but statistically extremely unlikely, that a white person in this country would ever be tried by an entirely non-white jury.

45. Tribunals must be impartial and they must be seen to be impartial. Current research shows that juries (whilst more representative than other forms of tribunal) are not truly representative, nor is jury decision-making wholly unaffected by the race of its members. Ideally, this would not be the case and genuinely random selection would be the fairest approach. However, since these factors are features of our system, we welcome allowing the court a measure of discretion to redress the existing imbalance. Any potential juror unease over their role or that of other jurors should be addressed by way of judicial direction: no member of the jury is there to represent any particular view.

Questions to juries and perverse verdicts

46. We are not against the idea of judges posing pre-agreed questions to juries. Indeed, we agree that this could provide a useful framework for jury deliberations, particularly in complex cases where it happens routinely already. However, we do not agree that the

jury's verdict should then be required to follow as a matter of formal logic from the answers given to those questions. Nor do we think that judges should be able to require juries to make their answers public. The review puts forward this recommendation as a means of avoiding perverse verdicts and of making juries' decisions open and accountable. These are valid and important aims but they must be achieved by means that do not strip juries of their democratic, merits-based approach to decision-making. We have discussed above the differences between the decision-making roles of juries in adversarial systems and those of other forms of tribunal. We have also argued why, in the context of an adversarial system, the exercise of jury equity¹⁹ does not necessarily mean that a verdict is perverse. There may be issues that a jury considers to be relevant to its verdict but which have not been identified in the judge's questioning. For example, the jury may consider that the defendant committed the acts alleged but did so in the context of extreme and unjustified police harassment. For the reasons given below on jury research, we do not believe that it is possible simply to assume, as the Auld review appears to do, that when juries decide cases in apparent contradiction to the view of the case taken by the trial judge, that this is necessarily a result of mistake or prejudice.

47. In Spain, where juries are given a "verdict form" containing a list of judicial questions, jurors are entitled to alter the propositions given to them. They are asked to answer the questions and then affirm or deny the proof of the defendant's guilt but they may, where the defendant is found guilty, recommend a suspension of sentence or ask that the government grant complete or partial amnesty for the offence²⁰. This has the advantage of making jury reasoning transparent and of bringing the exercise of jury equity into the open. However, it also raises problems with the finality of jury verdicts, particularly where the existence of a reasoned jury decision opens up the verdict to appeal. In

¹⁸ For example, Michael Zander QC in his response to the Auld review.

¹⁹ 'Jury equity' is exercised in the exceptional cases where a jury acquits a defendant, despite being of the view that he has committed the acts charged, because it considers the law to be oppressive or to have been applied in an oppressive way.

Spain, at least one high-profile jury acquittal has subsequently been overturned on appeal²¹.

48. In our view, the preferred option is for judges to be able to pose juries a series of questions. These should form the framework of the jury's deliberations but no answer should be required. Nor should verdicts be required to follow as a matter of logic. Instead, as Penny Darbyshire suggests, juries should be told of their power to acquit in the face of condemnatory evidence (but not to convict in the absence of such evidence) as an exercise of jury equity. We acknowledge that this would mean that the questions posed would not provide the complete framework for the jury's reasoning in all cases, although they are likely to do so in the vast majority of cases. However, as John Jackson pointed out at a JUSTICE seminar for the Auld review in June 2000, if the recommendation that defendants be given the right to elect bench trial is followed, this option would be open to defendants who were concerned to receive a reasoned verdict.

Perverse verdicts

49. Auld argues that jury equity, or nullification, is contrary to the oath or affirmation "faithfully [to] try the defendant and give a true verdict according to the evidence." In our view, this begs the question by assuming Auld's conception of what constitutes a "true verdict". It is a proper position to believe, contrary to Auld, that juries may, in exceptional cases, act as a long-stop against state oppression and acquit where they think justice requires it. This can still be a "true verdict in accordance with the evidence": it is justified precisely by the evidence of unjust laws. Jury equity is not about juries acting on whims, in the teeth of the evidence, but about them taking a just approach to the evidence of the case

²⁰ See Stephen Thaman, *Europe's New Jury Systems: Spain and Russia*, in Vidmar, *World Jury Systems* at note 8 above.

²¹ In the case of Otegi, a young Basque nationalist was acquitted, by a jury, of the murder of two policemen on the grounds that the killings were provoked by previous police harassment. His acquittal was subsequently overturned on appeal.

as a whole. Nor is such an approach necessarily illogical, as Auld argues²². The safeguarding role of the jury has always been important as a buffer against laws that do not accord with contemporary ideas of justice or morality. The number of cases in which there have been such verdicts is small: limited in recent memory to few cases beyond those of Clive Ponting, Randle and Pottle, and Peter Melchett and others in the GM food cases. In each, some justice could be found in the jury's verdict, whatever the law. Such acquittals are a necessary option for juries who cannot, unless we abandon democratic principle, be deprived of their power of decision-making. Thomas Jefferson memorably remarked that the execution of the law was more important than the making of it. We need to weigh carefully both the gains and the losses if we are to abandon this tradition in favour of greater judicial empowerment.

Jury research

50. We agree with the review's conclusion that there should not be any change to the ban on recordings or observation in the jury room. However, we do believe that further research into the ways in which juries deliberate and reach their verdicts would be valuable, particularly in view of Lord Justice Auld's rejection of the validity of jury equity. This type of research would necessarily involve questioning jurors, after the event, about how verdicts were reached, as was done in the study by the Law Commission of New Zealand²³. Such research would not be possible here under section 8 of the Contempt of Court Act 1981. The law therefore needs amending. We note that in New Zealand there is a common law prohibition on breaching the confidentiality of the jury room and it is a contempt of court for the media to approach jurors to elicit comment on what happened during the deliberations or to broadcast such information. However, the

²² Paragraph 104.

²³ Ibid.

general prohibition is flexible enough to allow strictly regulated academic research, with the permission of the Chief Justice, the Chief District Court Judge and the trial judge.

51. We disagree with the fears expressed in the review that the very process of researching juries would shake public confidence in them. There is no evidence from New Zealand that this has occurred. Indeed, the Law Commission there concluded that: “The research has confirmed the ability of the jury to reach appropriate verdicts... it highlighted the care and commitment that jurors bring to their task, the crucial aspect of community and civic participation, and the educative function of jury service.” Importantly, this runs counter to the anecdotal evidence cited in the Darbyshire review of experience of jury service²⁴ and the prejudice which seems to underpin most of the scepticism about looking too closely at juries for fear of what might be found.

52. We have argued above that the merits-based approach of juries is a central aspect of the adversarial system and that the whole process would be distorted if it were to be undermined. Auld’s idea seems to be that juries in their present form are not modern or convenient and that effective management requires streamlining and simplification without sufficient regard for overall coherence and structure. Perverse verdicts, in particular, are assumed to be based on an error of law, misunderstanding of the evidence or prejudice. This is supported by anecdote but not evidence; it is not borne out by the New Zealand research. In our view, significant changes to the role and jurisdiction of juries should be based only on credible research into the quality of decision-making.

²⁴ Darbyshire in *Criminal Law Review*, December 2001.

BENCH TRIALS

53. JUSTICE agrees with the recommendation that defendants should be able to opt for trial by judge alone. Where there is more than one defendant, all must agree unless there is a good, independent reason for separate trials. We are aware that this system is said to function well in other jurisdictions; and, indeed, does so in England and Wales in civil trials where there are complex legal arguments, for example, in actions against the police.

54. Fully reasoned judgments must be given in bench trials and there must be automatic rights of appeal, following in the Diplock courts model. Defendants can take this into account when deciding between a judge only tribunal or a jury trial where reasons will not be forthcoming.

ADVANCE INDICATION OF SENTENCE

55. Auld recommends a system of sentencing discounts that would be graduated so that the earlier the plea, the higher the discount. He indicates that defendants considering pleading guilty should be able to get an advance indication of the maximum sentence they would face, not taking mitigation into account. This has recently been picked up by the press, who suggest that if people exercise their rights to jury trial (not now to be abolished) and are convicted they will face heavier sentences.

56. We need to consider this proposal within an overall context. We have already noted the proposals in the review that have been influenced by the inquisitorial systems of other European countries. The driving force behind the inquisitorial process is a search for the

truth. As a result, in the purest form of inquisitorial system, there is no provision for defendants pleading guilty: it is for the court to find guilt or innocence on the basis of the evidence in the dossier and at trial.

57. By contrast, in an adversarial system, the defendant is asked whether he or she pleads guilty or not guilty. In the US, a rival influence to that of Europe, plea-bargaining has become a central feature of the system. Trials are comparatively rare, and there is often a great incentive to plead guilty - usually to a lesser charge than the original - because of the impact of sentencing guidelines. In many states the criminal lawyer's job is mainly to negotiate charges downwards, and to find alternatives that might be attractive to the courts. The prosecutors have the power to agree to reduced charges, and the resulting deal is put before a judge for rubber-stamping. There is very rarely any judicial intervention.

58. There is no suggestion that prosecutors in this country should be given equivalent discretion. However, the more formalised system of sentencing discount proposed by the review, and the likely increase in penalty for those who contest charges at trial, move us further towards the American system.

59. The issue of rewarding defendants for pleading guilty raises particularly difficult questions. On the one hand, we acknowledge the public interest in avoiding the expense, delay and potential trauma to witnesses and victims of a trial. On the other hand, as an organisation with long experience of working to combat miscarriages of justice, we are acutely aware of the dangers of putting defendants under increased pressure to plead guilty.

The presumption of innocence

60. The presumption of innocence, a central tenet of the common law, is repeated in Article 6(2) of the European Convention, which provides that “Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.” JUSTICE is concerned that Auld’s interpretation of this presumption may be too narrow in practice; and that his proposals could penalise defendants who put the prosecution to proof and are then convicted. Although this is a feature of the current system in practice, the effects may be very much accentuated by the introduction of a graduated system without sufficient safeguards. We note that the need for these is recognised by the review, which also acknowledges that the existing system of sentence discount is both controversial and criticised. We discuss this in more detail below.

61. If a graduated system is introduced, and we accept that there are arguments for and against, it would be wrong for defendants to lose any credit in advance of receiving full disclosure. Decisions to plead guilty can only responsibly be taken when all the evidence is available. Equally, judges can only make realistic assessments on the basis of good and accurate information.

62. There are still many reasons why defendants may legitimately opt to go to trial: in many shoplifting cases (for example) the defendant’s state of mind, and consequently the question of dishonesty, cannot usually be resolved without a trial. Charges of assault and obstruction of police are often divisive and emotionally charged, particularly where they follow stops and searches of ethnic minorities. The perceptions of both inevitably come into play, and this makes acceptance of police evidence doubly difficult.

63. However, if full disclosure is made and defendants are not pressured, many practitioners feel that it would be very useful to have a clear idea of what the sentence, absent mitigation, would be. It is crucial that decisions be informed on both sides; and judges must satisfy themselves, as is suggested, that pleas are proper.

Cracked trials

64. Finally, while we agree that the problem of cracked trials needs addressing, we do not agree that offering increased discounts for early pleas is the only, or necessarily the most effective, means of doing it. As Auld himself acknowledges, trials crack for a number of reasons, “including overcharging, inadequate and late preparation of the case by one or both sides and short-term considerations of retaining as long as possible [the] right to bail or... privileges as unconvicted remand prisoners.” [paragraph 97]. (We agree with his proposal to reform the last.) The significance of these other factors should not be under-estimated. Zander and Henderson, in their Crown Court study in 1993 found that 70% of those who changed their plea only met their trial counsel on the day of trial and 94% of those who received legal advice and changed their plea did so on the basis of the advice they had received.

Innocent people do plead guilty

65. Lord Justice Auld states [paragraph 105] “if the present discounting practice operated in a fashion likely to induce significant numbers of innocent defendants to plead guilty but an offer they are not, there might be cause for concern”. He acknowledges that of all the criticisms levelled at sentencing discounts as contrary to the presumption of innocence, it is this which gives him greatest cause for concern. However, he does not go on to discuss any evidence of the level of pressure defendants may be under to plead guilty.

66. The Zander and Henderson study, found that 11% of those who had pleaded guilty subsequently maintained their innocence. Earlier research by Bottoms and McClean found 18% of guilty pleaders later denied their guilt. Admittedly, these figures are open to question on the grounds that they are based on the statements of individuals who no longer have anything to gain by admitting their guilt, and perhaps something to gain by protesting their innocence. Nonetheless, there are other independent factors which support the view that innocent defendants may plead guilty.

67. We accept Auld's assertion that no criminal justice system can be entirely safe from the risk of convicting the innocent; but equally there is not sufficient recognition of the damage that wrong guilty pleas can do: both in terms of subverting the system, and the implications for public confidence.

The other view

68. Professor Andrew Ashworth has argued consistently against sentencing discounts. He notes that in around 40% of cases where the defendant does contest guilt, he or she accepts the basic facts charged, but claims absence of mens rea or pleads self-defence (as in the shoplifting and offences against police examples discussed above). In these cases, defendants are being asked to risk a potential increase in sentence of up to 50% on the hope that the tribunal will take a particular view of their state of mind at the time of the offence. It is at least conceivable that a non-negligible proportion of people in this situation would opt for the certainty of a guaranteed lower sentence on a guilty plea than take such a risk.

69. As Andrew Ashworth points out²⁵, it is no longer controversial that confessions obtained at other stages of the criminal justice process should be scrutinised for safety and should not simply be accepted at face value. Section 76 of the Police and Criminal Evidence Act 1984 provides that a confession should be excluded from evidence if it was obtained in consequence of anything said or done which was likely, in the circumstances at the time, to render it unreliable. We share Professor Ashworth's view, and that of the Court of Appeal in *Turner*²⁶ and subsequent cases, that offering a defendant a substantial sentencing discount for a guilty plea may, at least in some circumstances, place him under unacceptable pressure, and such as may compromise the reliability of the plea.

70. Auld's suggestion [paragraph 99] that judges should satisfy themselves through canvassing the matter with both advocates as to the mental competence and emotional state of the defendant and as to whether he might be under pressure falsely to admit guilt is not always going to be an effective safeguard, particularly when the defendant's representative may have no previous knowledge of the defendant.

71. There have also been arguments against the review's suggestion that avoiding trial and rewarding defendants for making this possible is always in the public interest. It dismisses the idea that any injustice may be caused by discounting the sentences of those who plead guilty. Nor does it consider the damage that might be caused to public confidence if those charged with serious offences are given significant sentence discounts for pleading guilty, even where the evidence against them is considerable. Professor Lee Bridges gives the example of a defendant who seriously assaults his girlfriend outside a pub in front of numerous reliable witnesses, but who subsequently receives a third off his sentence for pleading guilty at the earliest opportunity. There is a real danger that this type of case would cause public unease.

²⁵ *Ibid.* p289.

Conclusion

72. It is an open question whether inquisitorial systems can offer a better balance between avoiding expensive trials on the one hand, and protecting defendants from improper pressure on the other. It is always difficult to make direct comparisons, because, as we have seen, the principles and processes are different throughout. We note the distinction, acknowledged in the Auld review, between practitioners, who tend to favour sentencing discounts coupled with a formalised process of advance indication of sentence; and academics who advocate to some degree of judicial endorsement of guilt as a matter of principle.

73. In our view, the method most appropriate to our system will depend to a large extent on the changes the government seeks to make following this review. Within the context of a robustly adversarial system, we agree that sentencing discounts may be appropriate, provided the safeguards discussed above are present. However, if reforms take the system as a whole in a more inquisitorial direction, the corresponding requirement for scrutiny of guilty pleas will become of increased importance.

DISCLOSURE

74. The Criminal Procedure and Investigations Act 1996 (CPIA) undermined adversarial principle by requiring, for the first time, participation by the defence in the process of pre-trial disclosure. It made secondary disclosure contingent on the delivery of a defence statement: a practice that takes us closer to the inquisitorial approach. Inquisitorial systems operate, as we have seen, on the basis of a dossier compiled by the

²⁶ 54 Cr App R 322 CA

investigating authorities which is made available to the court and the parties alike. Trials are conducted by means of judges asking questions arising from information in the dossier.

75. It follows that, if our current system as a whole is going to work, there can be no connection between proper disclosure by the prosecution and participation by the defence. This central point is not recognised by Auld despite the fact that he has articulated the widespread concern in the legal profession that the CPIA scheme is both unacceptable per se and that its provisions are being further undermined by poor working standards. The CPS Inspectorate has also been critical of the serious flaws it has identified in current practice: most notably the failure of material even to appear on the Schedule, as a result of the problematic role assigned to police officers.

76. The Attorney General's Guidelines, published in November 2000, acknowledge these difficulties. Indeed, there is a broad consensus that the Act has never really worked; and that the need for reform is urgent but problematical. While the Attorney-General's guidelines tackle some important issues (notably making prosecutors more responsible for decisions on disclosure and urging its provision in the magistrates' courts where it is reported to have been patchy), they build on the existence of the controversial defence statement. Auld recommends more effective use of defence statements; and has in mind improved clarification of issues in the same way as in civil, or indeed inquisitorial, processes.

77. Auld does not recognise the fact that, no matter how much the defence is cajoled or pressurised to co-operate, it may not wish to do so. This is because the CPIA has subverted key adversarial principles, and with them the legitimate interests of the defence. Defence lawyers do not see why they should have to do the prosecution's work.

It is for the prosecution to prove the case: but defence statements may give the prosecution the opportunity to investigate further and to use any mistakes against the defendant. Legal privilege makes it impossible to establish whether lawyer or defendant was the author of any such error. Failure to mention or to adequately describe intended defences may be treated as evidence against the defendant. Additionally, adverse inferences may be drawn where there has been some failure of disclosure. What turns out to be inadequate drafting may not even be the lawyer's fault: it may be that he or she is awaiting evidence to back up a defence, and that, if it is not forthcoming, that defence will not be run. This is an unfair dilemma for lawyers and defendants alike.

78. The CPIA is wrong, in principle, in that it legitimates the withholding of defence relevant material, by making secondary disclosure dependent on a defence statement. In practice, the indications are that the CPS has been tempted to have a narrow view of what might constitute primary disclosure. The CPS Inspectorate itself has been critical of the overly restrictive interpretation of what "might undermine the prosecution case". It found that the scheme has been interpreted to mean that the existence of the second stage of disclosure indicates that some relevant material may be withheld in order to stimulate meaningful defence disclosure. This is wrong because it delays the disclosure of all relevant material, and because it may deny the defendant the possibility of running a legitimate defence. Auld supports the continuation of these two stages.

79. However, the longstanding chorus of disapproval has had the effect of producing the Attorney-General's guidelines. There are many who argue that, in the interests of getting the system to work, these offer some practical lifelines. They make clear that primary disclosure should be given a much wider interpretation; and point out that "while items of material viewed in isolation may not be considered to potentially undermine the prosecution case, several items together can have that effect". They provide a list of

other material which might be potentially undermining; and say explicitly that "if the material might undermine the prosecution case it should be disclosed at this stage even though it suggests a defence inconsistent with or alternative to one already advanced by the accused or his solicitor" (at the police station). The DPP has said recently that primary disclosure should be about 90 per cent of available material. JUSTICE argues that the material that the Attorney General lists in the category of secondary disclosure ought to be disclosed under the heading of primary disclosure.

80. The last word comes from Home Office commissioned research on the workings of the system. Woolfson and Plotnikoff's report, *A fair balance: evaluation of the operation of disclosure law*, has recently been published. They concur with many of the criticisms already articulated and suggest a consultation exercise within the criminal justice system to develop a working consensus on the principles underpinning the disclosure regime. They particularly urge reconsideration of the link between the defence statement and secondary disclosure; the disclosure timetable; guidelines on what constitutes an adequate defence statement; the range of sanctions for non-compliance; and whether powers are needed to impose sanctions on the police. We agree with these proposals.

81. Disclosure is a fundamental aspect of the quality and fairness of trials, and the reforms discussed need urgent consideration and implementation.

Public interest immunity

82. We agree with the arguments rehearsed in this part of the review, and with the review's conclusion that there should be special independent counsel to represent the interests of defendants where prosecution applications not to disclose sensitive material are conducted in the absence of the defence.

APPEALS FROM MAGISTRATES' COURTS

83. JUSTICE is particularly concerned about the proposed abolition of the right to appeal by way of rehearing from the magistrates' court to the Crown Court. We refer to our previous discussion of the difficulties of magistrates' court trials, which make them less fair than proceedings in the Crown Court. There is also the question of public confidence.
84. Prior to the introduction of the Criminal Justice (Mode of Trial No.2) Bill, the Commission for Racial Equality commissioned Professor Lee Bridges²⁷ to research the level of confidence that ethnic minorities felt in magistrates' courts. As a result, there is recent material that demonstrates unequivocally the poor image ethnic minority defendants have of these courts. Confidence amongst the general public is also poor, a recent MORI poll commissioned by the IPPR found that only 29 per cent of people think the lower courts do a good job²⁸.
85. This lack of confidence, coupled with the acknowledged defects of procedure in the magistrates' courts (eg lay assessors deciding both issues of law and fact and the highly unsatisfactory system of disclosure), argues powerfully for retaining an automatic right of appeal on both law and facts. In addition, the magistrates' courts are not courts of record, therefore, rehearings are the only practicable means of appeal, unless there is some alteration in their status.
86. Professor Andrew Sanders, in his analysis of magistrates courts²⁹, concluded that lay panels sitting without a judge are not appropriate tribunals for contested cases, even at the summary level. Sanders recommends that the contested summary jurisdiction be

²⁷ Ibid. at footnote 16.

²⁸ See Andrew Sanders, *Community Justice: modernising the magistracy in England and Wales*, IPPR 2001

²⁹ *op cit*.

transferred to mixed panels. Illogically, the Auld review, despite its reliance on Sanders' public opinion research in relation to mixed panel decision-making, not only ignores Sanders' criticisms but expresses such confidence in lay magistrates that it proposes restricting the means of appealing against their decisions.

87. The Auld proposal is not supported by the high success rate (40 per cent) of cases that are appealed to the Crown Court for rehearing. Admittedly, the proportion of convictions that are appealed is only 7 per cent, but Sanders points out that there is currently great difficulty in obtaining legal aid for such appeals. Defendants may also be disinclined to appeal against conviction because sentence will be at large if the Crown Court upholds the magistrates' court's finding.

88. In our view, the very high success rate of such convictions as are appealed shows that concerns over procedures in the magistrates courts are not merely theoretical. Appeals by way of rehearing of facts as well as law remain an important safeguard. They should not be abolished.

Appeals to the High Court by way of case stated and judicial review

89. We are also concerned about the review's proposals for abolishing appeals from the magistrates' court to the High Court. These are a valuable and effective means of bringing what can be complex and important issues of law directly before a High Court Judge. We acknowledge that under the Auld proposals it would be possible to have complex appeals heard by a High Court Judge sitting in the Crown Court. However, this misses an important aspect of the current system of appeals to the High Court: decisions taken in the Crown Court (even by High Court Judges) are not binding. A central feature of the present system is that disputed or unclear areas of law can be decided in such a way as to provide binding precedents. Under the proposed system, the same points of

law arising in different cases would either have to be appealed to the Crown Court each time they arise (with the potential that they would be decided differently on different occasions) or cases would have to proceed to an additional layer of appellate review (the Court of Appeal) in order to be decided authoritatively.

90. We acknowledge the review's criticisms of the complexity of the current system, with its three different avenues of appeal from the magistrates' court. However, the current option of appealing to the High Court to obtain an authoritative determination of issues of law is, in the long run, simpler and, in all likelihood, more cost efficient, than appealing first to the Crown Court and then, if necessary, to the Court of Appeal. In the interests of simplification, we would recommend keeping the present right of appeal to the High Court but merging appeals by way of case stated and by way of judicial review. The expansion in the scope of judicial review with the advent of the Human Rights Act has further blurred the distinction between these two jurisdictions. We see no reason why they should be kept separate.

BAIL APPLICATIONS TO HIGH COURT JUDGES

91. Bail is an issue of overriding importance. If it is denied, the liberty of the subject - rightly of paramount importance in terms of constitutional principle - is forfeited before any findings of fact have been made. European Court cases highlight the importance of sufficient disclosure by the prosecution in advance of bail decisions; but every practitioner has stories of how allegations have been inflated at first appearances before much information is available, so that bail is denied.

92. This can have extremely serious consequences for the individual, who may well be acquitted in the longer term. No compensation is offered in this country, unlike most of

the rest of Europe, for time spent in custody before acquittal. This is a cause for serious grievance for criminal lawyers and their clients.

93. Over the past 20 years, bail applications have in any event been restricted by the requirement to show a change in circumstances before a renewed application. Concern about the remand prison population has been such that the former Chief Inspector of Prisons undertook a special review of it, indicating the deleterious nature of the physical and psychological conditions that were all too often encountered³⁰.

94. This is important background, and it militates strongly against the abolition of the right to apply to a High Court judge in chambers for bail. The advantage of such an opportunity is that judges at this level may have the distance and objectivity that may be lacking in the more pressured lower courts. Often bail will be granted here, albeit with stringent conditions attached: showing that it is a valuable resource.

95. We do accept that such intended applications be screened by the Legal Services Commission, so that only meritorious cases are funded. This should be a sufficient safeguard against abuse; and this is not a right that should be cleared away in favour of tidying up the system.

DOUBLE JEOPARDY

96. JUSTICE originally opposed any relaxation to the double jeopardy rule³¹ when the Law Commission produced its Consultation Paper arguing for the rule to be abolished in all cases attracting a three-year sentence or more. However, since then the Home Affairs

³⁰ *Unjust deserts a thematic review by Her Majesty's Inspector of Prisons of the Treatment and Conditions for Unsentenced Prisoners*. Published December 2000.

Select Committee has recommended the relaxation of the rule in relation to murder cases only. The Law Commission revised its position in the light of this and other recommendations so that by March 2001 its final view was that, in murder cases only, the Court of Appeal should have power to quash an acquittal where there is reliable and compelling new evidence of guilt and a retrial would be in the interests of justice.

97. The Commission reasons that new evidence would be compelling only if, in the opinion of the Court, it made it highly probable that the defendant was guilty. In deciding whether this requirement was satisfied, the Court would consider the new evidence in the context of the issues that arose at trial. A retrial would not be possible unless the new evidence added substantially to the strength of the prosecution case: and it should be restricted to new forensic evidence, rather than cell confessions, for example.

98. We retain our concerns about the consequences for the presumption of innocence at retrials, given that juries would know or could guess the Court of Appeal's view of the case. We nevertheless prefer the Commission's final recommendations to the Auld review's position that the double jeopardy rule should be abolished in relation to other very serious offences. We are not convinced that there are sufficient safeguards to ensure fairness. Although new forensic techniques may be more reliable than, say, new confessions, their reputation is much more questionable than it used to be. As we argue in our original (Feb 2000) paper, the use of such techniques on material retained, possibly for some length of time after a trial, raises further difficulties: in particular the possibility of accidental or deliberate contamination of, or interference with, the evidence.

³¹ JUSTICE's response to the Law Commission's consultation paper on Double Jeopardy, February 2000

99. While accepting the difficulties raised by new forensic evidence that could not reasonably have been adduced at the first trial, we foresee problems with the proposed reform. The Lawrence case illustrated the necessity for thorough and competent police investigations and the necessity of having properly prepared prosecutions. The insufficiency of the original evidence was responsible for the Crown Prosecution Service's decision not to prosecute.

100. The unsupervised nature of police inquiries; the limited powers of prosecutors; and the limited disclosure of evidence to the court and the defence is unusual in European terms. Our system remains an adversarial one with few independent safeguards in the early stages with heavy reliance upon the testing of evidence and the way in which it was obtained, at trial, orally, in front of judge and jury. The limited exceptions to the double jeopardy rule of other Council of Europe member states must, therefore, be seen in context. It is significant that the other common law countries cited in the Law Commission's comparative section (Law Commission paper 267 – March 2001) have retained an absolute bar on reopening acquittals that have been finally determined at trial and appeal.

101. Public confidence in the system must be equally affected by the erosion of the important principles of certainty and finality as by the rare case where strong new evidence arises. We need to consider the distorting effect such a change may have on the system. If the rule is abolished, the category of cases affected must be kept very small and the exception limited to very exceptional circumstances.

RESTORATIVE JUSTICE

102. We welcome the recommendation to develop and implement a national strategy to ensure consistent, appropriate and effective use of restorative justice techniques across England and Wales.

103. JUSTICE has a particular interest in this area, having researched restorative justice in a youth justice context (*Restoring Youth Justice* 2000) and having recently been commissioned to undertake further work that will look at the relationship of restorative justice to the criminal justice system. This will try to assess both what it can offer in a variety of contexts and what its limits are. We shall be looking at the treatment of serious offenders in Texas; how the French mediation system which puts victims first fits with an overall system that is centred on offenders; the nature of restorative justice initiatives within the criminal justice system in Minnesota, where there has been both legislation and pioneering initiatives; how the community is involved in restorative justice in Norway, and possibly Vermont; and lastly, we shall be visiting Austria to examine how their very successful youth mediation service has been extended to adults. Our research will not be restricted to alternatives to courts, but will also consider sentencing and post sentencing stages, as well as prevention.

104. The Youth Justice and Criminal Evidence Act 1999 has already introduced a mandatory system of youth referral orders where young people plead guilty on their first appearance in a youth court, and are not sentenced either to an absolute discharge or to immediate custody. This new system has been piloted in a number of areas, and is due to operate nationally as from April 2002. We accept that there are many questions that still need to be answered about theory

and principle, as well as about practice. However, we recognise that this is a major new direction in criminal justice and a shift in thinking that may have profound consequences. The Auld report acknowledges this, and has clearly understood that it has the potential to affect a wide range of cases. It recognises that restorative justice is a philosophy rather than a model.

105. The report correctly highlights the level of resources necessary to tackle the causes of offending and to reintegrate young people. It refers to experience in New Zealand, Australia, and Canada of “proper investment securing long-term and widespread savings to the community in the reduction of crime”³². In New Zealand in particular, family group conferences are used in serious juvenile offences. These methods are widely accepted and are now being extended to adults in a number of pilot schemes. There is also considerable experience of diversion in Scotland. Children are dealt with by special panels where their interests are legally paramount; and in relation to adults, the Procurator Fiscal has the power to fine directly (fiscal fines) and to divert those who accept their guilt to a variety of relevant agencies for treatment, courses, or community reparation where appropriate. At present, the Crown Prosecution Service has no such power. We support the report’s view that this should be remedied so that the CPS may act similarly where appropriate.

106. The recent review of the criminal justice system in Northern Ireland was unquestionably influenced by the Scottish example.³³ It recommended that

³² paragraph 66

³³ criminal justice review implementation plan 2001 (NIO)

restorative justice be integrated into the criminal justice system and that the police be able to give informal warnings and cautions to young people, rather than the structured Crime and Disorder Act approach of issuing reprimands and final warnings that lead to automatic court appearances.

107. The Northern Ireland review was also influenced by the 1989 reforms in New Zealand which established for young people a special branch of the police and a system of diversion that applies to all who do not deny offending. At the lower end, the diversion is informally arranged by police, with more serious cases referred by the courts to family group conferences. The details of their operation will be broadly familiar, and the original concept of diversion has largely survived. A later reassessment produced changes (in legislation in 1994) to achieve greater safeguards for those young people detained by police, although it left untouched the central features of the 1989 Act.

108. The Northern Ireland review explicitly adopts the New Zealand thinking, listing its attributes as: inclusivity; the balancing of interests; non-coercive practice; and a problem solving orientation. It recognises the greater success that conferencing has with more serious offences and recommends that court-ordered referrals be discretionary for indictable offences. This is a much more confident and wide-ranging reform than we have yet seen in England and Wales and could point the way ahead for us. The Northern Ireland review also suggests conferences for 18 to 21 year-olds, young adults who may still be very immature, a category historically somewhat neglected but who are now receiving belated attention from policy-makers in England and Wales.

109. In relation to pre-prosecution restorative justice, the review envisages referral by either police or prosecution to restorative processes, with the prosecution retaining the right to prosecute, as in Scotland and New Zealand, until the agreed plan is completed. Community restorative justice is held to have a role to play for low level offenders but it must be accredited, and subject to standards laid down by the government for training, human rights protection, and due process and proportionality issues. These are to be monitored and inspected by a Criminal Justice Inspectorate.

110. We note that the Home Office is currently funding a major research project examining the viability of restorative justice in relation to adult and more serious offenders and is supporting other relevant projects. Nevertheless, the overwhelming emphasis in this country so far is on young minor offenders who, in other jurisdictions, would be dealt with much more informally. We argued in *Restoring Youth Justice* (JUSTICE 2000) that more attention should be paid to international law, with its insistence on keeping young people away from courts if at all possible; on detention being the last resort; and on the primary importance of reintegration. This holistic approach should apply generally rather than in the restricted, mandatory way it operates at present.

111. There is considerable concern about whether restorative practice is effective in reducing re-offending, a political imperative that may sit uneasily with a philosophy based on an entirely different premise. Restorative practice primarily seeks to address the needs of those involved in particular offences - victims and

offenders alike. JUSTICE has identified the necessity to examine whether and how these different aims and purposes can integrate into the criminal justice system, a key question for the future of restorative practice. The review's recommendation for a national strategy will greatly assist in establishing a practical and conceptual framework to support this growing momentum. The requirements of the Human Rights Act that sentences should have an express purpose and incorporate the means by which to achieve it, (an idea fully endorsed by the Halliday Report), are a useful contribution to this developing perspective.

YOUNG DEFENDANTS

112. We agree that young defendants should be dealt with by a specialist court as recommended by the review. JUSTICE published a report, *Children and Homicide* 1996, making this same recommendation. Lawyers and psychiatrists worked together to prepare the report in tandem with the progress of a particular case, *Hussain v UK* (21 February 1996) in the European Court. The decision in *Hussain* resulted in the Home Secretary losing his role in the release of those detained during Her Majesty's Pleasure, and prefigured the *T&V* litigation. We append a paper summarising the post *T & V* position, and will supply the full version on request.

113. The abolition of *doli incapax*, still in existence at the time of the original criminal trial of Thompson and Venables, means that children below the age of 14 are assumed to be fully responsible for their actions in the same way as adults. This adds to the task of ensuring "effective participation" (as required by *T&V*) in trials for this age group.

Children and Homicide recommended that children under 14 years of age should not be liable for a public trial in adult criminal courts. They should be tried in private so that their identities are protected. Only the facts of the case and the sentence should be made public. We suggested that in the case of children accused of homicide, and in other cases which might fall to be tried in a Crown Court, proceedings should take place before a specially convened panel of a judge and two magistrates with relevant experience and training. We felt that such an arrangement, by providing the young people with an opportunity to understand proceedings and present their case, was more likely to expose the true circumstances of the offence.

114. We recognised that trial by jury and public proceedings were fundamental principles of the criminal justice system; and that any move to restrict jury trial therefore required strong justification. We agreed that there was such justification in the case of children under 14.

115. Furthermore, the organisation of a jury trial invariably leads to delay. Moreover, the need to address a jury necessarily creates a formal and accusatorial atmosphere. A jury composed of 12 adults is intimidating in itself and means that children in this position are considerably disadvantaged both in comparison with others in their age group charged with lesser offences, and with adults. The fact that children cannot be expected to function in such a setting is readily appreciated by imagining a situation in which the jury, rather than the defendants, were 10 year-olds. The judgment in *T&V* confirms these findings. International law is clear that children and young people should be approached and treated in a different way from adults: they should be punished less severely and the

primary purpose of any measure taken in respect of them should be rehabilitative. Hearings must be conducted in an atmosphere of understanding.³⁴

116. For those aged between 14 and 18, we considered that crown court proceedings may be more appropriate. However, both speed and rehabilitation are equally imperative. We therefore recommended early pleas and accelerated hearings in such cases, with a view to early intervention and therapy. The judge would continue to have the power to impose reporting restrictions in the interests of the young person. We acknowledged that further consideration was needed in cases where children were charged with adults.

117. These conclusions have been endorsed by subsequent events and reform is urgent to reflect the requirement in the European Court of Human Rights decision in T and V to provide effective participation. Moreover, it is clear that the Lord Chief Justice's Practice Direction is insufficient. Practitioners say that it has not achieved the change in the dynamics of the process nor, of course, could it affect many of the practical problems. Thomas Grisso, the American psychologist, has recently published (Grisso ed 2000) research on trying juveniles in adult courts; details of which are available in the paper already referred to. In summary, he found not only that a large percentage of young people could not participate to an acceptable degree, particularly those of limited emotional or intellectual capacity; but also that those tried in such a way had higher rates of re-offending than those tried in juvenile courts.

118. One area that neither the litigation nor the Auld review tackles, but which is nevertheless in need of reform, is sentencing. The Halliday Report does not deal with

³⁴ para 14.2 of the UN Minimum Standards on the Administration of Juvenile Justice reads: "proceedings shall be conducive to the best interests of the juvenile and shall be conducted in an atmosphere of understanding, which shall allow the juvenile to participate therein and to express herself or himself freely". See also the UN Convention on the Rights of the Child.

young defendants; but the acceptance by both the European Court of Human Rights and the House of Lords of the principles enshrined in the Convention on the Rights of the Child and other instruments militates against the continuing survival of mandatory indeterminate sentences for young people. Such sentences are particularly inappropriate in the case of young people, who need certainty even more than adults do. In Germany, the maximum sentence for murder by a juvenile is 10 years, for this explicit reason. The Committee on the Rights of the Child has expressed concern about the existence of the sentence of Detention During her Majesty's Pleasure. Its indeterminate nature has no parallel in other European countries. JUSTICE's research for the *Hussain v UK* (1996) case showed that the UK treats young people who commit murder in a much more punitive way than its European neighbours. This cannot be sustained following the Court's finding (in *Hussain*) that the rationale of the sentence is in part preventative and rehabilitative.

119. In *Children and Homicide* we recommended that the distinction between murder and manslaughter should be abolished and should be replaced with the single offence of homicide. We continue to believe that the distinction serves no useful purpose. Rather than concentrating on the difficult area of intent, the more important judicial task is to determine the most appropriate sentence in each case, with a view to the protection of society and the rehabilitation of the young person. This recommendation was made in the knowledge that these are often cases in which there is no substantial dispute as to the facts.

120. There should be sentencing discretion to impose the appropriate sentence which would include indefinite custody in appropriate cases. We believe sentencing discretion is essential: the research, necessarily limited because of the rarity of the event, indicates the marked heterogeneity of individual offenders' characteristics and circumstances. In

the light of this evidence, we believe it is essential that the trial judge (or judicial panel) that has heard the evidence and is in the best position to determine the sentence required, should do so with full discretionary powers. In the case of indeterminate sentences, minimum periods of detention should be for one year, as currently suggested by the Sentencing Advisory Panel (in their consultation paper of November 2001).

121. Decisions on the release of those sentenced to indeterminate detention at the court's discretion should be taken by an independent panel modelled on the Parole Board. This body should review and monitor progress annually, and have power both to give directions as to placement and to release.

122. Clearly the vast majority of children, convicted of homicide, will continue to be detained. They will spend at least some initial period in a secure unit. It is essential to assess and treat them appropriately and consistently, and to promote their rehabilitation. The success of this approach has been publicly apparent in relation to Venables and Thompson, who were released last year after making what Lord Woolf described as "exceptional progress" in detention. Their case also illustrates the desirability of not transferring young people automatically to adult prisons.

123. Given the necessity of implementing the European Court's decision in *T&V*, we should not fail to recognise that we have an ideal opportunity of reforming the equally important aspect of sentencing.

124. The question of whether children charged with adults should be tried in adult courts must, we feel, be a matter of judicial discretion. Circumstances vary widely and courts must bear the *T and V* principles in mind. It may be that some older children should be tried in adult courts, with all the protections outlined in the Practice Direction, and with

the option, of course, of having a bench trial. Sometimes, separate trials may be justified. We note that in some other jurisdictions (Zambia, for example) adults may be tried with young people in youth courts.

125. Finally, we are in favour of sentencing being a joint exercise in the new specialist courts. It seems to us that the level of training and expertise required by all members of the panel justifies this approach, particularly if, as we recommend, sentencing is at the discretion of the court.

JUSTICE

31 January 2002