LORD JUSTICE AULD’S REVIEW OF THE CRIMINAL COURTS

A RESPONSE

by

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EXECUTIVE SUMMARY

- *The Consultation Process* Should be longer; contributions should be on the LCD’s website (p.1)

- *Conduct of the Review* Some criticisms (pp.2-5)

- *Juries*
  - The evidence is that jurors are positive about the experience (p.7)
  - The evidence is that jurors are reasonably representative of the general population (pp.8)
  - Agree that categories of ineligibility for jury service should be abolished (p.10)
  - Do not agree that categories of statutory excusal should all be abolished (p.10)
  - Recommend that disqualification for jury service be removed (p.10)
  - Do not agree that there should be special ethnic minority jury members for race sensitive cases (pp.13)
  - Argue merits of jury research (pp.13-16)
  - Do not agree that the Contempt of Court Act 1981 be amended to permit the Court of Appeal to inquire into what happened in the jury room (pp.17-18)
  - Disagree that the law should declare that the jury has no right to acquit a defendant in defiance of the law or in disregard of the evidence (pp.18-19)
  - Agree that the defendant should have the right to elect for trial by judge alone in the Crown Court (and, if it is set up, in the District Division) (p.20)
  - Agree that the allocation of “either-way” cases should always be for a court and that therefore the defendant’s right to elect jury trial be removed (pp.20-23)
  - Do not agree with the proposed criteria for allocation of “either-way” offences (pp.20-23)
  - Do not agree that in case of dispute as to the allocation of “either-way” cases the decision should be taken by a District Judge (p.23)
  - Agree that committal for trial and committal for sentence should be abolished (p.23)
  - Agree (reluctantly) that maybe long fraud trials should be heard by a judge and two experts rather than a jury (pp.23-24)
  - Agree that some – but not all – serious cases involving young defendants should be heard by the youth court (pp.24-25)
  - Agree that fitness to plead be dealt with by the judge (p.25)
  - Agree with proposals regarding length and frequency of jury service (p.25)

- *Unified Criminal Court* Accept that there is a case for a unified criminal court (p.26)

- *Intermediate court* Strongly disagree with the proposal for a new intermediate District Division court (pp.26-33)

- Agree with the proposed jurisdiction of the District Division, if it is set up (p.34)
• **Management structure for courts** Agree that there should be a new centrally funded executive agency responsible for the administration of all the courts (p.34)

• **Information technology** Agree with the Report’s proposals for major changes in the IT serving the criminal justice system (p.35)

• **Running the criminal justice system** Agree with the Report’s recommendation that a Criminal Justice Board with wide powers and a new advisory Criminal Justice Council be established (pp.36-39)

• **Alternatives to trial**
  - Agree with proposals regarding: fixed penalty notices; “caution plus”; regulatory enforcement for some financial infringements; restorative justice; and civil debt enforcement (pp.39-.41)

• **Preparing for trial**
  - Do not agree that the CPS rather than the police should charge the defendant (pp.45-46)
  - Do not agree that the CPS should take over responsibility for deciding what is disclosable (pp.47-50)
  - The disclosure regime will always be less than satisfactory (pp.50-54)
  - Do not agree that automatic Plea and Directions Hearings be abolished (pp.55-63)
  - Agree that sanctions are basically useless for enforcing standards of pre-trial work in criminal cases (pp.63-65)

• **The Trial**
  - Agree that the judge should give more of an introductory statement to the jury (p.65)
  - Do not agree that the parties should be required to prepare an agreed “case and issues summary” – though they could be encouraged to do so (pp.66-68)
  - There is no evidence that the jury needs more assistance – if anything, there is evidence that it manages quite well (pp.68-69)
  - Agree that advocates should give time estimates – but most such estimates turn out to be wrong (pp.70-71)
  - Do not agree with the proposal for changes in the way that judges sum up on the law or on the facts, do not agree with the proposal that the jury be asked to answer detailed questions, do not agree that they be asked to return a special verdict (pp.71-73)

• **Appeals** Do not agree that the prosecution’s proposed right to ask for a retrial after an acquittal on grounds of fresh evidence should be extended beyond murder cases – at least for the time being (p.74)
This Response is mainly directed at those parts of the Auld Report with which I disagree or in regard to which I wish to make some further comment. In regard to the overwhelming majority of the recommendations, I either completely agree or have no particular comment.

The terms of reference
The inquiry was called a Review of the Criminal Courts in England and Wales. Its terms of reference were to inquiere into:

“the practices and procedures of, and the rules of evidence applied by, the criminal courts at every level, with a view to ensuring that they deliver justice fairly, by streamlining all their processes, increasing their efficiency and strengthening the effectiveness of their relationships with others across the whole of the criminal justice system and having regard to the interests of all parties including victims and witnesses, thereby promoting public confidence in the rule of law”.

Lord Justice Auld was told that he was not expected to provide a costed blue-print and therefore, as he said, he left to others the task of detailed examination of feasibility and costing of his proposals.

In his Foreword, Lord Justice Auld said that it was primarily a review of the practices and procedures of the criminal courts but that it went broader to include also how the criminal justice system works insofar as it concerns the courts.

The present consultation process
The Report is almost 700 pages long and makes 328 recommendations. It covers a vast range of topics. Given the importance and complexity of the issues raised, the time allowed for consultation (from mid-October to the end of January) is wholly inadequate, especially considering the fact that it includes the Christmas period. If the consultation process is to be meaningful, individuals and, even more, organisations in the system must be given enough time to do justice to the issues raised. It is worth noting in this context that although Sir Robin was asked (and presumably agreed) to complete his report within a year, it actually took 21 months before it was delivered to Ministers. An extra month or two for consultation would be appropriate. Major reform of the criminal justice system is too important to be rushed through at a breakneck speed.

That, naturally, is on the assumption that the consultation exercise is genuine. Some believe that, subject to being blown off-course by adverse reactions, the Government has more or less made up its mind already on most of the issues raised by Auld. Such a view was supported by the leaked Home Office memorandum on criminal justice reform
reported in The Guardian on October 31, 2001.¹ It was also unfortunate that, shortly after the consultation period began, both the Home Secretary and the Lord Chancellor publicly declared views about the Auld report.² Both made it clear that they were their preliminary views subject to the consultation exercise. But it is one thing for the Minister to have views which he keeps to himself during the consultation process and another for him to announce them publicly. Once they are known to be his views, it becomes more difficult for him to change them than if he had kept quiet. Moreover, if he adheres to his announced views, there may be a suspicion that he made up his mind before hearing all the arguments. It diminishes the notion of consultation if it seems that minds have been made up before the consultation period has ended and before time has been allowed after that for assessment of the views received. In short, it were best that Ministers keep their tentative conclusions to themselves.

On a different point, it would be very helpful to those outside Government if submissions that come in as a result of the consultation exercise (save any that are confidential) were posted on the relevant website so as to be available to all those interested in these matters. Indeed, given the availability of the web, this should be done as a matter of routine in all governmental consultation exercises.

**Conduct of the Review** (paras.10-19)
The Review was consciously set up by Ministers as a one-man inquiry not as a committee, let alone a mini-Royal Commission. Lord Justice Auld was appointed on 14th December 1999 and was asked to complete his work by the end of 2000 – an unwisely short time-frame and one that in the event proved impossible to meet.

Sir Robin had twelve expert consultants. Unfortunately, however, they were not appointed until the very end of March 2000 - by which time the Inquiry was in full-swing and all the initial work had already been done. The structure of the Review, the nature of the consultation to be undertaken and the organisation of the inquiry had all been settled. The expert consultants had no say in any of it. Thereafter, the consultants were basically used individually, as and when the judge asked for their help. They could, of course, make whatever suggestions they wanted – but, understandably, most of them did not do that to any great extent. They did not meet as a plenary group.³ They had no way of knowing how the judge’s thinking was developing. They only received such written submissions made to the Review as Sir Robin sent them. He wrote the report himself.⁴ The consultants did not even receive drafts of his report for comment. Sir Robin may

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¹ The article reported that confidential papers, accidentally left in a pub by a senior Whitehall official, revealed Government thinking about the Auld Report, including itemisation of recommendations in light of implementation plans.
² In the case of the Home Secretary, see the trail for a speech to the Institute for the Study of Civil Society (CIVITAS) in The Times, October 25, 2001. In the case of the Lord Chancellor at the Magistrates’ Association, see Solicitors’ Journal, November 2, 2001, p.999.
³ There was a residential conference in September 2000 attended by the consultants and other stakeholders in the system and three three-hour lunchtime discussion sessions in November-December 2000 to discuss emerging conclusions. Every consultant attended at least one of those special meetings.
⁴ The report is well written but the absence of an index to so massive a document is very regrettable.
have felt that he used his expert consultants as much as he wanted, but at least some of them felt that they would have been able to contribute much more if they had been more involved. What was missing in particular was any real opportunity for them to engage by way of cut-and-thrust ongoing debate with Sir Robin on the topics under review.

Auld invited written submissions by writing to over 1,000 individuals and organisations in this country and overseas, by placing advertisements in national, local, professional and ethnic press and publications and on the Review’s website. But (unlike the Runciman Royal Commission) he did not solicit evidence on the basis of a detailed questionnaire. He listed six brief main headings and asked for views. Responses were supposed to be in by March 2000. The first Progress Report in May 2000 gave slightly different indications as to the main headings and said a little as to how Sir Robin was approaching the different topics. But by that date written submissions were supposed to have been sent in - and the majority had in fact already been received. Those preparing submissions therefore did so without any clear idea as to what detailed issues would be of interest to the Review.

Sir Robin took immense time and trouble to inform himself. He conducted many seminars, he held meetings with individuals and organisations, he attended conferences and visited courts, criminal justice agencies and related bodies here and in Scotland, Northern Ireland, the USA and Canada. But, apart from the help of his small secretariat, he conducted the whole process essentially on his own.

The contrast between this way of proceeding and that of the Runciman Royal Commission in which the writer was involved is very striking. All eleven members of the Royal Commission were involved in every part of the process from start to finish. In the two years of the Commission’s work, there were no fewer than 43 all-day plenary meetings, most of which were attended by all the Commissioners, each based on lengthy, detailed position papers prepared by the secretariat. They identified the issues, reported

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5 The structure and organisation of, and distribution of work between, courts; their composition, including the use of lay and stipendiary magistrates; case management, procedure and evidence (including the use of information technology); service to and treatment of all those who use or attend courts or are the subject of their proceedings; liaison between the courts and agencies involved in the criminal justice system; management and funding of the system.

6 Progress Report No 1, May 10, 2000. The topics now listed were management and funding of the system including the role of IT; structure of the courts system; composition of, and allocation of work among the courts; case management; pre-trial and trial procedure; evidence; public confidence in the system; the mechanics of sentencing; and appeals.

7 The Report (p.4, para.12) states that there were “over a 1,000 written submissions”. Over 700 had been received by the First Interim Report in May 2000.

8 Sir Robin conducted and personally chaired a series of no fewer than 20 seminars all over the country. In aggregate, some 500 invited participants, with different experience of the criminal justice system, took part. The basis of each seminar was an 11-page list of issues containing some 90 questions each briefly stated in a few lines. Most were very broad and general. The invited participants were informed in advance which questions would be the focus of that seminar. At the two seminars attended by the writer, Sir Robin simply invited participants to express views more or less at large. There was no serious interaction either between the chair and participants or between participants inter se. It was an opportunity for people to air, unchallenged, for the most part familiar views. It was difficult to imagine that Sir Robin found them very instructive.
what the written evidence said on each subject, indicated what the research showed and spelled out the options. Oral evidence, heard by the whole Commission, was taken from selected persons and organisations. Structured half-day seminars, again attended by all the Commissioners, were held with selected invitees on the basis of previously circulated papers identifying problems and options. Commissioners, in a variety of combinations, made innumerable site visits. Each Commissioner received every one of the hundreds of written submissions received by the Royal Commission. Every chapter of the Report went through many drafts each of which was the subject of successive meetings of the whole Commission. It was a massive collective exercise. The heart of the exercise was not the written or oral evidence, the seminars, the site visits or the countless meetings with others. The real work was done in the literally thousands of man-hours the Commissioners spent arguing and discussing with each other. Lord Justice Auld did not have the benefit of that process of a group consisting of experts and non-experts arriving at agreed solutions through discussion and argument over weeks and months. (Runciman made 352 recommendations almost all of which were unanimous.)

Some may consider that comparisons as to working methods are beside the point; that the only thing that matters is the quality of the final product. Certainly, the quality of the report is the main thing. Nevertheless, the way in which such an inquiry proceeds is of interest and can be of importance. If the way in which evidence is collected and conclusions are reached is open to criticism, the weight and authority of the Report is to that extent lessened.

As to research, Sir Robin stated (para.17) that, “[i]n the time available” he was only able to commission a few limited projects of research 10 though, as has been seen, in the event, his inquiry took only four or so months less than the Runciman Royal Commission which published twenty-two major pieces of commissioned research. (There is unfortunately, little sign in the Report that Sir Robin Auld consulted the Royal Commission’s research studies. I permit myself the observation that this is especially regrettable in the case of the Crown Court Study11 which, as will be seen, has a mass of information bearing directly on many of the topics addressed in the Report.)

The reason for setting up the Auld Review in the way it was done – rather than as a Royal Commission or Inter-Departmental Committee which the wide terms of reference

9 Of the eleven members, five were criminal justice “experts” – a judge, a barrister, a solicitor, a police officer and an academic lawyer - and six, including the chairman, were lay people.

10 On p.675 of the Report there is reference to the only three pieces of research commissioned by the Review: an evaluation of the composition of juries in three crown court centres; research on the criminal standard of proof; and a paper on what can be learnt from jury research. None of the three can be described as very significant. The first by the LCD is unpublished. The second by the writer (mentioned without a reference on p.193 of the Report), was published in New Law Jnl., 20 October 2000, p.1517. The third by Dr Penny Darbyshire et al is on the Review’s website.

11 M.Zander and P.Henderson, The Crown Court Study (Royal Commission on Criminal Justice, Research Study No.19, 1993, 264pp.) Lengthy questionnaires were completed by the judge, the prosecution and defence barrister, the defence solicitor, the CPS, the police, the court clerk, the defendant and the jurors. The only reference to the Crown Court Study in Auld (p.156, n.64) could have been derived from the Runciman Report itself (p.133, para.61).
certainly justified – may have been concern about the time traditionally taken by such more substantial inquiries. But Runciman produced its report in exactly two years – hardly a long time to wait for a report on such a major range of issues.

I am bound to say that for inquiries such as this one that range widely on important and highly controversial topics, the Commission or Committee model seems better than the model adopted here. A report of this kind by an individual, whoever he may be, cannot match the weight or authority of a report by a broadly based Commission or Committee. Moreover, a report on a subject that bristles with highly controversial topics is bound itself to be highly controversial. It places a considerable burden on an individual to ask him to become the target of the substantial brick-bats that are inevitably thrown at such reports, however good they may be.

Introduction (chap.1, pp.7-22)
The Introduction seems unexceptionable.

Summary and recommendations (chap.2, pp.23-70)
This chapter is the Executive Summary.

The Criminal Courts and their Management (chap.3, pp.71-93)
I note and agree with Sir Robin’s description of the Court Service’s 1999 Consultation Paper Transforming the Crown Court as “an ill-considered project” and “largely unworkable”. Since the Auld Review was in large part established to sort out the wreckage of that sorry exercise this damning verdict is of considerable interest. The “mood music” of the Court Service’s paper, in step with that of the Woolf reforms, was that the court “should get a grip” of cases by case management backed by sanctions. That of the Auld Report is the opposite – that the court should mainly rely on the parties to prepare their cases and that sanctions are virtually useless.

I opposed the Woolf reforms basically on the ground that the proposed case management would increase costs and would not work well and that the proposed sanctions, if used, would be unduly harsh and often counter-productive.

As will be seen, whilst I agree with Auld on sanctions, I believe that he goes too far in wanting to return to “the bad old days” in regard to pre-trial preparation – in particular by abolishing the automatic Plea and Directions Hearing.

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Magistrates (chap.4, pp.94-134)

I agree with the recommendations in this chapter. In particular I agree that the argument, proposed by Professor Andrew Sanders, for a hybrid court consisting of a mixture of magistrates and professional judges for summary cases is not made out.

I also agree that there should be no significant change in the balance of numbers of District Judges (Magistrates’ Courts) and magistrates, or in the relative volume or nature of summary work assigned to each of them (p.114).

I agree with Auld’s conclusion that there should be no further extension, at least for the time being, of the justices’ clerks’ case management jurisdiction (p.119).

Auld makes various suggestions (summarised on pp.128-9) to improve the process of selecting magistrates, with a view, in particular, to broadening the base of selection and improving the “community balance” of benches. Some involve extra resources and are therefore no doubt at risk from the Treasury. But insofar as the main thrust of government policy is to achieve a magistracy that is more balanced in terms of age and class, whilst I am wholly in favour, I doubt whether there is much likelihood of any significant improvement. The struggle to broaden the social class mix of the magistracy has been going on for decades and has made little headway. It seems to me inevitable that magistrates (like judges) will in the main continue to be middle class and middle aged. If that is right, it seems pointless to agonise over it or to regard it as a serious problem.

Moreover, the idea that the magistracy would have a better image if more magistrates were working class or younger is politically correct wishful thinking. The public is hopelessly ignorant on the subject. Professor Andrew Sanders reports that, “The public knows little about how the magistracy works.”13 One third of IPPR’s MORI poll did not even know that the majority of magistrates are lay people. Whatever the actual composition of the bench it will have the image of being broadly middle class. (Even the working class magistrate will tend to wear a suit.)

Of course, one should do what one sensibly can to broaden the base of selection, but it is unlikely to bring important dividends - beyond showing those who are concerned about it that the system is making sufficient efforts in that direction. Even if all the hopes of such a programme were realised it would obviously be a very long time before this could produce a measurable impact on the composition of a body consisting of 30,000 persons most of whom continue in post to retirement.

I agree with Auld (p.131) that District Judges should be deployed flexibly where needed. I equally agree with Auld’s proposals (p.134) regarding training of magistrates.

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Auld says (p.135, para.1) that the jury is a hallowed institution that commands much public confidence. In the van of such confidence he says are judges and legal practitioners. He went on, “However, support for it is not universal, *not least among those who have been jurors*” (emphasis supplied).

This suggests that there is a significant body of negative opinion about the experience among former jurors. There are, of course, many anecdotal expressions of negative feelings about the jury system from those who have served on juries. But anecdotes are a poor basis for judgment when there is something more solid available. The only existing major survey of jurors in this country shows an overwhelmingly positive view of jury service. The survey, part of the Crown Court Study carried out for the Runciman Royal Commission\(^\text{14}\), was based on questionnaires filled out by 8,338 jurors in 757 cases – a very high average response rate of ten questionnaires per jury. The cases in the sample were *all* completed trials in *all* Crown Courts throughout England and Wales\(^\text{15}\) for a two-week period in February 1992. The questionnaires were completed immediately after the end of the case. This therefore was a huge and representative sample of jurors.

Jurors were asked “How interesting have you found being on jury service?” The great majority said they found it either “Very interesting” (74%), or “Fairly interesting” (22%). Only 4% were negative about the experience.\(^\text{16}\)

Jurors were asked to rate the jury system overall. The verdict was very favourable. Exactly a third (33%) thought it was a “Very good system” and another 47 per cent thought it was a “Good system”. Fifteen per cent had no particular view. Only five per cent were negative, thinking it was a “Poor system” (3%) or a “Very poor system” (2%).

When the views of different age groups were compared, perhaps unsurprisingly, there was a progression, with 74 per cent of those between 18 and 24 thinking it was a “Good” or “Very good” system as compared with 84 per cent of those between 55 and 64. But the spread between age groups from 73 per cent to 84 per cent was not great. Moreover, the *negative* ratings did not fluctuate by age. They were 5-6 per cent for all age groups.

In summary, it appears that jurors are overwhelmingly positive about the experience.

\(^{14}\) See n.11 above.

\(^{15}\) Save that the three courts used in the pilot study, Kingston, Reading and Snaresbrook, were not included.


\(^{17}\) Ibid, p.232.
Representativeness of the jury

Auld (p.137, para.6) says that, because jury service is dependent on entry onto the electoral roll, people serving on juries are under-representative of those in their early 20s, ethnic minorities and the more mobile sections of the community such as those living in rented accommodation. This statement is based on Home Office figures comparing the electoral register with the general population. Some 8 per cent of those eligible to be registered were found not to be registered and the mentioned categories were especially prone not to have registered.\(^\text{18}\)

Auld suggests that a way to address that problem is to use in addition to the electoral roll other official sources of names such as the Driver and Vehicle Licensing Authority, the Department of Work and Pensions, the Inland Revenue and even telephone directories. If that is practicable, I agree.

But the Crown Court Study showed that, as regards age and ethnic balance, the jury is broadly representative of the general population.

Thus, although the Home Office figures show young people less likely to be registered, fifteen per cent of the sample jurors were in the age bracket 18-24 - compared with 14% in the general population.\(^\text{19}\)

As regards ethnic background, 95 per cent of jurors in the sample were white – precisely the same proportion as in the general population. The breakdown of different categories of ethnic background was as follows:

<table>
<thead>
<tr>
<th>Sample</th>
<th>General population</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>%</td>
</tr>
<tr>
<td>Black-Carribean</td>
<td>2</td>
</tr>
<tr>
<td>Black-African</td>
<td>0.5</td>
</tr>
<tr>
<td>Indian</td>
<td>2</td>
</tr>
<tr>
<td>Pakistani</td>
<td>0.3</td>
</tr>
<tr>
<td>Bangladeshi</td>
<td>0.05</td>
</tr>
<tr>
<td>Chinese</td>
<td>0.2</td>
</tr>
<tr>
<td>Other</td>
<td>1</td>
</tr>
</tbody>
</table>

(Source: Table 8.44, p.241)

Again, therefore, the evidence seems to be that, at least nationally\(^\text{20}\), the jury is reasonably representative of ethnic minorities – with black and Indian jurors slightly over-represented, and Pakistani, Bangladeshi and Chinese jurors slightly under-represented.


\(^{20}\) For reasons that were unclear, we were denied permission to analyse the jury data in the study by region.
Social class It is widely believed that the higher social classes tend to avoid their duty to serve on juries more than those from other social classes and that, as a result, the overall social class composition of the jury is skewed.\textsuperscript{21} It is, of course, the case that certain categories of persons are statutorily ineligible for, or are excused as of right from jury service. (On that see below.) But the common belief referred to here relates not to those categories but to those who are eligible for jury duty but somehow manage to escape their civic duty. Be that as it may (the question of excusal is dealt with below), the Crown Court Study suggests that the social class composition of the jury is fairly close to that of the general population and that the highest social class is not greatly under-represented. The relevant table\textsuperscript{22} showed the following:

<table>
<thead>
<tr>
<th>Jurors’ occupations</th>
<th>Sample</th>
<th>General Population</th>
</tr>
</thead>
<tbody>
<tr>
<td>%</td>
<td></td>
<td>%</td>
</tr>
<tr>
<td>Professional/managerial</td>
<td>29</td>
<td>31</td>
</tr>
<tr>
<td>Clerical/administrative</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Office work</td>
<td>22</td>
<td>17</td>
</tr>
<tr>
<td>Service industry</td>
<td>14</td>
<td>20</td>
</tr>
<tr>
<td>Skilled manual</td>
<td>19</td>
<td>23</td>
</tr>
<tr>
<td>Unskilled manual</td>
<td>7</td>
<td>7</td>
</tr>
<tr>
<td>Other</td>
<td>7</td>
<td>2</td>
</tr>
</tbody>
</table>

(Source: ibid, Table 8.41, p.238)

However, even if the overall composition of the jury in a large national sample is tolerably representative of the population as a whole, it is still a question whether too many people avoid jury service.

This raises two distinct issues – first, the categories of \textit{ineligibility, excusal as of right} and \textit{disqualification} based on statute, and secondly, the various types of ad hoc discretionary excusal or deferral based on the way the summoning system is actually operated.

In the 1999 Home Office research study, based on a sample of 50,000 people summoned for jury service,\textsuperscript{23} it was found that only about one third (34\%) were available for service - and almost half of those had their jury service deferred to a later date. Those who were ineligible, excused as of right or disqualified accounted for 13 per cent of the sample. Some 8 per cent of those summoned had moved from the eligible address either before they were summoned or before they were due to serve on a jury and another 7 per cent failed to attend. No fewer than 38 per cent were excused, as will be seen, for a variety of reasons.

\textsuperscript{21} For a typical illustration see the front-page lead story in The Times, October 25, 2001 headed, “No jury dodging for the middle classes” which began: “The middle classes will no longer be able to ‘cop out’ of jury service under government plans to be announced today.”

\textsuperscript{22} It was not felt possible to ask a battery of questions to fix jurors’ social class. Just one question was put about the juror’s job (or last job).

\textsuperscript{23} Op.cit.,n. 18 above
**Ineligibility**
Those who by reason of their occupation are involved in the administration of justice (judges, lawyers, police officers, court officials, probation officers etc) and clergymen are statutorily ineligible for jury service mainly because it is feared that they might exert undue influence on other jurors. Auld proposes (p.149) that we should adopt the New York approach and abolish all categories of automatic ineligibility including that of judges and clergymen. I agree.

**Excusal as of right**
Certain categories of persons are entitled to be excused as of right because they are deemed to have even more important duties elsewhere. They include peers, MPs, doctors, dentists, nurses, members of the armed services. Auld proposes (p.151) that no one should be excusable from jury service as of right, only on showing good reason for excusal. It is difficult to know quite what “showing good cause” means. Is it a good reason that the applicant is a surgeon who would otherwise be operating on his patients? If, as I suspect most people would think, it is even more important that a surgeon be operating than that he be doing jury service, surgeons should be excused as of right rather than being put in the position of having to make the case. The same would apply to some other occupations. Rather than abolishing all excusal as of right, I would suggest that the list of occupations at present on the list be reviewed to see whether any should be taken off it.

**Disqualification**
Certain categories of persons are disqualified from jury service by reason of their criminal record. Auld (p.149), like Runciman, proposes no change. I would myself abolish the category of disqualification. I believe that the concept of the jury as twelve citizens picked at random from the electoral roll should embrace everyone except persons suffering from mental illness. The feeling that jurors with a criminal record would somehow contaminate the process is I believe unrealistic. As Auld acknowledges (p.149, para.34) at least in the past, checks on the criminal records of would-be jurors have been rare, so it is reasonable to assume that many with disqualifying convictions have in fact served without anyone being any the wiser. Now, however, the new Central Summoning Bureau has an electronic link with the Police National Computer which makes it possible to have an automatic check on everyone summoned. But I question whether it is either worthwhile or right to exclude those with previous convictions. If one trusts the concept of the jury, one should trust it to cope with the participation of someone with a criminal record just as much as someone who is a serving judge.

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24 Auld, p.149, para.34, does not make it clear whether this in fact happens or whether it is merely practicable.
A jury is more than its individual members

The evidence, such as it is, is that the particular composition of the jury makes no measurable difference to the outcome of cases. The Juries Act 1974 made major changes in eligibility for jury service - in particular by abolishing the previous property qualification which dramatically increased the proportion of women and younger jurors. An unpublished Home Office study looked at the overall acquittal rate of juries for three months before and three months after the introduction of the Act. No significant differences emerged. In a study in Birmingham the researchers looked to see whether jury decisions could be correlated with differences in the make-up of juries. They concluded that “however one regarded the material, no consistent patterns were apparent”. The presence of women, younger or working class jurors appeared to make no difference to jury results. They concluded:

“We can confidently state that no single social factor (nor so far as we could detect, any group of factors operating in combination) produced any significant variation in the verdicts returned. . . The truth of the matter is that most juries in Birmingham were extremely mixed, and it is to be expected that the amalgam of personal and social attributes that make up a jury will produce verdicts that reflect that unique social mix rather than the broad social characteristics of the individuals concerned”.

In the Crown Court Study the acquittal rate of juries with a lower average age was almost the same as the acquittal rate of juries with a higher average age - and insofar as there was a slight difference, the younger average age juries were more likely to convict than the older.

I believe that all these various indications are extremely encouraging as regards the working of the jury system regardless of composition.

Ad hoc discretionary excusal and deferral

As has been seen, the 1999 Home Office study showed that discretionary excusal is by far the most common explanation why someone who is summoned for jury service does not in the event serve. It accounted for no fewer than 38 per cent of the whole sample. Auld (p.151, para.39) states that “[i]t 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”.

26 Baldwin and McConville, op.cit.,p.100.
27 Ibid., pp.104-05.
28 For those with an average age of 25-34 it was 42%, for those with an average age of 35-44 and an average age of 45-55 it was 44%. (Op.cit., n.11 above, p.237, Table 8.39).
In fact, however, the statistics in the Home Office study on which this statement is based show a rather different picture. The most common reason for excusal (not mentioned by Auld) was medical, accounting for 40 per cent of the total. Another 20 per cent was accounted for by the problem of care for children or the elderly. The juror being an essential worker was the reason for excusal in 13 per cent of excusals and financial reasons in another 7 per cent. Nine per cent were excused because they were non-residents and six per cent because they were students. Transport problems accounted for only 1 per cent of the sample overall but in country areas where public transport is inadequate the proportion was much higher – 30 per cent of excusals at one court and between 5-9 per cent in six others.

There are obviously a great variety of other personal reasons. This miscellaneous category in the Home Office study (5% of the total) included having relatives in prison, having large numbers of animals to look after and pregnancy.

As has been seen, of the 34 per cent of the sample who were available for jury duty, nearly half were deferred. The reasons were sometimes the same as those for excusal (exams, medical, work, care of children or adults) but holiday arrangements accounted for over a third (35%). The Home Office study showed that significant numbers of jurors who were granted a deferral were granted a further deferral or were excused at a later date – for the same sort of reasons as before.

Auld suggests (pp.151-2) that when a claim for excusal appears to be well founded, the Central Summoning Bureau should aim to deal with it by way of deferral rather than excusal – and that, as in New York and other US courts, the person concerned should be asked to offer dates when, if at all, he could do jury service instead. A request for deferral should normally be accepted unless it is not practicable or unreasonable. I agree with these recommendations.

It must be accepted, however, that the numbers who get discretionary excusal or deferral will always be very large. (Indeed, if the categories of automatic ineligibility, excusal as of right and disqualification are abolished, the number of people asking to be excused or deferred on a personal basis is bound to rise.) Contrary to popular wisdom, this is not because masses of people dodge judge duty but rather, in the main, that many people who are summoned have life situations that make it extremely difficult for them to perform that duty. This should not be regarded as a problem providing that the basic principle is that those who can should instead serve at a later date.

**Enforcement of jury service**

As has been seen, 7 per cent of the Home Office sample failed to attend for jury duty on the day. At present there is little effort to enforce the duty. Auld says (p.145, para.25) it is not apparent on what authority, that “the result is that it has become widely known that a jury summons may be ignored with impunity”. According to Auld, in New York and other places in the USA jury summonses are now enforced quite strictly. He suggests that it should be done here – but not via the present penal proceedings which necessarily
involves a court hearing. Rather there should be a system for fixed penalties subject to a right of appeal to magistrates. There would of course be a proportion, perhaps a high proportion, who would not respond to the fixed penalty notice where enforcement would then require further proceedings. But, despite this, a system of fixed penalties would probably be a somewhat more effective mechanism of enforcement than the present one.

Ethnic minority representation on the jury
Auld proposes (p.159) that in cases where race is a significant issue the judge should have the means to arrange for the selection process to result in three members of the jury to be from some, though not necessarily the relevant, ethnic minority. A similar proposal was made unanimously by the Runciman Royal Commission. This was the only one of the recommendations to which I subscribed as a member of that Commission that I am now persuaded was mistaken. I am now persuaded that the arguments against this proposal are stronger than the arguments for it. The most powerful is that special ethnic minority representation on the jury breaches the fundamental principle of random selection. Another is that it opens the door to claims for similar special treatment for other minorities. A third is that if they were aware that they had been chosen by this special procedure it would place the ethnic minority jurors in a highly uncomfortable position in the jury room. They would be seen by the other jurors as in some sense different and apart which would thereby create divisions in the jury room. They could feel that the system was placing on them responsibility to “represent” the defendant whether they wanted to or not. It would threaten the integrity of the jury as a unit. There would be a risk of this happening even if by chance the ordinary selection process produced three ethnic minority jurors. In any case in which race was an important factor and in which there were three ethnic minority jurors it would be assumed that they had been chosen by the special method.

This is a recommendation that should not be adopted.

Jury research
Runciman proposed that the Contempt of Court Act 1981 be amended to permit authorised research in the jury room. Auld (p.168) disagrees. Sir Robin says that he has “grave doubts 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” (p.166, para.82).

It is not clear what Auld understands by the word “intrusive” research. The kind of research that is in question (by video and audio recording) need not be intrusive at all. Indeed the jurors would not need to be aware of it and it would be best if they were not.

Auld suggests that whatever value could derive from research could be achieved without amendment of the Contempt of Court Act. Such research had been carried out by interviews with jurors before and/or after their deliberations, or comparison of their
verdicts with the views of other participants including the judge and the advocates, or use of shadow or mock juries either present at the trial or in viewing re-enactments or video films of the trials. He refers in particular to the recent New Zealand study involving questioning of 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, the nature of and basis for their verdict and the impact of pre-trial and trial publicity.

I do not agree that under our Contempt of Court Act all such questions would be permitted here. The scope for asking jurors questions about the actual case here is probably limited to the kind of questions that were put in the Crown Court Study. (The questionnaire, which was carefully vetted by all the relevant authorities and received official approval at the highest level, had some 80 questions.) But it is not clear that Sir Robin actually has in mind the kind of inquiry into the decision-making process that was undertaken in New Zealand. Having said (p.168, para.86) that he would commend that kind of research he goes on, “What I have in mind is an inquiry 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”. That does not go very far – and is much less than was done in the Crown Court Study.

But even if the New Zealand type of study could be conducted under our Contempt of Court Act, that kind of research is a far cry from observation of the jury in action. Thus, if the question is, did the jury understand or remember the evidence, it is obviously of value to ask the jurors but that cannot provide a conclusive answer to the question. In order to have such an answer it would be necessary also to have an informed observer’s appraisal of what actually happened in the jury room. In the New Zealand study one question was “What was your understanding of the evidence of [the witness]”. The interviewer was then supposed to prompt the juror by selecting bits of evidence from key witnesses, and to ask what were the most important points to emerge from this evidence. With the best will in the world, even educated jurors would find it extremely difficult to give a coherent answer to such questions.

Runciman said that research in the jury room should be allowed “so that informed debate can take place rather than argument based only on surmise and anecdote”. It continued: “Such research might throw light on a variety of issues on which we have not felt able to make any recommendation – such as whether there is a case for a literacy requirement for

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29 In the Crown Court Study the Contempt of Court Act was invoked as the (very unconvincing) reason for official refusal for us to relate the questionnaires completed at the end of the case by jurors to those completed by the other participants in the case.


31 Section 8 of the Contempt of Court Act makes it unlawful to “obtain, disclose or solicit any particulars of statements made, opinions expressed, arguments advanced or votes cast by members of the jury in the course of their deliberations”.

32 Questions were asked, inter alia, about how well the jurors themselves (and the other jurors) understood and remembered the evidence, their opinion of the performance of the judge and the lawyers, their experience of the summoning process and of jury service itself. For analysis of the jury questionnaires see forty pages of text in the Crown Court Study, op.cit., pp.203-44.
jurors, whether the arrangements for majority verdicts should be changed or whether the disqualification rules require amendment”.33

The Conservative Government seemed inclined to accept the Commission’s recommendation. Its Interim Response to the Report of the Runciman Royal Commission, said, “The Government is sympathetic to the Commission’s recommendation that the law should be amended so as to allow research to be conducted into the reasons for jury verdicts; but it is still considering the precise scope of the research that the law might allow and the rules under which it might be carried out”.34 Thereafter, however, all was silence. It is believed that Lord Taylor, the then Lord Chief Justice, effectively stopped any notion of going forward with the idea of such research.

There are three different possible reasons for allowing research in the jury room. One is general “academic” interest in how an important institution works with no preconceptions and no axes to grind. Another is to test whether the jury system “works” – is it a sensible process in a sufficiently high proportion of cases to justify its retention. A third is to see whether the jury system or the rules of evidence or the rules of procedure can be improved. Runciman was only interested in the third. As an academic researcher I am interested also in the first, but that reason would obviously not be sufficient to justify a change in the law to permit such research.

As to the second, there is almost universal agreement that the jury system should be retained – if only because no one can think of a system for trying serious cases likely to enjoy equal, let alone greater, public confidence. Research is therefore not needed to persuade a doubtful community as to the merits of the jury system. There are some sceptics about the jury system but they are a tiny and, I would say, insignificant minority. Certainly it cannot be seriously suggested that there is a significant level of doubt about the merits of the jury system that needs to be resolved.

On the other hand, there is at least a possibility that such research might generate doubt as to the merits of the system. The mere fact of setting up such a study might suggest that there are doubts about the system. (When it was clear that Auld was inquiring into the relationship between lay magistrates and stipendiaries there were many who feared that that this heralded the demise of lay magistrates – fears generated, despite strenuous official denials, by nothing other than the mere fact of the inquiry and rumour.)

If, contrary to one’s expectations, the research showed the jury system works very badly (by some definition), it would risk destabilising an institution that presently enjoys great public confidence – and, if no better system can be devised, to what purpose or advantage?

There is also a danger that some might conclude from such research that the institution was working badly whereas in fact it was working as well as can be expected and in any event well enough. Thus, in any sample of a hundred cases there might well be a few

34 February 1994, para.12.
where the jury’s decision seemed to be against the weight of the evidence. Some such cases might fall into that rare category (like that of Clive Ponting or Pottle and Randall – on which see below) where the jury plays its historic role of protecting the citizen against unjust laws, unfair prosecutions or harsh penalties. But some would be cases where there was no such apparent justification, where the jury for some reason simply “got it wrong”. The occasional decision of that kind is the price one pays for having a jury system. There are the peculiar cases where members of the jury consult a ouija board, or do something equally outlandish, where they get the wrong end of the stick, where they decide out of unreasoning prejudice or stupidity. In the account of the research one would have to be prepared for some such horror stories.

It is worth noting that when the Contempt of Court Bill was originally introduced in 1981, clause 8(1) establishing the new rule prohibiting revelation of what transpired in the jury room was qualified by clause 8(2) which made an exception specifically crafted for authorised research. Lord Hailsham, the Lord Chancellor, explaining the clause, said, “Provided that individual cases are not identified there is also a place for bona fide research in the field”. Lord Mackay, then the Lord Advocate, agreed: “The jury system, great institution that it is, surely can stand up to properly conducted research”. That is my belief too – not to test whether the system works but whether it can be made to work better. But, to be worth undertaking, such research would have to be based on a significant size sample. I do not regard changing the Contempt of Court Act in this regard to be a high priority but I believe it might bring some useful as well as interesting results.

The unreasoned jury verdict

Auld speculates whether either the European Court of Human Rights in Strasbourg or our courts might one day rule that juries must give reasons for their decisions because of the provisions of the European Convention on Human Rights. He inclines to the view (p. 170, para.92) that the Strasbourg Court is unlikely to hold that Article 6 of the Convention requires juries to give reasons.

It is possible, though I think very unlikely, that the Englishs court might rule otherwise. (If it ever should happen, there is no procedure that would permit the Government to appeal such a ruling to the Strasbourg court, since governments do not have that

35 For a current example see the recent inexplicable case where the jury convicted Nicholas Kay of manslaughter of his wife when the evidence overwhelmingly suggested either murder or an acquittal – see Marcel Berlins, The Guardian, 31 October 2001.
36 Cl.8(2) provided, “This section does not apply to publications which do not identify the particular proceedings in which the deliberations of the jury took place or the names of the particular jurors, and do not enable such matters to be identified, or the disclosure or solicitation of information for the purpose of such publication”.
39 A very recent decision of the Divisional Court held that in a summary trial justices can give their decision without stating their reasons in any detail. The Human Rights Act had not changed the position. The justices only had to show that they had applied their minds to the ingredients of the offence and had taken account of the defendant’s state of mind. That could be done in a few sentences. (R (on the application of McGowan) v Brent Justices, October 17, 2001 – see 165 Justice of the Peace, 27 October 2001, p.834.
possibility.) Sir Robin notes that 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” (p.172, para.96) He also refers to the broader point made over many years, notably by Sir Louis Blom-Cooper, that a publicly unaccountable jury is unacceptable in the modern world.

In some, usually civil, cases the judge asks the jury to answer specific questions. Much more often he directs the jury on the law and puts the issues to them as alternatives for them to determine. Often, Auld says, this has caused difficulties which have resulted in appeals and “a plethora of conflicting and otherwise unsatisfactory jurisprudence” (p.172, para.97).

Auld concludes (ibid),

“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.

He develops this recommendation in Chapter 11 and I leave my discussion of the question until then – see p.71 below. In brief, I am against the idea.

Inquiry by the Court of Appeal as to what occurred in the jury room
Sir Robin urges amendment of the Contempt of Court Act 1981, s.8 to reform the rule that inhibits the Court of Appeal from inquiring into what occurred in the jury room. (In fact this inhibition was self-imposed by the Court of Appeal and long pre-dated the 1981 Act.)

The question is whether the process inside the jury room should be sacrosanct, beyond review by the appellate process. In R v Young where some members of the jury consulted a ouija board to interview the deceased, the appeal court was able to quash the conviction because it happened at a hotel rather than in the jury room. If it had happened in the jury room, the Court would presumably have felt unable to interfere. In such an extreme case it seems highly unsatisfactory that the Court cannot interfere. But if one permits appeals on the ground of impropriety in the jury room one may be opening a real can of worms. It opens the way for members of the jury who came to their decision reluctantly to reopen the whole question by allegations of impropriety of one sort or another by other jurors. It might lead to attempts at intimidation or bribery of jurors by

40 Emphasis supplied.
41 For a civil case see Boston v WS Bagshaw & Sons [1966] 1 W.L.R.1135 (the CA refused to interfere although all 12 members of the jury swore affidavits that they had mistakenly given the opposite verdict to what they intended). For a criminal case see R v Thompson [1962] 1 All E.R.65 (the CA refused to interfere though the evidence was that the jury had improperly been told of the defendant’s prior convictions by the foreman of the jury).
associates of a convicted defendant to try to get them to make allegations of impropriety by other jurors. It could lead to lawyers for the defendant attempting to find out from the jury after the case whether there had been any form of impropriety on the basis of which an appeal could be founded. In other words, the reform, in solving one set of problems, might create an even more serious set of different problems.

No one knows how often serious impropriety does occur in jury deliberations. But to take an example mentioned by Sir Robin, I would doubt whether jurors sleeping through the jury’s deliberations is likely to occur on a scale sufficient for it to be worth worrying about. One doubts whether many juries toss a coin to decide the case or do other completely unacceptable things. Such cases are presumably so rare as to be treated as de minimis risks.

Sir Robin also mentions as possible grounds for inquiry by the Court of Appeal “impropriety of reasoning or lack of reasoning or that the jury decided one way or the other on some irrational prejudice or whim, deliberately ignoring the evidence” (p.173, para.98). I would be strongly opposed to a change in the rules to permit any such inquiry. The Court of Appeal can quash a conviction on the ground that in its view there was not sufficient evidence to found a verdict of guilt beyond a reasonable doubt. That question can be addressed in the light of the transcript of the case. An attempt to inquire into the jury’s process of reasoning without a transcript of its deliberations would be a hopeless and highly objectionable exercise.

On balance, therefore, I would be against alteration of section 8 of the Contempt of Court Act to permit enquiry by the trial judge or the Court of Appeal into alleged impropriety in the jury room.

Perverse verdicts (pp.173-76)

Auld proposes (p.176) 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.

I regard this proposal as wholly unacceptable - a serious misreading of the function of the jury. The right to return a perverse verdict in defiance of the law or the evidence is an important safeguard against unjust laws, oppressive prosecutions or harsh sentences. In former centuries juries notoriously defied the law to save defendants from the gallows.43 In modern times the power is used, sometimes to general acclaim, sometimes to general annoyance, usually one imagines to some of each.

Auld quotes E.P.Thompson’s eloquent passage in describing the function of the jury:

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43 For the history of role of the jury in defying the authorities see T.A.Green, Verdict According to Conscience, 1200-1800, University of Chicago Press, 1985. Green shows in particular that, although in modern times jury intervention is seen mainly as a matter of occasional resistance to the authorities, in earlier times it was an integral and routine feature of the administration of criminal justice – tolerated by government over centuries - in the refusal to convict defendants who faced the death penalty.
“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 attends in judgment, not only upon the accused, but also upon the justice and humanity of the law…. 44

This exactly captures the position, which I would say is part of the unwritten constitution of this country. Auld says that he regards the ability of juries to acquit and to convict in defiance of the law and in disregard of their oaths, as 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” (p.175, para.105). I believe that this statement, perhaps the least attractive sentence in the whole report, reflects deep distrust of the jury. It is based I believe on an authoritarian attitude that disregards history and reveals a grievously misjudged sense of the proper balance of the criminal justice system.

In the Introduction to his Report (p.10, para.8) Sir Robin quotes, with apparent approval, from the concluding sentence in my Dissent to the Report of the Runciman Royal Commission, “the integrity of the criminal justice system is a higher objective than the conviction of any individual”. But the concern for justice and for the integrity of the system is too important to be entrusted solely to the judges. The jury have a role in that regard too.

The Runciman Royal Commission dealt with this issue in a short paragraph – which was not mentioned by Auld:

“Although juries are under a solemn duty to return a verdict in accordance with the evidence, they do from time to time perversely return a verdict contrary to the evidence. Until there is research on jury deliberations it is impossible to say confidently why this happens. But it is plausible to suppose that it is because the jury has taken an unfavourable view of the prosecution or of the law under which it is brought or the likely penalty. We do not, however, think that these cases justify the introduction of a right of appeal against acquittal.” (p.177, para.75)

I cannot imagine that on a constitutional matter of this importance any government would prefer the view of an individual judge, however distinguished, to the unanimous contrary view of a recent Royal Commission.

I believe that the present system provides the right balance in telling the jury that they must decide the case in light of the law and the evidence but allowing them to ignore either or both if they believe that to be the right course. We have lived with that system for hundreds of years. I believe that there is no acceptable reason to consider changing it.

44 Writing by Candlelight, 1980.
**Defendant’s option of trial by judge alone (pp.177-81)**

I support Auld’s proposal that, with the consent of the court, the defendant in the Crown Court should be given an option to elect for trial by judge alone. He recommends that this should apply also in the proposed District Division. I am against the whole idea of the District Division (on which see p.26 et seq. below). If it is introduced, I would suggest that the power to elect trial by judge alone be confined for an experimental period to the Crown Court.

**What to do about “either-way” offences? (pp.181-200)**

On any view, this is one of the most important and is likely to be the single most controversial topic in the entire Report.

Auld’s recommendations (see p.200) are:

1. That in “either-way” cases, if the parties are agreed as to venue, the magistrates’ court, rather than the defendant, should determine venue after representations from the parties
2. That in the event of a dispute on the issue, a District judge should decide
3. There should be a right of appeal from any mode of trial decision, on paper only, to a Circuit judge
4. The procedure of committal for trial for “either-way” cases should be abolished. Pending establishment of the proposed new unified criminal court, such cases should be sent to the Crown Court in the same way as indictable-only cases.
5. That committal for sentence should be abolished

The first of these proposals was the unanimous recommendation of the Runciman Royal Commission and despite the furore provoked by the recommendation I adhere to the view that it was correct. (So far as I am aware, no member of the Runciman Commission changed his or her mind on that matter.)

Whatever may be the Government’s reason for adopting this proposal, the main reason that the Runciman Commission took that view was not that it would save public money – though it probably would. The main reason was the point of principle, that the question of mode of trial should be determined objectively by the system, not subjectively by the defendant. That is clearly the chief reason why Auld adopts it too.

Runciman recommended that where both sides agreed on summary trial, the magistrates should try it and where both sides agreed on trial by jury it should be sent to the Crown Court. In the event of a dispute the magistrates should decide on venue, having regard to the present statutory criteria and, in addition, all relevant factors such as the defendant’s reputation and record, if any, the gravity of the offence, the complexity of the case and its likely effect on the defendant.
Martin Narey in his *Report on Delay in Criminal Courts* in 1997 agreed - save that he thought that the matter should not be left to agreement between the parties but should always be decided by the court after hearing representations from the parties.

The Government’s Criminal Justice (Mode of Trial) Bill, introduced in the House of Lords in November 1999, gave effect to the Runciman/Narey view on the basic issue of the right of election. On the question of the role, if any, for agreement between the parties, it preferred the Narey view that the court should always make the decision.

The Bill was much criticised. It reached the Committee stage in the Lords but, after a series of defeats, it was withdrawn. The Government re-introduced the Bill (the Criminal Justice(Mode of Trial)(No.2)Bill) – this time in the House of Commons. But when it reached the Lords it was again defeated and was again withdrawn.

The crucial change between the (No.1) Bill and the (No.2) Bill was the removal of all but one of the factors the court was permitted to take into account when making the allocation decision. These were now reduced to “the nature of the case” and “the circumstances of the offence (but not of the accused)”. It no longer referred to appreciation of the relevant circumstances – such as previous convictions and reputation - mentioned in the previous Bill. Because of these changes I opposed the (No 2) Bill. I adhere to the unanimous view of the Runciman Royal Commission that the court making the mode of trial decision must be able to take into account all relevant factors including in particular the personal circumstances of the defendant.

Having carefully read the Auld Report, I have been unable to determine for sure whether Sir Robin prefers the approach of the Mode of Trial (No.1) or of the (No.2) Bill. In other words, does he think that the allocation decision should take into account all the defendant’s personal circumstances or not? There seems to be no clear statement one way or the other.

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45 The Bill said that in making the allocation decision the court should take into account any representations made by the parties and certain specified matters, namely: “(a) the nature of the case; (b) whether the circumstances make the offence one of serious character; (c) whether the punishment which a magistrates’ court would have power to impose for it would be adequate; (d) whether the accused’s livelihood would be substantially diminished as a result of a conviction or as a result of punishment of a kind of magnitude likely to be imposed by the court on conviction; (e) whether the accused’s reputation would be seriously damaged as a result of conviction or as a result of punishment of a kind or magnitude likely to be imposed by the court on conviction; and (f) any other relevant circumstances which appear to the court to be relevant.” The Bill added for good measure that the accused’s previous convictions, if any, could be mentioned so as to permit the court to consider item (e).

46 The Bill had its Second Reading on December 2, 1999. The Committee stage on January 20, 2000 resulted in a defeat for the Government by 222 to 126 on the right of election. It was then withdrawn.

47 It did not get beyond its Second Reading in the Lords on September 28, 2000.

48 Mr Jack Straw, the Home Secretary, set out the thinking behind the (No.2) Bill in the New Law Journal, May 12, 2000, p.670.

One may deduce that Sir Robin prefers (No.1) to (No.2). The Report (p.195, para.158) says that it was “to say the least maladroit” for the Government expressly to mention potential damage to livelihood and reputation as included in the mode of trial criteria in the first Bill and then to exclude them in the second Bill. But this does not make it clear which approach is preferred. I was unable to find anything else on the point in the section on the matter in chapter 5. The Report returns to the issue in a short passage in Chapter 7 (pp.281-3) when considering allocation. It says there that “the criteria should be broadly drawn according to the seriousness of the alleged offence, mostly, but not always, judged by the severity of the potential sentence”. (p.281, para.37) This is ambiguous. “Broadly drawn” suggests the (No.1) Bill; “according to the seriousness of the alleged offence” suggests the (No.2) Bill; “mostly, but not always, judged by the severity of the potential sentence” could be said to point to either Bill. At the end of the same paragraph Auld says, “However, even if it is considered that the sentence in any individual case would not exceed the relevant limit, it could still be allocated to a higher level by means of its seriousness whatever the likely sentence”. This seems to acknowledge that there is a category of seriousness quite apart from likely sentence - which would point toward the (No.1) Bill.

I find this uncertainty as to what Lord Justice Auld thinks on the point disappointing. One would have expected him to make his view on such a contentious point clear – and especially, one might have hoped that he would offer clear guidance on what the Government should do in regard to Mode of Trial Bill (No.1) as compared with the approach of the (No.2) Bill.

What is certain is that he nowhere refers in terms to what the Runciman Royal Commission thought was a key issue – namely is this a case where jury trial is warranted because of the seriousness of the matter for the defendant in terms of all relevant factors including in particular his reputation. For a person with no prior convictions, a prosecution for stealing a book worth £5 may not be very serious in terms of its likely sentence, but the impact of a conviction could be devastating for the accused. In the unanimous view of the Royal Commission that was an archetypal case justifying jury trial. I was unable to find a word in his Report to indicate whether Sir Robin agrees or disagrees.

So, the Auld Report, like both Runciman and Narey, recommends that the allocation decision be taken by a court, but it does not spell out whether the criteria should be those in the (No.1) Bill or those in the (No.2) Bill or some other criteria.

As already indicated, I very strongly favour the approach of the (No.1) Bill which reflected the view of the Runciman Royal Commission. If the choice now is between (No.1) or (No.2) I would urge the Government to go back to (No.1).

50 See also Recommendation 90 in the summary of recommendations in Chapter 2 (p.42): “The court should allocate all “either-way” cases according to the seriousness of the alleged offence and the circumstances of the defendant in accordance with statutory and broadly drawn criteria. . .”(emphasis supplied)
There is little reason to think that those who criticised the two previous Bills before will accept either now. Since (No.2) was even more widely and more severely criticised than (No.1), it would make sense to go back to (No.1).

If the Government decides to go ahead with such a Bill (irrespective of whether it is on the basis of (No.1) or (No.2)), it will obviously do so knowing that it will presumably be defeated again in the Lords and that the only way of getting it onto the statute book would therefore be by use of the Parliament Act – an unattractive option for a project that is so widely criticised outside Parliament as within. If the Government’s main reason for doing so is to save taxpayers’ money, it may be that it will decide that the game is simply not worth the candle.

If it does go ahead, I assume that the Government will take to heart Lord Justice Auld’s severe criticism of the way it argued the case for its two previous Bills (see pp.195-97). Auld deals powerfully with the various arguments that have been deployed in this debate. I agree with him that the fundamental reason for taking away the defendant’s right to elect is that it is properly a decision that should be taken objectively by the system rather than subjectively by the defendant.

I also agree with Auld (p.198, para.169) that real, or imagined, failings of the prosecution process or of justice in the magistrates’ courts are not a valid reason for retaining the right to elect jury trial. The right response is to seek to cure such failings and to correct those misapprehensions. Even if they cannot be cured or eradicated, that still does not mean that such considerations should affect, let alone determine, the allocation decision.

There is one important detail in the proposal made by Auld that I do not agree with – namely that in case of a dispute between the parties as to mode of trial, the matter should be determined in the first instance by a District Judge rather than by the magistrates’ court. Apparently, this means that the magistrates are treated as being fit only to rubber-stamp an agreement as to venue by the parties. Given that Auld agrees with the (No.1) and the (No.2) Bills that there should be a right of appeal against any allocation decision to the Crown Court, that seems not only unnecessary but wrong. It would obviously involve delay and extra costs. It is also extremely disparaging of lay justices. Runciman thought they were capable of making the initial decision and I have no doubt that that is right.

For the reasons he gives, I agree with Lord Justice Auld that committal for trial in either-way cases and committal for sentence should both be abolished. The abolition of committal for sentence is, of course, highly relevant to the debate about abolition of the right to elect.

**Fraud and other complex cases** (pp.200-213)

Auld (p.213) proposes that in serious and complex fraud cases, the nominated trial judge should have the power to direct trial by himself sitting with lay members, or where the defendant has opted for trial by judge alone, by himself alone.
I have hitherto been against the idea of a special tribunal for fraud cases – preferring the views so powerfully expressed by Walter Merricks in his famous dissent to the Roskill Report. I have, however, reluctantly come to the conclusion that the case for retaining juries in these cases may now be outweighed by the arguments to the contrary. I am especially influenced by the fact, acknowledged by the Bar Council in its submission to Auld, that because of their extreme length it is difficult to find juries for these cases that are a true cross-section of society. Moreover, as Auld notes, this problem will be aggravated if the list of automatic exclusions from jury service is abolished since people in responsible positions would often be excused from serving in very long cases.

I am less impressed by the argument that ordinary jurors are unfamiliar with the subject matter of these cases and are therefore unsuitable to try them. It is, of course, true that at the outset of the case the jurors will be completely at sea. But gradually, as these long cases continue, they probably get the hang of the jargon and the concepts and by the end of the case they are likely to be au fait with the subject matter. (I recall that the foreman of the jury in one of these interminable cases told the Runciman Commission that by the end of the case she passed a note to the judge asking him not to patronise the jury by going so slowly for their benefit and inviting him to move things along more briskly.)

As has often been said, the question for the jury is usually one of judgment as to honesty and I tend to the view that by the time they come to deliberate, most of the jurors probably can cope with that decision – though I recognise that there will be cases where that is not so.

But the difficulty of finding a representative panel of jurors is important. I am also impressed by the argument that a trial that lasts many months is an extremely burdensome intrusion on jurors’ personal and working lives. This would be less of a problem for paid experts who allow their names to be put onto an official panel.

There are pros and cons to each of the possible alternative systems of trial for these cases. Auld comes down in favour of a judge plus two expert lay persons drawn from a panel maintained by the Lord Chancellor in consultation with professional and other bodies. The parties would have an opportunity of making written representations as to their suitability. The judge would decide on matters of law but the experts would have a full vote on the facts and could therefore overrule the judge. I agree that this is probably the least bad alternative to jury trial and I would (reluctantly) support the detailed proposals made in this section of the report (pp.213-214).

**Trial of young defendants in serious cases** (pp.214-216)

Auld (p.216) proposes that cases involving young defendants that now go to the Crown Court should instead be tried by a specially constituted youth court consisting of a judge and two experienced lay magistrates. The proposal affects a (to me surprisingly) large number of cases. Auld states that in 1999, no fewer than 4,718 defendants under the age
of 18 were committed for trial at the Crown Court and another 851 were committed for sentence.

The argument for having these cases tried by a youth court is obviously much stronger for very young defendants than for those at the older end of the age group.

I would retain the possibility of trial by jury if the defendant asks for it and the court considers that it is appropriate. (No right to elect but a right to ask.) Subject to that, I would support a proposal to remove cases involving defendants under 16 to the youth court constituted as recommended by Auld. There is a case for applying the same approach to defendants who are 16-17 but my preference would be to leave the decision as to where those cases are heard to the discretion of the court in individual cases.

Auld (p.216, para.211) suggests that, “Notwithstanding the public notoriety that such cases now attract through intense media coverage”, they normally be heard in private just as much as other cases in the youth court. The idea that cases as serious as murder trials should be dealt with privately in the youth court is extremely troubling. But, on balance, I accept that even in such grave cases, privacy should be the normal rule, unless the court rules that the public interest in having the trial reported should prevail.

Fitness to plead (pp.217-218)
Auld proposes that the decision as to fitness to plead be transferred from the jury to the judge. I agree.

Information for and treatment of jurors (pp.218-221)
I support the proposals made by Auld (p.221) to improve the information about their duties and the arrangements for jury service provided to jurors.

Length and frequency of jury service (pp.221-223)
I support the proposals made by Auld (p.223) regarding length and frequency of jury service. I especially approve the proposal that we experiment with the American idea of jury service that consists of “one trial or one day” (para.223) under which a juror is discharged at the end of the first day unless he has been selected for a trial. If that could be made to work, it would at a stroke eliminate a great many of the present complaints about jury service.

The Judiciary (chap.6, pp.226-268)
Auld makes a whole series of recommendations in this chapter. All of them seem entirely sensible.
A Unified Criminal Court (chap.7, pp.269-314)
At the start of this important chapter Auld (pp.269-70) sets out the principles on which the structure of the criminal courts should be based. I agree with them all.

I have no strong views about the proposal for a unified criminal court “supported by a single and nationally funded administrative structure, but one providing significant local autonomy and accountability” (p.270, para.2). I can see that there is a case for it though it could prove that the upheaval caused by creating this unified court may not be justified by the benefits it brings.

Auld (p.273, paras.12-14) advances three particular advantages of the unified court: 1) that the right court could take charge of a case at the earliest opportunity; 2) that there could be a unified criminal code of procedure; and 3) that a common administration would speed the implementation of a common IT system. I find all three reasons somewhat unconvincing. The first and second could just as well be achieved under the present system. In regard to the third, I am sceptical as to whether it would make much difference one way or the other.

The case for a unified court system stands or falls on whether it is likely to bring overall cost-benefit and efficiency gains in the running of the courts system sufficient to outweigh the problems caused by such major alteration of the existing system. I do not feel that I have enough knowledge of the matter to make an educated guess as to the answer to that question.

A Middle Tier of Jurisdiction (pp.274-281)
In this section of the Report Auld puts forward his very important proposal for a new middle tier of jurisdiction to be called the District Division of the unified Criminal Court. I am unpersuaded that the case for this new tier is made out.

The section starts (pp.274-275) by pointing out that our present system has only two methods of trial for criminal cases. Trial is either in the Crown Court, in which case it is conducted by a judge sitting with a jury, or in the magistrates’ court, in which case it is heard either by a bench of lay magistrates or by a District Judge (formerly known as stipendiary).

Auld accepts that indictable-only cases (in 1999, 33,000 cases, some 1% of the total) should continue to be heard as now in the Crown Court and that summary-only cases (1.4m cases, some 73% of the total) should continue to be heard in the magistrates’ courts. That is uncontroversial; more or less everyone would agree. The problem category is “either-way” offences.51

A Table in Appendix IV of the Report (p.677) shows how “either-way” cases are handled at present overall. In 1999, there were 480,000 such cases. Just over a quarter (27%) were “terminated in advance of trial”; over half (55%) were convicted and sentenced by

51 These are the figures given in Appendix IV at p.676 of the Report.
the magistrates’ court; four per cent were convicted by the magistrates’ court and
committed to the Crown Court for sentence; two per cent were found not guilty after
summary trial; and around 11 per cent were committed for trial in the Crown Court.

Of those committed for trial in the Crown Court, the great majority (nearly 70%) were
committed because the magistrates’ declined jurisdiction. The defendant elected for trial
in just over 30 per cent of the cases that were committed for trial. Auld states, “Overall,
therefore, less than 4% of defendants charged with an “either way” offence elected to be
tried in the Crown Court”. (p.678, para.7)

The potential case-load for the proposed District Division would be an unspecified
number of those now dealt with for “either way” offences by the magistrates’ courts and
by the Crown Court.

What then is the argument for the proposed intermediate District Division?

The need for an intermediate level court identified by Auld is that there are some cases
dealt with in the Crown Court that are not sufficiently serious to justify jury trial. (“Many,
mostly ‘either-way’, cases now dealt with in Crown Court are not sufficiently serious or
difficult to warrant the use of what is a relatively slow, cumbersome and expensive
process”(p.274, para.17). That, of course, was precisely the reason why Runciman and
Narey recommended that the allocation of “either-way” cases should be determined by
the court. Both assumed that if the court made the decision, a proportion (though no one
could know what proportion) of the cases that would previously have gone to the Crown
Court would instead be allocated to the magistrates’ court. So that does not explain the
need for the proposed intermediate court.

Auld say (p.274, para.18) that there are also some cases currently heard by magistrates’
courts that raise “jury” issues and are also legally or factually complex that might ideally
be suitable for trial by a tribunal consisting of both a judge and lay magistrates. But, if
they raise “jury issues”, he does not explain why it is better that they go to a tribunal
consisting of a judge and two lay magistrates - rather than to a jury.

The question Auld poses is “whether, for many cases around the borderline, a mixed
tribunal would be a more appropriate and acceptable forum than consigning them to one
or other of the present two very different forms of proceedings” (p.275, para.20)

He continues “There has been much support in the Review for a tier of jurisdiction
between that of magistrates’ courts and the Crown Court to be exercised by a tribunal
consisting of a professional judge and two lay magistrates” (p.275, para.21).

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52 One measure of the seriousness of cases is the sentence imposed. By that standard, the statistics show
that over half of the defendants sentenced in the Crown Court in respect of “either-way” offences receive
sentences that could have been imposed by magistrates’ courts. In 1999, 41 per cent received non-custodial
sentences and 16 per cent received custodial sentences of 6 months or under. (Report, Appendix IV, Table
accompanying para.10).
Under Auld’s proposals, the judge in the District Division would make all the orders and rulings at the pre-trial stage, would conduct any necessary case management and would rule on bail. At the trial, the judge would rule on all questions of law, procedure and evidence. The tribunal members would retire together and would have an equal vote on the fact issue on the basis of a majority vote. The judge would give the reasoned decision of the court and would be solely responsible for sentencing. The judge would normally be a District Judge, but it could also be a High Court judge, a Circuit judge or a Recorder.

Unfortunately, when speaking of “much support” for the proposal Auld does not elaborate as to the source of such support, which deprives this statement of its weight. (Quite apart from that, pre-publication support for any particular proposal advanced in the Report cannot be taken as carrying much weight unless one can be sure that those giving the support were apprised of the details of the proposal and its context. Given the way that Sir Robin conducted the inquiry (on which see pp.2-4 above) this cannot be assumed.) At all events, pre-publication support will not be the test. Either the proposal as now made commands support or it does not. The proof will be in the response to this Consultation exercise.

In the succeeding paragraphs of the Report Sir Robin argues why a mixed tribunal of a judge sitting with lay magistrates could be expected to do a satisfactory job. I have no quarrel with any of this. I have no doubt that such a mixed tribunal could do a more or less satisfactory job in handling the cases that Auld suggests should be allocated to them – just in the way that magistrates’ courts and Crown Courts on the whole do a more or less satisfactory job with the cases they try.

But that it seems to me is not the question. The question is whether those cases should be allocated to the proposed new tribunal in preference to the court where they are now heard or where they would be heard if the District Division were not set up. As Sir Robin himself put it, whether a mixed tribunal would be “a more appropriate and acceptable forum than consigning them to one or another of the present two very different forms of proceeding”.

Auld says that “[t]he main rationale for mixed tribunals is that they combine the advantages of the legal knowledge and experience of the professional judge with community representation in the form of lay magistrates” (p.276, para.23). This “main rationale” cannot persuasively be cited in support of a proposal to substitute trial by mixed tribunal for trial by jury. Whatever the merits of the mixed tribunal, it cannot be suggested that it is an improvement in terms of community representation over trial by jury. The proposition is manifestly untenable.

Implementation of the Auld Report would be likely significantly to reduce the number of “either-way” cases dealt with by the Crown Court. The extent of this potential reduction is made clear later in the Report when, dealing with preparation of cases, Sir Robin says,
“for trials of substance, which under my proposals, would in future be the sole or main candidates for trial by judge and jury” (p.522, para.24, emphasis supplied).

It is clear from these words that he has in mind a breathtakingly radical agenda for reform.

Under the Auld proposals some of the cases that would no longer be dealt with in the Crown Court would be heard by the magistrates’ court as now constituted, whilst some would go to the new intermediate tribunal.

The reason for sending them to the new intermediate tribunal was explained by Auld thus:

“There should be a third tier for the middle-range of cases that do not warrant the cumbersome and expensive fact-finding exercise of trial by judge and jury, but which are sufficiently serious or difficult, or their outcome is of such consequence to the public or defendant to merit a combination of professional and lay judges, but working together in a simpler way.” (p.277, para.26)

Such cases, Auld suggests, “could be those where, in the opinion of the court, the defendant could face a sentence of imprisonment of up to, say, two years or a substantial financial or other punishment of an amount or severity to be determined” (p.277, para.26). The main criterion, it seems, would be the severity of the likely penalty looking at the case “at its worst, which would require consideration both as to the circumstances of the offence as well as of the defendant, including any previous convictions (p.277, para.27). Complexity would not be part of the allocation process as, the choice being between judge and jury as against judge plus magistrates, the judge would handle the complexities in any event (ibid).

For those who want to see the right of election preserved, the proposal for an intermediate tribunal is likely to be completely unacceptable since it presupposes first, its abolition and, secondly, the removal of a large slice of the Crown Court’s caseload. From that perspective, whether the case ends up being tried by a magistrates’ court or by the mixed tribunal is a relatively minor consideration by comparison with the main issue — the non-availability of trial by jury. Nevertheless, that granted, they might nevertheless have a preference as between those alternatives.

For those, such as the writer, who favour abolition of the right of election, the question rather is why is a choice between trial by magistrates’ court or Crown Court not sufficient? As has been seen, the fact that there are “either way” cases that are too serious for the magistrates’ court does not answer that question, since those cases could go to the Crown Court. Equally, the fact that there are “either way” cases that are not serious enough to warrant jury trial does not answer it, because they could go to the magistrates’ court. So why would establishing the proposed intermediate court be an improvement?
Unless that question can be answered satisfactorily, the proposal seems totally without merit. Sir Robin not only does not answer the question, he does not even properly address it. The nearest he gets to an answer is the sentence quoted above (p.277, para.26) that there are cases that “do not warrant the cumbersome and expensive fact-finding exercise of trial by judge and jury”, that would benefit from a mixture of judge and lay judges - “but working together in a simpler way”. (Working together “in a simpler way” here is, presumably, code for “cheaper”.)

In other words, (a) cases that would previously have been tried by the Crown Court should be heard by the District Division because that would be cheaper; and (b) the District Division would provide a stronger tribunal than the magistrates’ court – to mollify critics of the Mode of Trial Bills who claimed that trial by magistrates’ court is not as good as trial by jury.

I believe that true believers in the idea of the District Division are likely to be limited to those who think it important to save more taxpayers money than would be saved by Mode of Trial Bill No.1 or Mode of Trial Bill No.2. One may imagine that the Chancellor of the Exchequer, and perhaps the Lord Chancellor and the Home Secretary, might form the nucleus of such a group. But it is difficult to imagine who else might be a member. (One hopes, for instance, that the Law Officers, would not.)

Quite apart from the fundamental question whether the intermediate mixed tribunal is likely to be seen as “an appropriate and acceptable forum”, there are various practical problems about the proposal. One is that it is difficult to imagine that lay magistrates will be greatly attracted by the idea of sitting to perform the function that in the Crown Court is performed by jurors. One suspects that many will not. In Chapter 4, Auld expressly rejects the idea of lay justices sitting with District Judges in a hybrid form of magistrates’ court:

“I would tread warily, certainly with the level of cases now dealt with by magistrates’ courts and where lay and professional judges sitting separately from each other are well established, before suggesting, on the grounds of fairness or otherwise, that either should be routinely submerged in some form of hybrid court. . . . And neither magistrates nor District Judges would welcome such a general transformation and diminution of their respective roles at that level. It would undoubtedly make recruitment of both difficult. And relegating the role of magistrates to untrained, short term ‘jury-like wingers’. …. would have the further disadvantage of producing a tribunal, two of whose members would, in the main, be unlikely to make an effective contribution to the process.” (p.109, para.40)

The paragraph continues:

“Different consideration arise, however, when considering the conferment of an enhanced jurisdiction on a mixed tribunal of, say, a District Judge and suitably
trained magistrates, for certain types of more serious cases, a matter with which I deal in Chapter 7.” (ibid)

It is not apparent why different considerations apply to the proposed enhanced jurisdiction of the intermediate tribunal. The magistrates there too would be relegated to a role of “jury-like wingers”. If, as Auld says, they would be unlikely to make an effective contribution to a hybrid magistrates’ court, why would it be different in a hybrid intermediate court? True, they would be dealing with a more serious class of case carrying heavier penalties but their role would still be just as diminished.

The problem of getting magistrates to sit would be aggravated by the requirement that they should be experienced - necessary, as Auld says, “so as to hold their own with the judge” (p.279, para.32).

Another practical problem is that such cases would sometimes run over from one day to another. So the magistrates performing this role would have to be not only experienced, but also able to sit on continuous days. Adjournments would obviously be highly undesirable. Auld recognised the problem.

“[T]hey would probably need to be able to give more time for continuous sittings than is now normally required in summary proceedings. Some system of selection would have to be devised to ensure a sufficient panel of experienced, available, and so far as possible, broadly representative magistrates for the task.” (p.279, para.32)

The Magistrates’ Association informed Auld that this should be possible. (p.277, para.25) But pace the Magistrates’ Association, the objective of getting magistrates who are experienced and available would tend to produce more elderly and retired or at least non-working magistrates. That would not be the ideal way of ensuring that they are broadly representative of the community. It also would not assist in establishing a positive image for the new court.

The question as to what image the proposed new tribunal would have is important. In this context it is as well to bear in mind that it would have to contend with the ill-feeling of all those who strongly believe that setting it up is a mistake simply because of the dramatic impact it would be likely to have on the numbers of cases in the Crown Court. 53 This constituency of opponents is not some negligible ragbag of left-wing critics. As Auld recognises (p.190, para.143) it includes the Bar Council, the Law Society (and most barristers and solicitors), the Black Lawyers’ Association, the Legal Action Group, JUSTICE, Liberty and NACRO. They constitute as Auld says, “the majority of legal practitioners undertaking criminal work, civil liberties’ organisations and ethnic minority groups” (ibid). It also includes most of the lay and professional press. If all these people and organisations start with a hostile attitude to the new tribunal it is bound to weaken the prospects that it could establish itself as a respected part of the system.

53 The impact on numbers would of course depend on what criteria were specified for the allocation decision and how they were applied.
Another practical problem concerns the numbers of judges. A significant transfer of work from the Crown Court, where most cases are dealt with by Circuit judges and Recorders\textsuperscript{54}, to the District Division, would require the appointment of many more District Judges. Would the Treasury countenance the cost?

Also, would there be enough work for the Circuit Judges? If not, would the numbers be run down by natural wastage by not renewing from the bottom at the same rate - with the result that the Circuit Bench would thereby gradually become more elderly?

Auld says that some cases in the District Division would be handled by Circuit Judges and Recorders. But in the case of Recorders there would be less opportunity for them to get experience in handling trials by jury.

A further practical problem is that the proposed District Division would require an appropriate administrative support system, involving appropriate expense. Again, would the Treasury provide the necessary funds?

A further practical problem is that the allocation question would become more complex and would therefore generate even more appeals against allocation decisions.

From the Government’s point of view, as has been said, the main attraction of the proposal would be that it should have the effect of taking many more cases out of the Crown Court than would be taken out by a Mode of Trial Bill. Presumably, Auld is right that trials in the District Division would be shorter and would therefore cost less than trials in the Crown Court\textsuperscript{55} and there would therefore be resulting cost savings. But the difference in cost might turn out to be not all that great. Most cases in the Crown Court are not long\textsuperscript{56} and the scope for significant reduction in the length and therefore the cost of cases may therefore be limited.

Moreover, insofar as some of the cases heard in the intermediate tribunal would otherwise have been allocated for trial in the magistrates’ courts, the costs would be greater rather than less. That would have to be off-set against potential cost savings resulting from the establishment of the intermediate tribunal.

But the objective of saving taxpayers’ money, however legitimate and even worthy, is unlikely to be recognised as an acceptable reason for a drastic reduction in the scope of trial by jury. I believe that once it is appreciated that the effect of the establishment of the District Division would have that effect, there will be an outcry which would make implementation of the proposal difficult, and probably, impossible. (I would myself be an active contributor to such outcry.)

\textsuperscript{54} In 2000, Circuit judges handled 82\% and Recorders handled 10\% of the cases committed for trial to the Crown Court – \textit{Annual Judicial Statistics, 2000}, Table 6.6, p.65.

\textsuperscript{55} See the Report, p.278, para.30.

\textsuperscript{56} For details see n.118, pp.69 below.
If the right of election were preserved, it is obviously unlikely that defendants who now elect for jury trial would elect for the intermediate tribunal instead. Ergo, in order to make the District Division viable, the Government is bound to conclude that the right to elect would have to be abolished – resulting in even more opposition than was generated by the two Mode of Trial Bills. Even if the necessary legislation to achieve that were eventually forced through Parliament, it is far from certain that the intermediate tribunal would be seen to be “appropriate and acceptable”.

In my view, any advantage derived from extra flexibility in the system created by the proposed new tribunal is greatly outweighed by the many disadvantages. I do not believe that there is any convincing case for the proposed intermediate level court.

**The Allocation of Cases** (pp.281-83)
This section of the Auld Report deals with allocation of cases to the District Division, should it be set up. It proposes that the cases for the District Division would broadly be those where there is a real possibility of a sentence of over 6 months and under two years. Cases with a real possibility of a sentence of more than two years would go to the Crown Court. Cases where the sentence seemed likely to be under six months would be tried by the magistrates’ court.

It is not easy to assess how many cases might be affected if this proposal were implemented, but according to the calculations that follow below, I estimate that of the 20,000 or so who in 1999 were tried in “either way” cases by juries, some 16,000 (80%) could have had their cases allocated to the magistrates’ court or to the District Division.

In 1999, 58,000 defendants were dealt with in “either way” cases in the Crown Court. Of these, 43,000 were convicted and sentenced. Of this 43,000, 24,000 (56%) received either non-custodial sentences (19,000) or custodial sentences of under 6 months (5,000); 13,000 (30%) received sentences of over six months and up to two years; and 6,000 (14%) received sentences of over two years. So, applying Auld’s proposal simply on the basis of the sentences they received, of the 43,000 cases, 24,000 would have gone to the magistrates’ court and 13,000 defendants would have gone to the District Division.

But to calculate a “ball-park” figure of numbers potentially affected by the proposal, one must add those who were not convicted in whose cases the penalty, if they had been convicted, would have been under two years. The total number committed for trial in “either-way” cases who were not convicted in 1999 was 15,000. If one assumes for the sake of the calculation that the proportion of this 15,000 who for the purposes of an allocation decision faced penalties of under two years was the same as the proportion of those who were convicted who got sentences of under two years, namely 86 per cent, the number would be 12,900. On this hypothetical calculation the numbers potentially affected by the proposal would be 24,000 plus 13,000 plus 12,900, or a total of some

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57 The figures in this set of calculations are based on Appendix IV, p.678, plus the same figures on the basis of plea supplied to me by the Home Office. The 58,000 figure refers to defendants dealt with in 1999, the 51,000 figure referred to above were defendants committed for trial in 1999.
50,000. That would represent 86 per cent of the 58,000 committed for trial in “either way” cases. All of them might under the Auld proposals have their cases allocated to the magistrates’ court or the District Division.

However, not all of them would thereby lose the possibility of jury trial since that only applies to those who plead not guilty and the majority of defendants in the Crown Court plead guilty. In 1999, there were jury trials in the 13,000 “either-way” cases ending in acquittal plus another 7,400 “either-way” cases ending in conviction, a total of just over 20,000.

Of the 7,400 who were convicted, 5,800 (78%) received either a non-custodial sentence or a custodial sentence of under two years. If the proportion of the 13,000 who were acquitted, potentially facing sentences of under two years was the same as those who were actually sentenced for “either way” offences (namely, 78%) that would give another 10,100 cases. The total number of jury trials in 1999 that would under the Auld proposals have been allocated on the basis of sentence to non-jury trial would therefore have been of the order of 10,100 plus 5,800, a total of some 16,000.

If, contrary to the view expressed here, the District Division were set up, the scope of jurisdiction proposed by Auld seems about right, providing it is made clear that the allocation decision as between jury trial and trial in the District Division or the magistrates’ court should be based on all relevant factors – as per the Mode of Trial (No.1) Bill (see n.45 above, p.21).

Thus, the basic distinction regarding allocation of “either-way” cases as between the magistrates’ court and the District Division would be the likely penalty. By contrast, the basic distinction regarding allocation to jury trial or non-jury trial (whether in the magistrates’ court or in the District Division), would be whether the case deserves jury trial in light of all relevant factors, including the defendant’s reputation. So, whereas, Auld sees jury trial reserved wholly or mainly for “heavy” cases (see p.522, para.24), I would want to see them preserved for suitable “either-way” cases of whatever degree of “heaviness” that fit the criteria.

*The Circuits* (pp.283-287)
I have no comments on this section of the Report.

*A new management structure for the courts* (pp.287-295)
I agree with Auld’s view (p.295) that if a unified court is set up, a single centrally funded executive agency should be responsible for the administration of all courts (save for the Appellate Committee of the House of Lords), replacing the Court Service and Magistrates’ Courts Committees. I also agree that it would be important, however, that such an agency should, so far as possible, be managed locally (p.292, para.64).
I have no comments on this section of the Report.

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This is one of the most important topics in the whole report. Success or failure in regard to establishing a successful IT system will be a critical factor in how the criminal justice system works in the future.

So far the story has basically been one of lamentable failure. The main problem was described in the National Audit Office’s Report, *Criminal Justice: Working Together*:

> “Each organisation in the criminal justice system is independently responsible for developing its own business processes and information flows, and for identifying, developing and procuring information technology to support them. As a result, information systems have historically been developed in isolation. Moves toward the automated exchange of information have been slow and constrained by the different systems in use and the fact that they were not designed to communicate with each other.”

Auld (p.353, para.92) repeats this analysis: “Each of the main criminal justice agencies has introduced, or is about to introduce, a system designed for its own needs, and with varying or no ability to communicate direct its electronically stored information to other agencies that need it”.

It appears that there are, or are about to be, no fewer than six separate systems:

**Police**: “NSPIS”, Custody and Case Preparation(in progress); “Connect 42”, provision of personal computers and an e-mail facility to lawyers and caseworkers (in progress); “Compass”, a case management system (contract yet to be awarded); **Magistrates’ Courts**: “LIBRA”, (still partly in pilot and yet to be installed nation-wide); **Crown Court**: “CREDO” (yet to be introduced); **National Probation Service**: “CRAMS” (yet to be introduced) and “Copernicus” (yet to be introduced); **Prison Service**: “Quantum” (about to be installed).

Auld (p.354, para.94) rightly describes as “a public disgrace” the fact that manual systems still play an important part in the operation of the criminal justice system. But the inefficiency of the development of IT for the criminal justice system is even more of a

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58 HC 29, Session 1999-00, at 117, para.6.6.
60 Auld Report, p.353, n.73.
Auld is clear what is needed and make a series of well-considered and far-sighted recommendations (pp.308 and 365-366). The most important recommendation is that the project of linking the six main IT systems in the criminal justice system be scrapped in favour of a single integrated system for all the agencies. Biting this bullet will be a painful matter but unless it is done the saga of failure in regard to IT in the criminal justice system is bound to continue.

But it has to be said that, given the history and the many problems of achieving a satisfactory IT system (of which the cost is not the least), one can have little hope that Auld’s recommendations will be implemented.

Security (pp.309-314)
I have no comment on this section of the Report.

The Criminal Justice System (Chap.8, pp.315-366)
Auld is caustic about the confusion, division, inefficiency and waste of time, effort and money in the arrangements for running the system. His verdict on the recent efforts on “working together” or “joined up government” is damning:

“[T]he three main criminal justice department have made considerable efforts in recent years to work better together, both in establishing common aims and in seeking to implement them... But, sadly, this ‘working together’, or ‘joined up’ government as it is called, is not achieving results commensurate with all the enthusiasm and effort put into it. There is little over-all planning or direction, as distinct from pooling ideas, plans and schemes for co-ordination. There are a multiplicity of inter-departmental and inter-agency bodies at national and local levels. Mostly they have no authority or operational function.” (p.319, para.12)

Efforts made to improve the level of co-operation between departments and agencies sometimes make matters worse. (“… there are pilot studies, working parties, steering groups and reviews all over the place”. (p.319, para.13)

In summary, “The whole edifice is structurally inefficient, ineffective and wasteful”. (p.319, para.14) The basic problem, Auld says, is the shared but divided responsibilities of the three Government departments – those of the Lord Chancellor’s Department, the Home Office and the Attorney General. His terms of reference did not permit him to address their relationship. But he argues that although over-all political accountability for investigation, prosecution and adjudication should remain separate, there should be some mechanism for securing some central direction and joint management. (p.320, para.15)
Having painstakingly analysed the roles and functions of the myriad bodies concerned with running the system - strategic, operational and consultative (see pp.320-328), Auld proposes a radical solution - that they should in effect be scrapped and a new system be put in place.

The chief requirement is to have some means of achieving direction and management. (“If the Government truly intends ‘to manage the system as a whole’ as the authors of its 1999-2000 Strategic Plan have suggested, it should get on and do it.” (pp.329-330, para.40)

“The present medley of bodies with their ill-defined and overlapping roles and uncertain relationships should be replaced with a single line of direction and management, coupled with a separate and an appropriately used consultative system. A single national body should plan and direct, rather than merely respond to and co-ordinate individual agencies’ plans, as is now the case.”(pp.330-331, para.43)

As to consultation,

“[T]he Criminal Justice Consultative Council should be replaced by a more effective advisory body with a statutory remit.” (ibid)

Auld develops his thinking in detail over many pages (see pp.330-352) and makes a series of what seem to me to be well-considered recommendations (see pp.344-346, 350-351 and 352). At the heart of the proposals is the setting up of a Criminal Justice Board.

He considers three options as to the functions of the Board. His preferred option is the most radical – that it would be responsible for: planning and setting objectives; budgetting and the allocation of funds across the system; securing the achievement of its objectives; having an integrated IT system; research and development; and combating inequality and discrimination in the criminal justice system. The Board would replace the Strategic Planning Group, the national Trials Issues Groups and its sub-groups and take over the operational responsibilities of the Criminal Justice Consultative Council. Auld acknowledges that this may all be unrealistic.

“The task of managing an annual expenditure of £12 billion across five major agencies and a plethora of smaller ones, each assailed by competing pressures and interest groups with their own cultures and ways of working, might prove too much, particularly as work starts from such a low base. There might also be a risk, in the allocation of funds under a shared budget, for the most powerful or more powerful departments to increase their power and pursue their own priorities at others’ expense. These are real difficulties. . .” (p.336, para.56)

But hope spring eternal:
“if departments put aside any sectional interests and strive for a solution, they may be surmountable”.

However desirable it might be as a model, it does seem unrealistic to imagine that the Government Departments concerned and their Ministers would agree to such a drastic handing over of power to the proposed Board – even if they could “put aside their sectional interests.”

If that was too bold, an alternative, Auld says, would be to give the Board a central role in spending reviews by advising both Ministers and the Treasury, leaving departments to manage their own budgets.

Failing that, the least radical option would be to follow the proposal advanced by the Government in its paper Criminal Justice: The Way Ahead for strengthening the Strategic Planning Group (SPG). As Auld says, “the critical question is what sort of strengthening . . . it has in mind”. The answer appeared to be “not much”. (ibid, p.337, para.59) That option, Auld said “seems to me to fall a long way short of what is required”. (ibid, p.338, para.60).

“Although the Government talks of ‘strengthening’ the SPG through enhancing its role in the annual planning process, it is still unwilling to give the body any operational means of securing the various departments’ and agencies’ compliance with its instructions.” (p.338, para.60)

Its weakness in such a role was manifest in its “lack of effective control” over the project to co-ordinate the planning and implementation of IT throughout the criminal justice system (known as IBIS).

The Government proposed that the strengthened SPG (to be renamed Strategic Planning Board) would concentrate on three national priorities each year. Auld says he regards this “a curious feature” of the proposal (p.338, para.61). It was likely to have the effect of narrowing the focus of the national body to the three stated priorities and then only for a year at a time, “thus denying it and Ministers the ability to take a strategic and long-term view of the criminal justice system as a whole” (ibid). This was to confuse target setting in specific areas with direction and management of the system.

In summary, Auld categorically rejects the Government’s proposal:

“In my view, the Strategic Planning Group’s make-up, its terms of reference, its lack of involvement in the bidding process for funds for the criminal justice system, its seeming inability to initiate over-all planning for the short or long term as distinct from respond to individual departments’ and agencies’ plans, its lack of authority to manage as distinct from seek agreement, and its lack of any structural relationship with the hierarchy above, below and alongside it, all make it an inappropriate vehicle for the task. What is needed is a new body, which is not
simply strategic. It is a body that should plan, bid for and allocate funds, direct and through a single administrative structure below it, manage those activities of the criminal justice system on which its justice, efficiency and effectiveness depend.”

Option three would fall considerably short of this aim and he doubted whether option two would come close to it in practical terms – though perhaps the best way forward would be to set it up on that model with a remit of seriously examining the possibility of moving to the first option. (p.339, para.62)

Auld has thrown down a gauntlet. It would be a brave person who predicted that it is likely to be taken up.

Advising on criminal justice (pp.346-351)
My only comment in regard to this section of the Report concerns the proposed composition of the Criminal Justice Council (p.347, para.81) I believe the Council would benefit from also having some lay members.

Decriminalisation and alternatives to conventional trial (chap.9, pp.367-394)
This chapter makes proposals for ways of dealing with a variety of problems and issues.

Fixed penalty notices (pp.369-75)
Wider use should be made of fixed penalty notices – for use of TV without a licence, for vehicle excise duty evasion and for a wider range of minor motoring offences. That seems sound.

Specialist drug courts (pp.376-378)
Not being sufficiently expert I do not comment on Auld’s view that we should not establish specialist drug courts of the kind that have been set up in various places in the USA.

Caution plus (pp.380-382)
Auld, suggests that consideration should be given to the introduction of a conditional cautioning scheme over a wide range of minor offences enabling the prosecutor, with the consent of the offender, and where appropriate, with the approval of the court, to caution the offender subject to compliance with conditions and to bring the offender before the court in the event of non-compliance. I approve. The Runciman Commission made similar proposals.61

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61 See pp.82-83 of the Royal Commission’s Report.
Regulatory enforcement (pp.382-384)
Auld says that consideration should be given to transferring some financial and market infringements from the criminal justice system to the regulatory and disciplinary control of the Financial Services Authority once it is fully established. Again I agree.

Restorative justice (pp.387-391)
Auld supports the current moves towards “restorative justice” whereby victims meet the offender in a controlled situation with a view to a discussion of what happened, and why and what should be done to the offender. He calls for the development of a national strategy to ensure “consistent, appropriate and effective use” of such schemes. That seems most desirable.

Enforcement of civil debts (pp.391-394)
Auld wants to see the phasing out of the enforcement of civil debt through the criminal courts. He admits that the use of summary proceedings to recover civil debts is very effective. Local authorities report that the threat of proceedings helps to achieve a council tax collection rate of 95.6 per cent; the Inland Revenue reports that three-quarters of defaulters clear their debt on receipt of a warning letter or court summons. He admits that some of the stigma and fear associated with criminal courts probably rubs off on civil defaulters. But he does not think the state should benefit from such misunderstanding. Moving the work to the county court would have its problems but that would be the right course in the long run. I agree with that recommendation.

Preparing for Trial (chap.10, pp.395-513)
This chapter deals with a variety of important topics.

It starts with some general propositions:

1. For a variety of reasons, the criminal justice process is more difficult ground for the orderly preparation of the case by the parties and management by the court than civil disputes
2. These difficulties are aggravated by defects in the system
3. However, with will and resources something can be done about them
4. There is now wide acceptance that there is scope for greater intervention by the court and other agencies and for more co-operation by the parties in the preparation of cases (p.395, para.2)

I accept the first and second of these propositions. I am less confident about the third. As regards the fourth, I acknowledge that it currently has wide acceptance but I am not myself convinced that it has much value.

62 For a list of 18 differences between civil and criminal cases from this point of view see the writer’s Criminal Law Review article, op.cit., n.12, p.5 above at 422-25.
Sir Robin then sets out what he sees as the basic aims as regards preparation for trial:

1. The key to a just and efficient criminal process – good case preparation – is early identification of the likely plea, and, if it is not guilty, of the issues. The culture of last minute decisions must be attacked. The parties must prepare the case properly without constant recourse to the court. Requiring the defendant to identify with some precision the matters of fact and law that he intends to put in issue is not contrary to the prosecution’s burden of proof or the right of silence (p.396, paras.4-5)

2. The parties are responsible for preparing the case and of the issues, the scope of the evidence and points of law. Pre-trial hearings should be reserved for matters that cannot be resolved by the parties informally between themselves. Pre-trial hearings currently are mostly unnecessary and misused.

   “They are treated primarily as a means of bringing everybody together in court, to enable advocates to meet their clients (often for the first time and to take instructions), theoretically to focus on the issues of law and fact and to make decisions as to the conduct of the case. Of course, it is a good thing to do all of that, but a pre-trial hearing in court is not the place or the means for it, save as a last resort. It is misused largely because of a mix of failures by the prosecution and defence, aggravated by lack of resources on both sides. Sometimes the charges are unrealistic because the prosecution has failed to review its case at an early stage and/or it has not served its proposed evidence or made due disclosure. This in turn has encouraged the defence to delay in its preparation or prompted an unwillingness to indicate a plea or the issues it intends to take at trial. There is also little incentive for publicly funded defence solicitors and counsel to prepare early for trial because they are not paid a discrete fee for a conference with their client or early preparation. And, as they are paid a derisory fee for attending a plea and directions or other form of pre-trial hearing, there is also little incentive to prepare properly for it or for the trial advocate to attend.” (p.397, para.6)

3. Where there is need for a pre-trial hearing it should be used to resolve all outstanding issues. This calls for the court to adopt a “more interventionist and authoritative role than has been traditional” which in turn requires adequate preparation both by the parties and by the judge. (p.397, para.7)

4. Experience suggests that court sanctions cannot make much impact on the problem of the “uncooperative or feckless defendant and/or his defence advocate” who frustrates the orderly preparation of cases for trial

   “Experience in this country and elsewhere in the Commonwealth indicates that, in the main, court sanctions won’t compel the sort of forensic discipline that efficient case preparation requires, that they could cause injustice one way or the other and could often delay trial and increase expense rather than the reverse” (p.397, para.8 63.)

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63 See to the same effect pp.490-492, paras.229-232.
However, the Review had developed ideas for encouraging better preparation and compliance with court directions. These included formal written orders, incentives and changes in professional culture aided by properly structured payments that reward preparation for trial, professional management systems and in extreme and clear cases, sanctions. Incentives for the defendant included increased discounts for early pleas and retention of bail and custodial penalties after a plea of guilty and before sentence. (pp.397-98, para.8)

5. Better IT facilities including a single file for each case used by all agencies and greater use of video-conferencing. (p.398, para. 9)

Auld says that early identification of the issues depends crucially on lawyers doing their job properly. He suggests that there are four main essentials:

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

(p.399, para.11)

The rest of Chapter 10 consists of a long sequence of specific issues concerning pre-trial matters. Before addressing these, I would venture a few comments on Auld’s preliminary propositions, “basic aims” and “main essentials”:

I believe that Sir Robin places excessive emphasis on the importance of early identification of issues. There is nothing wrong with such early identification. If it can be achieved, fine. But I would give it a lower priority than he does. My main reason is that it is very difficult to achieve and I am not persuaded that the necessary efforts involved are worthwhile – and the more so since to a considerable extent they are likely to fail.

I believe that, however desirable it may be, it is not possible to eradicate the culture of last-minute decisions in the criminal justice system. It is endemic for a variety of reasons many of which cannot be altered.

One obviously is human nature – the tendency to leave things to the last minute and to put off the evil day. This is true in every walk of life but there are features of the criminal justice process that make it especially likely.

Another is that delay often benefits the defence – the victim makes up with his assailant and declines to give evidence against him; delay means more time to get the defence case together; the defendant finds a job or a girl friend so as to put himself in better odour when it comes to being sentenced - and so on.
Another reason for the culture of late decisions is that clients so often only get to see the advocate at the last minute. In the main that is not the client’s fault. Nor is it usually the lawyer’s fault. It is the result of the way the system works. In the case of solicitors’ firms it is mainly the result of the pressure of work and inadequate resources, though poor work and poor organisation are decidedly also factors. In the case of the barrister it is mainly because instructions are commonly delivered late, and that, if delivered earlier, they are often returned. That may be undesirable, but it is a fact of life for which no one has yet found a solution – I believe because there is no solution. (It is a weakness of the Auld Report that none of these problems are mentioned let alone addressed. The working relationship between barristers and solicitors and what goes on in barristers’ chambers and solicitors’ offices in the handling of criminal cases is basically ignored as if it were unproblematic – whereas in fact it bristles with problems that would benefit from scrutiny.)

Returned briefs, like late preparation of cases, are an integral part of the system which is based on the priority given to avoidance of delay! To promote maximum through-put of cases, the principle is that when a case finishes there should, so far as practicable, be another case waiting to start at short notice. Returned briefs generally result from the unavoidable fact that cases sometimes run shorter or longer than was anticipated. When a case runs short and a new case is brought on to fill the gap, the lawyer earmarked for the case now cannot do it because he is “part-heard” in another case. When a case runs long, it is the same problem in reverse. It is extremely rare for courts to grant an adjournment to permit an advocate who appeared at an earlier stage to act. Nor would it help if adjournments were granted in that situation as that would merely increase delays and the same problem of one or other lawyer in the case being part-heard could occur again.

Another reason for change of lawyer during a case is the fee structure. Auld says that the system of payment must be altered so that pre-trial work is properly rewarded. But even in the unlikely event that payment for pre-trial work were significantly improved, it is inconceivable that publicly funded pre-trial work will be paid at a higher rate than trial

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64 Defence solicitors in the Crown Court Study said the defendant saw his barrister for the first time on the morning of the trial in 55% of contested cases and in 70% of cases that “cracked” (i.e. became guilty pleas at the last minute).

65 See generally the very sobering study of defence lawyering by Professor Michael McConville and colleagues, Standing Accused (Clarendon, Oxford, 1994).

66 In the Crown Court Study, half (51%) of all prosecution barristers and one third (31%) of defence barristers in contested cases received the brief in the case on the day before the hearing or on the day itself. (op.cit., sect.2.1.3) It is remarkable that despite this, 95% of prosecution barristers and 93% of defence barristers said they had enough time to prepare the case. (op.cit., sect.2.1.4). In fact, in contested cases when the barrister got the brief on the day of trial, 78% of prosecution barristers and 81% of defence barristers said they had enough time. (ibid)

67 The Crown Court Study showed that close to half of all briefs were returned. Prosecution barristers in contested cases said their brief had previously been returned in 59% of cases. For defence barristers the proportion was 44%. (op.cit., sect.2.1.6)

68 Again, the study by McConville et al, referred to at n.65 above is an important source, especially in regard to the solicitors’ side of the profession.
work - from which it follows that the pre-trial lawyer will often be less senior than the trial lawyer. That again is a fact of life and railing against it will change nothing.

All this last-minute work looks bad. One would not want to be the defendant for whom the work was done in that way. But the reality is that not only does the system work in that way, but that it probably works better than one might think. In the Crown Court Study, for what it is worth, the judges generally thought that counsel was well or adequately prepared and that view was overwhelmingly shared both by those who instructed them. Again for what it is worth, jurors when asked what they thought of the presentation of the case by the lawyers in terms of “knowing the facts”, “putting the case across” and “dealing with the points in the opponent’s case” overwhelmingly thought they did a good job. (There were positive ratings in 85-90 per cent of instances).

Needless to say, these opinions do not mean that the work done was satisfactory – but they are somewhat encouraging.

Another reason why it is difficult to achieve early identification of issues is what Sir Robin refers to critically as the “uncooperative or feckless defendant and/or his defence advocate who considers that the burden of proof and his client’s right to silence justifies frustration of the orderly preparation of both sides case for trial”. (p.397, para.8) Sir Robin appears to think that the defendant and his lawyer are to be blamed for being uncooperative. I take a different view. I do not believe that it is the job of the defendant to be cooperative. The process is adversary. He is not to be blamed for taking advantage of every opportunity the system gives him to escape conviction, to lessen his sentence or in other ways to ease his situation. The system may of course offer him inducements to encourage him to be cooperative of which he may or may not avail himself. But the idea that the defendant should be cooperative out of a sense of good citizenship seems misconceived. One should work on the basis that the defendant will be cooperative only if he thinks it to be to his advantage – and that that attitude is not only understandable but wholly legitimate. (How would act oneself in the defendant’s situation?)

As to the defendant’s lawyer, his task is to represent his client within the rules. Subject to those rules, if in the client’s view it is to his advantage that his lawyer be cooperative, he should be so; if not, he should not.

When Sir Robin says that early identification of the issues depends crucially on lawyers doing their job properly, that may be true – but there are an infinite number of reasons why they may fall short. To say that the prosecutor must be “strong, independent and adequately resourced” and that there must be “an experienced, motivated defence lawyer adequately paid for pre-trial preparation” is unrealistic. It is the right objective but, in

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69 Nearly half (47%) of the judges thought both prosecution and defence counsel were “very well prepared” and the same proportion thought that they were “adequately prepared” – op.cit.sects.,2.4.13 and 2.5.21.

70 No fewer than 98% of CPS respondents said that the barrister had sufficient knowledge of the prosecution case; and 99% of defence solicitor respondents said the same of the defence barrister – op.cit., sects.2.4.10 and 2.5.19

71 op.cit.,sect.8.19.

72 Just as an example, consider the CPS Inspectorate Report for 1999-2000 cited by Auld (p.470, para.181). He says it found frequent weaknesses in the CPS’ review of cases going to the Crown Court, “in particular,
the nature of things, it will often, perhaps usually, not be realised. To make it “an essential” is therefore not sensible. People will do their job according to their lights to the best of their ability in the circumstances. Usually the circumstances will be difficult and their ability will be average. That is how it is.

Specific pre-trial issues (pp.408-513)
In the hundred or so remaining pages of this chapter the Report deals with a succession of matters and makes 80 recommendations. (See the eight pages summarising these recommendations, pp.50-58.)

In regard to the great majority of these recommendations I have no comment. Either I agree or I have no concluded view on the matter. In most cases I agree. But there are some on which I disagree. I confine my comments to those issues and one or two other issues on which some qualifying comment seems indicated.

The charge (pp.408-413)
Auld (p.408, para.35) states as if it were a fact, “A significant contributor to delays in the entering of pleas of guilty and in identifying issues for trial and in consequence, the prolonged and disjointed nature of many criminal proceedings is ‘over-charging’ by the police and failure by the Crown Prosecution Service to remedy it at an early stage.” No empirical source is quoted for this statement, for the very good reason that there is no such source. It is simply Sir Robin’s opinion.

It may be that many would agree that “overcharging” by the police takes place but no one knows how often that happens or what effect it has on delay. It is therefore not possible to say meaningfully that it is a significant factor – or for that matter to say that it is not. For what it is worth, my own guess is that “overcharging” in the sense of laying of charges at a level that cannot be justified at the time when they are formulated is fairly rare. At that stage one would expect the charges to be put somewhat higher rather than lower. It is easier and more acceptable to reduce the charges at a later stage than to raise them. Since everyone knows that bargaining over the charges is commonly the basis of persuading the defendant to plead guilty, the prosecution needs to put the charge high enough to permit that bargaining process to operate.

It would not even be easy to get agreement on what is meant by overcharging. The fact that the charges are reduced at the door of the court obviously does not mean that the original charges were inflated. Auld (p.408, para.35) quotes the finding of the CPS Inspectorate that about 23 per cent of indictments had to be amended before trial but...
there is no way of knowing in what proportion of those cases there was anything wrong with the original indictment. The change may simply mean a change in the fact situation or in the development of the evidence or that the CPS are required to apply a different test to that applied by the police.

This proposition therefore cannot be regarded as a sound basis for altering the system – and especially when it concerns something so sensitive as taking away from the police a power and responsibility that they undoubtedly regard as central to their role.

Auld (p.409,para.37) asserts that “much of the problem is due to the fact that the police, not the Crown Prosecution Service, initiate prosecutions” and recommends that the duty of charging the defendant in all but minor, routine offences should be taken over by the CPS.

The Runciman Royal Commission at one stage considered making the same recommendation but after very lengthy and careful consideration it unanimously rejected the idea:

“We saw certain advantages in such a change, not least because it would have the advantage of distinguishing unambiguously between the responsibility for the investigation of criminal offences and the responsibility for bringing a case against a defendant and presenting it in court. After closer examination, however, we concluded that the practical difficulties outweighed this theoretical advantage. It would not be practicable to have CPS staff posted to police stations in order to frame the charge in every case, or even only in serious cases. There would still therefore have to be some procedure to mark the point at which the police concluded their investigation and the CPS took over. It seemed to us that this procedure would be bound to remain very similar in all but name to the present police charging process but that there might in addition have to be additional steps incorporated to accompany the proposed transfer of responsibility. This would bring with it the risk of extra bureaucracy and delay and on balance we recommend no change to the present system.”

The problem of aggravated delays in charging would be especially acute in light of the Narey reforms designed to get a case into court within 24 hours. The thrust of these reforms would be seriously compromised if the suspect had to wait for the CPS to formulate the charges. Auld does not allude to this.

As already indicated, the proposed change would deeply upset the police and would thereby worsen an already somewhat fraught relationship with the CPS. It therefore requires very solid justification. Auld does not mention the Runciman Commission’s conclusion on the matter. I believe that its arguments are unanswerable. This recommendation should definitely not be implemented.

Disclosure (pp.444-476)
The disclosure issue relates mainly to disclosure of unused material by the prosecution.\(^76\) There is general agreement that the present system works badly. The question is what to do about it.

Auld makes a considerable number of recommendations for improving the position (pp.472-473). I agree with most of them. In particular I agree -

- that there should be a single instrument setting out the duties of all concerned
- that the test for disclosability be the same at the primary and the secondary stage
- that the test be along the lines proposed by Auld
- that there be automatic primary disclosure of certain common categories of documents
- that the police retain responsibility for retaining, collating and recording material gathered during an investigation
- that the prosecutor should retain ultimate responsibility for the completeness of the material recorded by the police
- that the requirement for a defence statement remain as at present
- that there be a defined timetable for each level of jurisdiction for all stages of mutual disclosure unless the court in an individual case orders otherwise
- that the Prison Service should introduce national standards for access to due process for remand prisoners

I do not agree that the CPS should take over from the police responsibility for identifying and considering all potentially disclosable material or that the CPS should assume sole responsibility for primary and all subsequent disclosure. On both these important issues I agree with the CPS Inspectorate\(^77\) and with Joyce Plotnikoff and Richard Woolfson\(^78\) that the duties should remain with the police. (It is inexplicable that the Home Office, which I understand received the final version\(^79\) of the Plotnikoff and Woolfson study as long ago as May 2001, had still not published it by the time of writing in the middle of November, six months later. It must have been obvious that it needed to be available in time for the consultation period in relation to Auld - and the more so since Auld disagrees with the authors on this important issue. I am grateful to the authors for making a copy available to me.)

Auld gives two reasons for his view (pp.468-70, paras.176-179):

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\(^76\) In the Crown Court Study, prosecution barristers and CPS respondents agreed that they were aware of the existence of unused material in just under one third of the sample cases – op.cit.,sect.4.3.1.


\(^79\) It was originally delivered in January 2001, was commented on by the Home Office and came back to the Home Office in May.
1. Assessing the materiality of information to issues or likely issues in a criminal trial is a lawyer’s task “not that of an, often relatively inexperienced investigative officer perfunctorily trained for the purpose”. (p.468, para.176)

2. It is also essential for the prosecutor’s fair conduct of the prosecution’s case before and at trial, not least because of his continuing duty to review the adequacy of disclosure (ibid). He can only discharge his duty if he is aware of potentially disclosable material. (p.469, para.177)

Everyone will see the force of both reasons. If the Auld scheme could be made to work I would support it. But I believe that it is unworkable and would in the result make a bad situation even worse.

Auld explains how the proposal would work in just one sentence:

“In my view, the police and prosecutors should continue to work together where necessary, but the prosecutor should examine the file and the material at the earliest possible time and make the initial decisions as to disclosability rather than, as now, spend much time in reviewing and, often overruling those of the officer.”(p.470, para.179)

If that would increase costs, Auld says, “timely prosecution disclosure is so fundamental to the fairness and efficiency of the criminal justice process that if it costs more to do it properly, it is a price well worth paying”. (p.470, para.179) Before saying amen to that, however, it is important to be reasonably sure that the new system, arguably costing extra millions, will increase the fairness and efficiency of the criminal justice process.

As already noted, Auld accepts that the police must retain prime responsibility for assembling the file, “that is for retaining and recording all material gathered or generated in the investigation”. (p.470, para.179) But if the CPS are to determine what is disclosable, they must receive everything in the file. Otherwise, how could the prosecutor decide what is disclosable? I am not in a position to assess the practical, physical problems of giving the prosecutor everything in every file - but they must be huge, even perhaps insurmountable. (I agree with Auld that if and when the file can be transmitted electronically, those problems would be considerably eased – but we are a good way off that situation as yet.) Obviously it would involve a heavy manpower cost for the CPS (as well as major additional costs for defence lawyers) and may therefore founder on Treasury objections in any event.

The present scheme of disclosure enshrined in the Criminal Prosecution and Investigations Act 1996 was based on the recommendations of the Runciman Royal Commission. Rightly or wrongly (and maybe wrongly) the Commission was persuaded

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80 Estimated by Plotnikoff and Woolfson at £30m.
81 My anxiety has always been whether the Commission was mistaken to accept the prosecution’s plaint of being overwhelmed by the common law disclosure regime. I was not comforted to see in the Plotnikoff-Woolfson study the words of an unnamed senior police officer: “There is a big irony regarding costs.”
that the common law on disclosure of unused material had become excessively burdensome on the prosecution (and the defence) in that it required the handing over in effect of more or less everything relevant to the offences charged. The Commission unanimously recommended that, because of this, the duty of disclosure should be changed into a two-stage procedure of primary and secondary disclosure as was done in the CPIA.

The Explanatory and Financial Memorandum published with the Criminal Procedure and Investigations Bill stated that overall the changes were expected to be cost neutral. Additional costs for the CPS were put at £6.6-7m but these would be balanced by savings for the police estimated at £6.7m. In their study, Plotnikoff and Woolfson (unpublished manuscript, p.145) report that instead of saving police money, the CPIA has increased police costs. No force had figures but senior officers in over three-quarters (77%) of all police forces said that their costs had increased as a result of the CPIA. 82 (Almost four-fifths(79%) of forces also said that the CPIA had increased the administrative burden on the police.) Since the sole reason for the Runciman recommendation was to save police resources and since it seems on this evidence that the opposite may have occurred, there would seem to be a case for going back to the drawing board and considering whether it might not be more cost effective to return to the pre-CPIA regime. Maybe the National Audit Office should be asked to take up that exceedingly painful question.

In any event, the CPIA did not, and could not, solve the fundamental problem that someone has to review all the material and decide what is disclosable. Whether it is done by the police or by the prosecutor it necessarily involves reviewing everything. Narrowing or expanding the test of what is disclosable does not alter the task of reviewing the material. Whether the test is broad or narrow, the person responsible for applying the test must have all the material before him. The only way of avoiding that task of evaluation is by giving the defence everything (or everything other than sensitive material). Then no test is needed.

It is the police who conduct the investigation. They develop the file, they assemble and log the material. The police case is submitted to the prosecution in a file prepared in accordance with the national Manual of Guidance. This contains a series of forms – the MG6B, C, D and E. Guidance for their completion is contained in the Criminal Procedure and Investigations Act 1996 Joint Operational Instructions- Disclosure of Unused Material, issued by ACPO and the CPS in March 1997. The responsibilities of the disclosure officer are set out in the Code of Practice issued by the Home Office under Part II of the CPIA. The Code requires the disclosure officer to examine material retained during an investigation; create schedules of unused material and submit them to the prosecutor; reveal material to the prosecutor during the investigation and criminal proceedings; and certify to the prosecutor that action has been taken in accordance with the Code.

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82 A senior officer from each of the country’s 43 forces, nominated by the Chief Constable, was interviewed by telephone.
Plotnikoff and Woolfson (unpublished manuscript, p.37) say that the Code and the Joint Operating Instructions (JOPI) envisaged a regime in which completion of the MG6 disclosure schedules was carried out by a single individual but that they had found that this was not always the case. Their study was based mainly on interviews and study of files. Files relating to 193 prosecutions were examined in six areas. The cases were chosen in response to the researchers request for completed cases in volume (i.e. ordinary or routine), major and serious crime. In volume cases, some forces had removed responsibility for schedule completion from the officer in charge (OIC) or had shared it among officers as a consequence of implementing the Crime and Disorder Act 1998. Under these Narey reforms, the police gave priority to the preparation of expedited files within 24 hours of charge for defendants’ first appearance in court. Also intelligence-led police and crime screening had changed the way disclosure was handled. However in around 80 per cent of volume cases, the disclosure officer was usually the OIC, and in major and serious crime the disclosure officer was likely to be a member of the investigative team. (ibid, p.38) On that basis it is reasonable to assert that in the great majority of cases the disclosure officer is the officer in charge of the case. (To the uninitiated, the Officer in Charge of the Case sounds like someone of quite senior rank. In fact it is usually a police constable.\textsuperscript{83})

Given that the OIC knows his file, is it sensible to require the prosecutor to master it to the extent that he is in a position to make the initial determination of what is disclosable. In an ideal world where resources are unlimited and time is not a problem I can see a purist’s case for such a view. In the real world it does not seem sensible. I would leave the initial determination with the disclosure officer who will usually be the OIC and leave the prosecutor with the review function. The evidence is that the review officer already has enough difficulty in performing that role – see below. To give him a bigger role would be likely to make matters worse.

I would add a warning or cautionary note that it might be as well if it were generally accepted that there is no way that the disclosure system can be made to work satisfactorily. Every reasonable effort must of course be made to make it work as well as possible. But at its best it will still work badly. The evidence for this is overwhelming.

Plotnikoff and Woolfson report, inter alia,\textsuperscript{84}

- that MG6C and MG6D schedules were not dated as required in close to two-fifths of cases
- that descriptions of items in MG6Cs were classified as “poor” in 73 per cent of cases
- that the requirement of stating that the file contains no sensitive material was complied with in only 2 cases out of 44

\textsuperscript{83} In the Crown Court Study, the person identified in 1,177 questionnaires as the officer in charge of the case was a constable in 80% of cases. In 16% he was a sergeant and in only 2% was he more senior than a sergeant – sect.7.5.1.

\textsuperscript{84} op.cit., Executive Summary, unpublished manuscript, pp.8-19.
quality assurance checks on schedules were done in 63 per cent of forces but the checks were often limited to ensuring that schedules were present on the file and that the disclosure forms had been signed

two-thirds (66%) of CPS respondents said their lawyers could not review schedules adequately in the time available – 73 per cent blamed general pressure of work and 58 per cent said it was because schedules were received late

the reviewing lawyer often does not sign the forms as required – across the six areas, lawyers had not signed MG6Cs in between 30 and 52 per cent of cases and MG6Ds were unsigned in 43 to 100 per cent of cases

fewer than one in five disclosure officers said that consultation with the CPS took place in most cases

over half (54%) of defence statements either contained a bare denial of guilt or did not meet the requirements of section 5 of the CPIA but the CPS requested further details in only 8 per cent of cases

65 per cent of prosecution barristers did not routinely advise on the compliance of defence statements and 90 per cent of CPS respondents said they would not ask counsel for such advice

74 per cent of CPS respondents said advocates were not briefed to raise non-compliance of defence statements with the court; 78 per cent of prosecution barristers said that they did not do so and 77 per cent of judges agreed that this rarely happened

the CPS decision concerning primary disclosure was omitted from 35 per cent of briefs even though they were served after primary disclosure

75 per cent of prosecution barristers said that their instructions rarely contained an adequate account of the reasons for primary disclosure decisions

74 per cent of prosecution barristers said they did not usually receive copies of unused material with the brief

72 per cent of defence barristers, but only 45 per cent of prosecution barristers, routinely discuss disclosure with those instructing them

94 per cent of CPS respondents, 84 per cent of justices’ clerks and 66 per cent of defence solicitors agreed that defence statements were rarely served in summary cases

56 per cent of defence solicitors, 16 per cent of CPS respondents and 24 per cent of justices’ clerks said the lack of defence statements was often due to primary disclosure less than 14 days before trial

in the files studied, defence statements in Crown Court cases were served out of time in 65 per cent of cases

over half (52%) of the defence statements in those cases either contained a bare denial or did not meet the requirements of section 5 of the CPIA

nearly two-thirds (59%) of judges said they would order a non-compliant defence statement to be amended but only four per cent of CPS and prosecution barrister respondents thought that most judges did so

81 per cent of barristers, 70 per cent of judges and 62 per cent of CPS respondents thought that secondary disclosure was rarely served by the PDH

nearly 60 per cent of barristers (72% of defence barristers), 50 per cent of defence solicitors and 15 per cent of judges said that in their opinion, non-sensitive unused material was “often” withheld from the defence when it should have been disclosed
This long list is hardly encouraging. Nor can it be convincingly be dismissed on the 
ground that these are teething problems. The new system has now been in place for some 
years.

In my view these statistics are par for the course. In the Crown Court Study court clerks 
were asked whether the listing information forms required to be filled in by lawyers had 
been received. Almost half (47%) said they had not been received and that those that had 
been received had often come in late. Studies of compliance with time-limits in the 
legal system invariably show non-compliance on a massive scale. Thus, a previous report 
by Plotnikoff and Woolfson considered the impact of LCD target time-limits for transfer 
of committal papers from the magistrates’ courts to the Crown Court and for lodging the 
indictment with the Crown Court. The study found that almost without exception the 
time-limits were being exceeded, often by huge margins.

That, regrettably, is the way things are. Auld thinks that a variety of things can be done to 
improve matters. In regard to police handling of the initial stages of the disclosure regime 
he proposes (p.467-468, para.174):

- there should be a nationally approved system of “thorough training”
- there should be a rigorous system of spot “audits” by HM Inspectorates of 
  Constabulary and/or of the CPS to encourage compliance
- prosecutors should rigorously observe their professional duty to check police 
  schedules against witness statements and unused material for categories that may 
  have been omitted
- failure of the police properly to schedule and make available to the prosecutor all 
  unused material could be a police disciplinary offence

This is what Auld says would represent “significant tightening up” (p.467-468). In my 
view it would do little, if anything at all, to improve matters. Better training could at best 
have only a marginal effect. Exhortation that people should do their job better is harmless 
but useless. Making failure to comply a disciplinary offence serves no purpose whatever 
unless disciplinary charges are actually brought at least occasionally. Since, as Plotnikoff 
and Woolfson show, failure to schedule and make material available to the prosecutor is 
the norm most disclosure officers would be liable to be charged – an obvious absurdity. 
When PACE was first passed any breach of a PACE Code was automatically a breach of 
police discipline. The police were understandably nervous that this would result in 
thousands of disciplinary proceeding. But when six years later the Runciman Royal 
Commission undertook a study of breaches of the PACE Codes it transpired that virtually

86 J.Plotnikoff and R.Woolfson, From Committal to Trial: Delay at the Crown Court, 1993, p.32.
87 Plotnikoff and Woolfson’s study of disclosure showed that the average length of training received by 
disclosure officers in volume, major and serious crime was less than a day. Fewer than half the disclosure 
officers in all three categories had been trained specifically for their role. (op.cit., unpublished manuscript, 
p.139.)
no disciplinary proceedings had been brought. As a result, the provision in the Act making a breach of the Codes automatically a breach of police discipline was repealed.

In dealing with non-compliance by defence lawyers with the rules regarding defence statements, Auld (p.461, para.159) acknowledges that there are a variety of explanations including the very tight 14-day time-limit, no, or inadequate, instructions from the defendant and defective or late primary disclosure by the prosecution. He says judges are likely to be cautious before allowing the jury to draw adverse inferences when such circumstances are suggested. “There is thus little scope for use of the sanction of adverse inference to encourage proper use of the defence statement.” (p.461, para.159) That, I am sure, is correct. He suggests that a known willingness of the court to adjourn a trial to give the prosecution time to meet any surprise defence might be more effective. (p.462, para.160) It might indeed help to solve the problem of surprise defences but it would not be more effective in dealing with the problem of inadequate defence statements because, at least in the view of prosecution barristers, surprise defences are quite rare, whereas, as has been seen, inadequate defence statements are extremely common. But, as Auld acknowledges, adjournments mean not only delay and extra costs but also problems when there is the jury and the witnesses to consider. So they are usually not a good option. Plotnikoff and Woolfson’s study makes it clear that there is no enthusiasm for even the limited form of defence statement now required amongst defence barristers or prosecution barristers or judges. That being so, given all the problems of getting them, I would suggest that efforts to “tighten up” are very unlikely to make much progress.

Referring to my Dissent to the Report of the Runciman Royal Commission in regard to defence statements, Sir Robin (p.458, para.151) said that I was against them partly on grounds of efficiency:

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

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89 In the Crown Court Study, prosecution barristers said they asked for an adjournment in 19 per cent of the cases in which there was an ambush defence and the request was granted in about half. (op.cit.,sect.4.12.5)
90 In the Crown Court Study, prosecution barristers were asked, “Did the defence produce any wholly unexpected (ambush) defence other than an alibi which could have been checked or rebutted if there had been time, but which could not be checked or rebutted for lack of time?” According to prosecution barristers the answer was Yes in 41 cases out 601 (7%) in which there was a substantive reply to the question. According to the police respondents, however, there was an ambush defence in 152 out of 581 cases (26%). (op.cit.,sect.4.12.1) The difference between the police view and that of prosecution barristers is striking.
Contrary to Sir Robin’s suggestion, I believe that my “pessimism” has been justified in every particular. Plotnikoff and Woolfson’s study shows that more than half of defence statements in their sample either contained a bare denial of guilt or did not meet the requirements of the 1996 Act. Yet the prosecution requested further details in response to the defence statement in only 8 per cent of cases. Three-quarters (74%) of CPS respondents said advocates were not instructed to raise non-compliance of defence statements with the court and nearly four-fifths (78%) of prosecution barristers said they did not raise non-compliance of defence statements. Sir Robin himself says that a high proportion of defence statements do not comply with the requirements of the 1996 Act, and that “the statements, in the form in which they are generally furnished, do little to narrow the issues at, or otherwise assist preparation for trial” (p.461, para.158). Yet despite this and all the other discouraging findings of the Plotnikoff and Woolfson survey, he does not recommend that anything more be done to expand or strengthen the defence statement regime.

“I have considered whether to recommend any additional requirements, for example, a general obligation to identify defence witnesses and the content of their expected evidence similar to that where the defence is alibi or it is intended to call expert evidence for the defence. Whilst, as a matter of efficiency, there is much to be said for them, many would find them objectionable as going beyond definition of the issues and requiring a defendant to set out, in advance an affirmative case. And they would be difficult to enforce.” (p.470, para.180)

Is that defeatist?

If the modest form of defence statement we now have cannot be made to work, anything more ambitious is bound to fail.

The moral of the defence statement story applies just as much to other aspects of the disclosure regime. With the best will in the world and despite the best efforts of all concerned, both prosecution and defence disclosure will go on working badly because nothing can be done to make it work well. This is not defeatist; merely my opinion about the reality of the situation. If it is so, I see nothing wrong with saying so.

But that does not mean that one gives up trying to improve the situation. Failings in regard to defence statements will usually only affect efficiency; failings in regard to prosecution disclosure can cause miscarriages of justice, which is a good deal more important. So every effort should of course be made to get disclosure, and especially prosecution disclosure, to work as well as possible.

The alternative, which may be better, is to scrap the system enshrined in the CPIA and return to the common law system it replaced.
Pre-trial hearings (pp.481-490)

As been seen (pp.39-40 above), Auld is very sceptical about the value of most pre-trial hearings which he suggests are usually unnecessary and unused. He seems to apply these strictures to all the different kinds of pre-trial hearing that are now in use91 but his aim is directed mainly at the automatic Plea and Directions Hearing (PDH) His conclusion is, that apart from special cases, “oral pre-trial hearings should become the exception rather than the rule” (p.487, para.218). They should take place only in cases which, because of their complexity or particular difficulty, require them.

There is empirical evidence to support the view that pre-trial hearings are not as useful as one might wish. In the Crown Court Study, conducted before the introduction of the automatic PDH, pre-trial hearings had taken place in 40 per cent of the contested cases, in 35 per cent of the cases that “cracked” and in six per cent of the cases that were listed as guilty pleas. The trial judges were asked whether the pre-trial hearing had achieved its objectives and whether it had saved much time or money.92 In half the cases (49%) the judges said that the objectives had been achieved and in another two-fifths (19%) that they had been partially achieved. In a third of the cases (34%) they had not been achieved.93 However, in as many as two-thirds of cases (66%), the judges said they did not think the pre-trial hearing had saved much time and money. In another quarter of the cases (24%), they said that a little time and money had been saved. In 29 per cent of cases they said that “a fair amount of time and money” had been saved and in 2 per cent that it had amounted to a “a great deal”.94

In the context of the Woolf reforms in civil cases I argued that it is generally not helpful for the court to be involved pre-trial in the mass of cases since all but a tiny proportion will settle out of court in any event. The front-loading of costs through early court case management for all cases is therefore unnecessary and undesirable. But criminal cases ending in conviction are different from civil cases in that they all reach the court. My view has been, and remains, that for reasons given below, in the Crown Court case there is value in having an automatic pre-trial hearing.

At the time of the Runciman Royal Commission I failed to persuade my fellow Commissioners that plea and directions hearings would be a better innovation than the

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91 In the Crown Court there are four different kinds: the non-statutory Plea and Directions Hearing in all cases; the statutory pre-trial hearing under Pt.IV of the Criminal Procedure and Investigations Act 1996; statutory preparatory hearings at the start of the trial of serious or complex fraud cases under the Criminal Justice Act 1987; and the similar preparatory hearing for other cases of complexity and length under Pt.III of the CPIA. In the magistrates’ court there is the pre-trial review. See Auld, pp.481-486.
92 These questions drew responses from 377 and 386 judges respectively.
94 Op.cit.,sect.2.8.9. Michael M.Levi, in his study of fraud cases conducted for the Runciman Commission, wrote: “none of the defence lawyers I interviewed argued that pre-trial reviews had any significant effect on the development of the case... The problem is that the judge in the pre-trial reviews is seldom the trial judge, has seldom read the papers, and therefore understandably does not wish to become embroiled in complex matters”. (The Investigation, Prosecution and Trial of Serious Fraud, Royal Commission on Criminal Justice, Research Study No.14, 1993,at p.105). And that was in heavy fraud cases!
majority’s proposed elaborate new pre-trial procedure.\textsuperscript{95} The Government, however, rejected the majority’s approach and in 1995 automatic plea and directions hearings were introduced in all Crown Courts. (See Practice Direction [1995] 4 All E.R.379.) Auld now wants to stop most such hearings.

The purpose of the plea and directions hearing (PDH) is for the pleas to be taken and, in contested cases, for the prosecution and defence to assist the judge in identifying the key issues and to provide other information required for the proper listing of the case. The LCD has issued a standard check-list of questions (the Judge’s Questionnaire) for consideration at the hearing. In large centres as many as 30-40 a day may be listed, “taking the form of a report on progress, good or bad, and the fixing of a trial date or the judge chivvying the parties into getting on with basic matters of preparation and to resolving issues that they may or may not have discussed before then”. (p.483, para.209) In more complex cases there may be more substance in such hearings.

Auld says that there are mixed views among the judiciary and practitioners as to their value. Much no doubt depends on the style and vigour of individual judges. He refers to the frequent mismatch between the time-tabling of the PDH and the progress of the case. Rigid time-tabling, dominated by Court Service targets and key performance indicators, sometimes “achieves the reverse of what is intended because the parties become committed to a trial for which they may not be ready”. (p.485, para.213)

Auld notes that some judges and practitioners “consider that pre-trial hearings of one sort or another are a useful means of getting the parties together to focus on the matter of the plea and, in the event of a contest, the issues and the likely evidence required”. (p.485, para.214) There is also the convenience to defence practitioners of having defendants in custody brought from prison to court for a conference.

“Frequently, the last factor is the most important in the exercise. . . [D]efence lawyers are often unable – and sometimes unwilling – to visit and take instructions from clients in custody. In my view this is a major blot on our system of criminal justice. It should be a fundamental entitlement of every defendant, whether in custody or on bail, to meet at least one of his defence lawyers in order to give him instructions and to receive advice at an early stage of the preparation of his case for trial, and certainly before a pre-trial hearing.” (p.485, para.214)

But Auld’s view is that this very serious problem must be solved by other means. In particular, he urges that video-links be established both to enable remand prisoners to confer with their lawyers and for the holding of court pre-trial hearings.\textsuperscript{96} The Government’s policy paper Criminal Justice: The Way Ahead, announced that every prison handling remand prisoners will have a video link to a magistrates’ court by March

\textsuperscript{95} See my Dissent to the Royal Commission’s Report, pp.223-33.

\textsuperscript{96} See, in particular, p.502, para.259 where Auld describes experiments that have been conducted and the very encouraging results of evaluation - J Plotnikoff and R.Woolfson, Video Link Pilot Evaluation, Home Office 1999 and Evaluation of Information Video Link Pilot Project at Manchester Crown Court (Court Service and HM Prison Service, 2000).
which would be an important step in the right direction. However, this commitment extends only to magistrates’ courts and Auld is right in saying (p.503, para.260) that “there is an equally compelling case for extending this facility to all pre-trial hearings in the Crown Court”. He urges that they should be not only available for court hearings. “They should also be available to enable representatives to speak to their clients and take instructions during the course of the preparation of the case.” I strongly agree with that recommendation. It could make an enormous difference both to defendants and to their lawyers. In reducing visits to court it would save costs. It would also reduce journeys to and from court that are troublesome for both prisoners and for the prison service - graphically described by Auld in para.215, pp.485-486.

But it is safe to predict that that will not come about quickly – and that when it happens it will be patchy, available in some places and not in others. Until it actually does happen (and works reliably) it therefore cannot be said to be a solution to the problem. The question posed in the meanwhile is whether to keep PDHs or to adopt Auld’s suggestion that they be used only exceptionally.

Auld’s proposal is based on his belief that PDHs are not necessary because the parties should be expected to do what needs to be done to move the case on.

“In courts at all levels the main players – the police, prosecutors and defence lawyers – should take the primary responsibility for moving the case on. They should concentrate on improving the quality of the preparation for trial rather than trying to compensate for its poor quality by indulging in a cumbrous and expensive system of, often unnecessary and counterproductive court hearings.” (p.487, para.220)

The way to do that, he said, was “by adequate organising and resourcing of the police, prosecutors, defence practitioners and the courts, including the provision of a common information system of information technology for all of them and the Prison and Probation Services”. (ibid)

Provision of a common IT system for all the criminal justice agencies would, in the best case, take years to establish. Again, therefore, that cannot be used to justify any alteration in the system until it is in place.

As to “adequate resourcing” of the criminal justice agencies, I have no confidence that significantly greater resourcing will become available. It is difficult to imagine that anyone could believe in such a proposition. But even in the unlikely event that the Treasury agreed to release significant extra funds, say, for generous remuneration of pre-trial work by legally aided lawyers, I do not think it would make much impact on the problem here under consideration, namely the identification of the key issues for trial.

I believe that, for a variety of reasons, the matters dealt with at the PDH will not be dealt either as efficiently or as quickly if they are left to the parties to handle without the

97 Cm 5074, 2001, p.107.
stimulus (what Auld calls the “wake-up call”) of a court hearing. The fact that the relevant interests are all there at the same time makes it possible to sort out matters that would otherwise not be sorted out at all – or that would take much more effort and delay to get sorted out. In my Dissent to the Royal Commission’s Report I spelled this out. I believe that what I wrote in 1993 is equally applicable today. For that reason I set it out here in full:

“Having an automatic Plea and Directions Hearing (PDH) for every case seems to me to have the following actual or potential advantages:

(1) All parties (prosecuting and defence counsel, defence solicitors, CPS and defendant) are required to come to court on a fixed date. This seems to work satisfactorily. It requires very little chasing. They come.

(2) The defendant has an early opportunity to discuss his plea in person with a barrister. Often it is not the barrister who would ultimately conduct his trial if there were one, but it is a barrister. This is a considerable advantage – especially if, as will commonly be the case, he has previously only discussed his case with a solicitor’s clerk.

(3) The PDH is a convenient opportunity for the two opposing counsel to confer to see whether there is any basis for a plea (or charge) bargain where the prosecution drops more serious charges and the defendant thereupon pleads guilty. At present this opportunity does not usually present itself before the day of trial. The effect of bringing it forward should be to reduce the number of last minute guilty pleas on the day of trial (cracked trials). The experiment with [the pilot study on PDHs known as]Recommendation 92 suggests that this is happening. 98

(4) If it appears that the case is to go forward as a contest, the barrister would normally have an opportunity at the PDH to consider what further steps need to be taken by his instructing solicitors to get the case ready for trial. Sometimes he would communicate such views informally and orally to the representative of the solicitors’ firm present at the PDH. Sometimes he would write them down there and then by ‘endorsing’ them on his brief. Sometimes he would send the solicitors a more formal and extended ‘advice on evidence’ from chambers.

Any of these forms of assistance should have the effect of improving the quality of preparation of cases. The Interim Report on the pilot experiment states: ‘The indications are that Recommendation 92 is improving the preparation and disposal of Crown Court cases. The extent of this will not be clear until completion of the pilot. . . It is however already clear that the key to

98 [The Interim Report of the National Steering Group, LCD, March 1993 stated that cracked trials were reduced from 31% to 19%. The Final Report There are no more recent data on the effect of PDHs.]
any improvement is early and adequate preparation by both prosecution and
defence….’

This is extremely important – considerably more important than ‘clarifying
the issues for the jury’ or ‘streamlining the trial’ or ‘saving costs’. It is central
to whether justice is done because it directly concerns the question whether
the defendant’s case is properly put to the court by his lawyers. Critical to that
is whether the case has been properly prepared by the solicitors. (Sir Patrick
Hastings QC, one of the greatest advocates of the century, said, ‘at least 90 per
cent of cases win or lose themselves and the result would have been the same
whoever the counsel’- meaning that preparation is much more often the basis
of success than advocacy.)

One of the most serious defects in the existing system is inadequate
preparation of routine cases by defence lawyers. Among the many reasons
for this is that the work in most solicitors’ firms is done by clerks with
insufficient guidance from solicitors in their own firms and, too often, with no
guidance from a barrister. The early opportunity of a face-to-face consultation
with a barrister for both the defendant and the representative of the solicitors’
firm is therefore one of the potentially most valuable aspects of the automatic
Plea and Directions Hearing for cases that end as trials. . . .

(5) The PDH pilot scheme includes provision for a detailed questionnaire, the
answers to which are checked through at the PDH in court by the judge
himself on the basis of responses given by counsel . . . The fact that the
questions are put by a judge is critical. Counsel having to attend and answer a
judge is more likely to produce answers than merely having to exchange
forms. Knowledge that counsel has to answer the judge is also apt to have the
effect of concentrating the mind of instructing solicitors on all the matters in
issue.

(6) The involvement of a judge in a hearing in every case may at first sight seem
to be a waste of resources. But it is probably, on balance both cost and benefit
effective in that it should achieve various important objectives which either
would not otherwise be achieved at all, or if at all, to a lesser extent or with
even greater costs:

- The PDH is usually brief – typically between 5 and 30 minutes
- It serves multiple purposes, including actual disposal of as many as
  half of all cases and, potentially, better preparation of a considerable
  number that end as contests.
- It provides a prospect that pre-trial information about the case,
  important to permit accurate listing, will actually be forthcoming – and
  at a very early stage.”(Royal Commission Report, pp.229-231)

The problems identified then appeared equally in the Court Service’s 1998 *Review of the Effectiveness of Plea and Directions Hearings in the Crown Court* (Effectiveness Review)

The Effectiveness Review found\(^\text{100}\), inter alia:

- Committal papers were served late on the defence in half of all cases in the sample (in 41% of cases less than 7 days before committal instead of 14 days as required and in 6% on the day of committal) (para.4.3)
- The prosecution brief for the PDH was returned in just over two-fifths of cases (42%) according to the CPS and in just under two-fifths (37%) according to prosecution counsel (Table, p.20) By comparison, defence solicitors reported that the brief had been returned in a fifth of cases (21%) and defence barristers in slightly less (18%) (para.5.11)
- The brief was usually returned on the day before the PDH or on the day itself (87% according to the CPS, 82% according to counsel) (ibid)
- The CPS said they met with counsel before the day of the PDH in only 3 cases out of 144 (para.5.6). Defence solicitors met with their clients before the PDH more often (37%), but two-third had not done so. (para.5.12)
- In the majority of cases (58%) defence counsel had not met with the defendant prior to the PDH (para.5.18)
- In almost cases (96%) there had been no contact between prosecution and defence counsel prior to the PDH (para.5.30) Usually the reason was that they did not know each other’s identity. Prosecution counsel said they learnt the name of their opponent on the day of the PDH in 96 per cent of cases. The equivalent figure for defence was 92 per cent. (para.5.31)\(^\text{101}\)
- According to Listing Officers, the defence failed to comply with the obligation to supply the court and the prosecution 14 days before the PDH with a full list of the prosecution witnesses they wanted to attend at trial in over three-quarters of the cases (77%). (Defence solicitors reported compliance in 47 per cent of cases). (para.5.38)
- Counsel at the PDH and at the trial was not the same person in three-quarters of the cases (74%) for the prosecution and in two-fifths (41%) for the defence. (para.6.31)\(^\text{102}\)

\(^\text{100}\) These data are based on 50 cases each from three Crown Court centres – Ipswich, Manchester Minshull Street and Newcastle. Interviews were conducted with the judge, CPS, defence solicitors, both counsel and the Listing Officer.

\(^\text{101}\) The Report said the graduated fee scheme introduced in January 1997 had attempted to deal with these problems by offering defence counsel an incentive for early preparation in the form of an advance fee of £100 for juniors, £250 for QCs. This was payable if the advocate certified that he had liaised with the prosecution, had read the case papers, held a conference with the client and advised on plea at least 5 days before the PDH. (“There is no evidence, however, that this incentive has encouraged any earlier preparation and there have been no claims received to date” – though this might be due to inertia by counsel’s clerk. (para.5.32)

\(^\text{102}\) A differential fee had been introduced to encourage first briefed defence counsel to attend PDHs. But only 13 per cent of barristers in the study felt that the graduated fees had had any impact on their attendance at PDHs. Court Managers agreed. (para.6.34)
The Effectiveness Review addressed the question whether a PDH should continue to be required in all cases. Opinion as to that varied but there was significant support for it being retained in all cases. That was the view of 41 per cent of the judges, 48 per cent of defence counsel, 69 per cent of prosecution counsel, 74 per cent of prosecution counsel, 73 per cent of the CPS and 66 per cent of Court Managers. (para.8.8)

In my view, abolition of the automatic PDH will impact adversely on many aspects of the pre-trial process. I believe, that leaving it to the parties to do what they should do, as Auld proposes, is simply to return to the previous era before automatic PDHs were introduced which was generally agreed not to be working. For the reasons set out in my Dissent in 1993, I would retain the automatic PDH. I attach particular importance to its value, already referred to, in regard to preparation of the defendant’s case. There is strikingly little in the 328 recommendations made in the Auld Report that can be said to be directed at benefitting the defendant. Abolition of the automatic PDH would be a blow to the prospects of preparation of the defendant’s case.

I believe that abolition of the PDH would be a blow equally to the efficiency objectives at which Auld is aiming - including the rate of early guilty pleas. The Court Service’s Effectiveness Review found that since the introduction of PDHs there had been “a significant reduction in the broad cracked trial rate (the number of cases cracking as a percentage of all disposals) from around 23% to 18%”. Also, “Since full implementation of the PDH scheme, average waiting times [had] fallen from around 16 weeks to slightly over 12 weeks.” The Review continued, “In part, this is due to the success of PDHs in encouraging guilty pleas at an earlier stage of the trial process, with the number of guilty plea cases dealt with before trial rising from 38% to 46%.”

But I do agree with Auld (p.488, para.221) that the time-tabling of PDHs must be made responsive to the needs of the parties and to the state of preparedness of the case. I see merit in his suggestion that at least in the higher level case (i.e. Crown Court, and, if it is established, in the District Division) the pre-trial time-table should be provisional, should be set by the court in consultation with the parties and that thereafter the parties should liaise with each other and with the court, informally communicating progress or lack of it. The court’s Case Progression Officer would play an important role.

The Bar Council’s suggestion to Auld was that there should be a “paper” PDH coupled with “front-loading” of fees to cover preparatory work. The defence advocate would advise on evidence and as to a trial plan. There would be a fixed date for a paper hearing, based on the parties’ answers to a questionnaire served on the court and each other, say, seven days prior to that date. The matter would then proceed without an oral hearing unless the defendant indicates a plea of guilty or either side requests it or the judge directs it. The defence advocate would get his fee whether or not there was an oral hearing.

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103 Strangely, there is no reference to this 1998 Court Service Report in Auld.
104 Executive Summary, para.3.
105 Ibid.
Auld states that a system of “paper” or “flexible” PDHs in straightforward cases is currently being piloted at three centres by the Court Service. Clearly the results of that pilot need to be evaluated before any view can be formed as to its merits.

Another idea that might be worth exploration is whether the PDH should be conducted at solicitor rather than at barrister level. Since it is the solicitor who is supposed to be in charge of preparation of the case, it is not immediately obvious that the best way of representing the state of preparation of the case is to have two barristers who often know little or nothing about it to come to court to tell the judge. Instructing counsel is a way for an indolent solicitors’ firm to cover the fact that it has not done the work or done it poorly - the hope being that counsel will somehow manage to conceal from the court the true state of play. (One experienced solicitor described PDHs to me as an “organised lying system”.) If the solicitors were required to report to the judge it would put the responsibility where it properly belongs. Whether that would result in any improvement is a different question.

Auld says that what is needed is a “pre-trial assessment” of the case and of the state of readiness. Under the proposal, in most cases the assessment would be a paper exercise – “the parties signifying in writing to each other and the court their readiness or otherwise for trial and the court responding in writing as appropriate”. This is reminiscent of what has existed before which did not work. The Runciman Commission (p.103, para.10) said that in 1982 a Working Party under the chairmanship of Lord Justice Watkins recommended a system of pre-trial discussion between the parties based on the exchange of forms giving information about the likely length of the case, the witnesses to be called, pleas and so on. But an experiment set up to try out the scheme had produced disappointing results. The use of the forms was patchy. Equally, as already mentioned, in the Crown Court Study, court clerks said that just under half (47%) of the listing information forms that were supposed to be sent in by the lawyers had not been received and of those that were sent in, many were returned late. If such systems did not work before, what reason is there to think that they would work now?

A paper PDH may sometimes be sufficient to achieve the various objectives of the PDH – but I believe that in a significant proportion of cases it will not. The reason for my scepticism is the many things that will go wrong (sometimes through someone’s fault, often not) if the matter is left for the parties to handle in their offices and chambers – as opposed to being physically in the same place at the same time in the presence of the judge. I believe that – despite all the shortcomings of the way it works in practice – this physical presence will often be better than what would be achieved without it.

Auld (para.489, para.226) says that “it is clearly vital that trial advocates should attend any pre-trial hearings”. If that is so, it cannot work well since, as I have suggested above,

\[106\] Auld says that he warmly commends this initiative but expresses caution as to its use “as a marker for general use unless it is supported by other mechanisms and resources [recommended by him] to improve the parties’ performance in preparing for trial”. (pp.488-489, para.223)
there is no way that it can be assumed and often it will not happen. The advocate at the pre-trial hearing will frequently (maybe, normally) be different - and usually more junior - than the advocate at the trial.

But I believe that Sir Robin may be mistaken in believing that this is a serious problem. In the Crown Court Study we asked the judge whether the barrister at the trial was different from the barrister who handled any pre-trial hearing and, if so, whether it mattered. Perhaps surprisingly, in the overwhelming majority of cases it seemed to the judge that it did not matter. In the case of defence barristers, the judge said that it did not matter all in 78 per cent of cases and to matter “a lot” in only 12 per cent of cases where there was different counsel. A change of prosecution barristers, in the view of the judge, mattered “Not at all” in 85 per cent of cases, and to matter “a lot” in only 7 per cent.107

It is worth noting in this context that it is probably even rarer for the judge at the trial to be the same as the judge at the pre-trial hearing. In the Crown Court Study, the judge was different in 83 per cent of cases where there had been a pre-trial hearing. We asked the trial judges whether they thought this matter. No fewer than 95 per cent of judges at the trial said that they did not think it mattered that another judge had conducted the pre-trial review.108

Sanctions (pp.490-492)

Sir Robin accepts that sanctions are mainly useless or inappropriate in promoting good standards in pre-trial work in criminal cases.

“Throughout the Review I have anxiously searched here and abroad for just and efficient sanctions and incentives to encourage better preparation for trial. A study of a number of recent and current reviews in other Commonwealth countries and in the USA shows that we are not alone in this search and that, as to sanctions at any rate it is largely in vain. In a recent report, the Standing Committee of Attorneys General in Australia commented: ‘… the primary aim is to encourage co-operation with pre-trial procedures. There are inherent practical and philosophical difficulties associated with sanctions for non-co-operation’” (p.491, para.231 and see also p.41 above)

This conclusion stands in marked contrast to the views expressed in the Court Service’s Consultation Paper Transforming the Crown Court issued under the imprimatur of the Lord Chancellor in September 1999 and in the Report of the National Audit Office, Criminal Justice: Working Together published in December 1999. The Court Service’s Consultation Paper repeatedly stated that compliance with protocols and other case management performance standards must be enforced by sanctions. These it suggested should include on-the-spot fines or fixed financial penalties imposed by judges or by court staff under judicial direction. Financial penalties would apply to the police and other agencies. Consistent failure to comply could lead to agencies’ budgets being

107 op.cit.,sect.2.8.6.
108 ibid., sect.2.8.5.
capped. The National Audit Office Report equally urged that sanctions should play a
central part in court management. It recommended (at p.110) that, “In taking forward its
proposals to change Crown Court procedures, the Court Service should ensure that
appropriate forms of sanctions are introduced to help manage robustly”. It identified the
sanctions available to the courts as costs orders against the lawyers, reprimand in open
court, reprimand in the judge’s chambers, a report to the head of chambers or, as the case
may be, to the senior partner of the firm of solicitors, and reference to the practitioner’s
professional body. The same view was taken by my fellow Commissioners on the
Runciman Royal Commission. Sanctions, they thought should include docking fees,
wasted costs orders, or a report to the head of chambers or to the leader of the circuit.

There is, in other words, a powerful contemporary disposition to imagine that sanctions
are an answer to the fact that pre-trial process does not function according to the rules.
(The same philosophy informed Lord Woolf’s Report on Access to Justice.) Not that that
they are frequently used. The National Audit Office, which was so enthusiastic about
their use, said:

“For sanctions to be effective they need to be workable and appropriate.
Magistrates and court staff we spoke to criticised costs orders, which they
considered to be overly cumbersome since a lawyer’s right to make
representations against an order can prove time consuming and expensive. They
are also felt to be inappropriately severe, since a single costs order can damage the
reputation of an advocate, leading to hostility rather than co-operation between
local defence solicitors and Crown Prosecution Service staff. Additional hearings
may entail expenditure greater than the award itself.” (op.cit.,p.90, para.4.67)

In my paper entitled “What on Earth is Lord Justice Auld Supposed to Do?”,109 I urged
Sir Robin to reject this fashionable current philosophy. (“[I]t is time that the belief in the
value of sanctions in securing compliance with performance targets in the context of the
justice system is challenged. People on the whole do their work as best they can
according to their abilities, so far as circumstances permit. If in the mass of cases the
system is not working as it is supposed to do it is probably not the fault of those doing the
work. Sometimes the fault lies in the design of the system, but often there is no fault.”)

I expressed the hope that, if Sir Robin was persuaded of this “it would be very helpful if
he said so in plain terms”. He has done precisely that and he has set out the reasons
(p.491, para.230). These may be summarised as follows:

- An order for costs against the defendant is usually not an option because of his lack of
  means and because he cannot be blamed for the faults of his lawyers.
- The fairness of the trial is threatened if the defendant is under threat of sanctions if he
  or his lawyers misjudge the extent of their obligations to co-operate with pre-trial
  procedures
- Judges are reluctant to make costs orders against the prosecution involving a transfer
  of funds from one public body to another

In attempting to make wasted costs orders it is difficult to identify who was at fault – on the prosecution side, counsel, those instructing him or the police, on the defence side, counsel, his solicitor or the defendant. Wasted costs proceedings are “an impracticable and expensive way of achieving efficient preparation for trial”.

There are considerations of public interest, including the fairness of the trial, in extending the court’s power to draw adverse inferences against a defaulting party or in seeking to import from civil process the notion of “strike out”, for example by depriving the defendant from advancing part of his case or by too ready a use of the court’s power to stay a prosecution for abuse of process.

Despite his conclusion that “there is little scope for improving on existing sanctions against the parties or their representatives for failure to prepare efficiently for trial”, (p.492, para.232), Sir Robin suggests two exceptions. In regard to his proposal (noted above) that the parties shoulder primary responsibility for the task, having recourse to a pre-trial hearing only when there are matters they cannot reasonably resolve between them, he suggests that they should be penalised if they unnecessarily ask for a pre-trial hearing. The penalty would be loss of the fee for the unnecessary hearing. In my view that would be open to all the same objections that Sir Robin levelled against wasted costs orders. The penalty would be used very rarely – and when used, would result in lengthy and costly debate and successful appeals. It would also be likely to have the effect of discouraging lawyers from asking for a pre-trial hearing in cases where one was actually needed.

Secondly, he suggests, the Bar Council and the Law Society should “incorporate more stringent and detailed rules in their codes of conduct about preparation for trial” and should issue clear guidance “as to the seriousness with which the court will view professional failures in this respect” (p.492, para.234). Again, in my view this would be either useless or actually counter-productive. The more stringent and detailed the rules, the more they will not be complied with. And to say that the courts will regard failure to comply with the stringent and detailed rules with “seriousness” - having just acknowledged that there are no workable sanctions - is to invite cynicism.

**The trial: procedures and evidence** (chap.11, pp.514-610)
Auld, like Runciman, finds that the system of trial in this country is basically sound but, like Runciman, makes a number of detailed suggestions for improvements. I mainly discuss only those on which I either disagree or in regard to which I would add something.

**The start of jury trial** (pp.518-523)
I agree with Auld (p.521, para.22) that the jury would benefit from having a somewhat more substantial opening statement than is normally given by the trial judge. This would include the structure and practical features of a trial, a word or two about their manner of working, including note-taking, early election of a foreman and his role, asking questions, etc. I agree equally that the jurors should be given a copy of the indictment (or charge).
But I am unconvinced by the argument for a written “objective summary of the case and the questions they are there to decide”. (p.521, para.22) I do not doubt that jurors would benefit from such a statement. They plainly would. My doubt is as to the disproportionate efforts that would have to be made to try to get such a document prepared on an agreed basis – and, even more, that the efforts would largely be in vain.

Auld (p.522, para.24) says,

“many criminal practitioners may not initially welcome this proposal, one that requires the advocates on both sides to co-operate in providing a basic document for the use of the judge and the jury as well as themselves. They may believe that it would be impracticable in the hurly-burly of their life, preparing cases for trial often in the cracks of the day while engaged in the trial of other cases.”

Such worries are dismissed by Auld as unnecessary. After all, busy civil and family practitioners had become accustomed to the discipline of advance identification of the issues in documents setting out the agreed facts, those in dispute and the issues for determination. Admittedly, “in those jurisdictions such documents are primarily skeleton arguments rather than a common aide-memoire”. (p.522, para.24) Also admittedly, in criminal cases there were considerations of the liberty of the subject. But, Auld, says,

“I am not proposing routine exchange and provision to the court of skeleton arguments or pleadings, simply a neutral and summary document derived from the sort of analyses that competent advocates on both sides would, in any event, need as part of their own preparation for trials of substance which, under my proposals, would in future be the sole or main candidates for trial by judge and jury.” (p.522, para.24)

I have already made clear my absolute rejection of the suggestion that jury trial should in future be reserved mainly, let alone wholly, for trials of substance (see pp.19-22 above). I would regard it an outrage – managerialism run amok - if this proposal were implemented. I will assume for the moment that it is not implemented and that jury trial remains available in a quite large number of “either-way” cases some of which would be “of substance”, in the sense of “heavy”, but many of which would not. (I will consider then what the position would be if the proposal were implemented.)

The problems relating to getting the parties to produce an agreed statement of fact include the following:

- It is common in Crown Court cases for both prosecution and defence barristers to receive the brief for the trial at the very last minute – the day before the trial or the morning of the trial. In that situation how could there be an agreed case statement?

110 See n.66, p.43 above.
• Very often, counsel at trial is different from counsel who dealt with the matter before. Again, this is true for both the prosecution and the defence. It could not be assumed that a statement drafted by the (usually more junior) counsel who acted earlier would be thought adequate by the trial advocate.

• There is no system that reliably enables counsel to know the name of opposing counsel in advance of the trial. In more substantial cases they would probably have that knowledge but in ordinary run-of-the-mill cases, they would often not. How could they agree a document if they do not know each other’s identity?

• Even if counsel does know the name of the then opposing counsel, since it is normal for counsel to change during the pre-trial stage, there would be no way of knowing whether that counsel will still be acting when the matter comes to trial.

• If, as would often happen, the appreciation of the facts changes as the case preparation moves along, the case and issues summary would have to be up-dated - with further resulting problems of getting agreement.

• Presumably the case and issues statement would have to be settled by counsel. But what would be the role of the defence solicitors and the CPS? The Report says nothing about this. Many solicitors would find it very unsatisfactory to be excluded from the process but having them involved would obviously add significantly to the complication and delay involved.

• Would the lawyers in practice get instructions from the defendant? There are, notoriously, serious difficulties in criminal cases in getting instructions from the defendant. If he is on bail, he frequently does not manage to get himself to his solicitors’ office; if he is in custody, his solicitors and barristers commonly do not manage to get to the prison.

• Since there would be no advantage to the defendant in agreeing a statement such as Auld has in mind, defendants and their lawyers will drag their feet and will not be cooperative. Why should they be? We already know that this is the case with defence disclosure (see p.50 et seq above) despite the fact that failure to produce a defence disclosure statement may result in adverse comment by the judge (CPIA, s.11(3)). Plotnikoff’s and Woolson’s research establishes that this is virtually a dead letter. The defence statement is generally either framed in a way that reveals little, or it is not entered at all. Yet, as has been seen, prosecutors generally do not ask the court to direct that further particulars be given nor do they generally ask the judge to comment adversely on the absence or inadequacy of the defence statement. One reason is that judges seem to be as unenthusiastic about enforcing the statutory obligation as prosecutors. If that is true of defence statements which are supposed to be helpful to the prosecution, how much more would it be true of Auld’s proposed case statements which would mainly be intended to be helpful only to the jury?

111 See n.67, p.43 above.
If these are the facts, it seems obvious that there is no possibility that Auld’s scheme could work. Any attempt to make them work would be bound to create extra delay, extra costs and a great deal of general aggravation.

Would that still be true if the Government were to implement Auld’s recommendation that jury trial be confined, wholly or mainly, to “trials of substance”? Auld (p.522, para.24) noted that in serious and complex fraud cases there was already provision for the judge to direct both sides to provide the court and each other with a “case statement” setting out the kind of matters that he thought should be included in such a statement.

Auld does not make the point that the case statement required in such cases, like skeleton arguments, is not a statement that has to be agreed between the parties. The prosecution can be directed to produce a case statement (Criminal Justice Act 1987, s.7) and where they have done so, the defence can be directed to do so (s.9(5)).

Nevertheless, one might think that in heavy cases an agreed statement might be of value. But Michael Levi’s research into serious fraud cases for the Runciman Royal Commission was not encouraging. Referring to the case statement in such cases, a defence lawyer put his experience as follows:

“Prosecution case statements are produced in advance of the trial. They are based on what the evidence is expected to be. Defence responses to the case statement have to take into account the allegations contained in the statement. However, the evidence frequently changes significantly between the case statement and the end of the prosecution case, and an argument put forward in response to an allegation which subsequently turns out to be not proved or inaccurate may be unfairly damaging to a defendant’s interests. To seek to forbid a defendant to depart from his case statement in these or similar circumstances would clearly be wrong. In any event in my experience, case statements and responses are rarely if ever referred to once the trial has started.”

It should be emphasised that this did not refer to agreed statements. If pre-trial reviews and case statements put in by each side in such cases are highly problematic, it is predictable that an attempt to get the parties to agree a statement for the jury is apt to be even less successful.

I see merit in encouraging the parties to agree a “case and issues summary” such as Auld proposes; I would regard it a mistake to make it a rule or requirement.

On this whole matter, the Auld report follows in a long line of pronouncements over many years to the general effect that the system should do more to help the jury. What is striking about these statements is that there is no evidence for the proposition that the jury needs more help - for the obvious reason that one is not allowed to conduct research in

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the jury room. What is also striking, is that such evidence as does exist, far from supporting the proposition, suggests that it may be essentially mistaken.

The best evidence is that from the Crown Court Study:

- Half the jurors (50%) said that it was “Not all difficult” for them to understand the evidence and another two-fifths (41%) that it was “Not very difficult”. Under ten per cent thought it was “Fairly difficult” (8%) or “Very difficult” (1%).

- When asked about fellow-jurors, over half (56%) of the jurors said that all members of the jury understood the evidence and another two-fifths (41%) said that most did. The foremen said the same.

- The results for remembering the evidence were almost the same.

- Some nine out of ten barristers thought the jury would have had no trouble in understanding the evidence in the case.

- Where there was scientific evidence, more than 90 per cent (94%) of judges thought that all the evidence was understandable by the jury.

Belief in the jury’s capacity to manage tolerably well seems plausible given that most cases are not long and juries usually do not take much time to reach a verdict. The Crown Court Study showed that in a third of cases (33%) the jury was out to consider its verdict for under one hour; in nearly two-thirds of cases (62%) it was out for under two hours and in nearly ninety per cent (87%) took under four hours. Unsurprisingly, the longer the case, the longer on average, the jury’s deliberation.

None of this is conclusive evidence, but it is suggestive and, even one might say, encouraging. It certainly does not provide support for the often stated view that the jury needs more help.

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113 Op.cit., Table 8.3, p.206
114 Op.cit., sect.8.2.3.
115 Op.cit., sects.8.2.4 and 8.2.6.
116 94% of prosecution barristers; 90% of defence barristers – op.cit.,sect. 6.2.7.
117 op.cit.,sect.3.2.14.
118 Figures supplied to me by the LCD based on payments to lawyers in 9,949 trials show that two-fifths (41%) of all Crown Court trials currently last one or two days; nearly a quarter (23%) last three days; nearly two-fifths (19%) last four to five days; just over a tenth (11%) last 6-10 days; 3 per cent last 11-15 days; 1 per cent last 16-20 days; 1 per cent last 21-25 days and 1 per cent last over 25 days. The figures are for April-September 2001. Guilty pleas and cracked trials are not included. The figures somewhat inflate the length of cases since if a trial starts at 2pm and continues for two hours on the next day the lawyer will have been paid for attendance on two days even though the trial only lasted four hours.
119 op.cit., sect.8.10.1.
120 Thus, where the case lasted under half a day, the jury was out for under two hours in 96% of cases. When it lasted 3-4 days, the jurors were back in under two hours in 40% of cases; when it lasted for two weeks or more it was out for under two hours in 7% of cases. In cases lasting between a week and two weeks, the jury was out for less than four hours in 53% of cases and between four and eight hours in another 44% of cases. When the case lasted over two weeks the comparable percentages were 31% and 40%. (op.cit., Table 8.24.)
Listing and time estimates (pp.494-495, 523-524, )

Listing The Report recommends (p.495, para.237) that “there should be a move to give fixed trial dates to cases of any substance”. It is impossible to evaluate the merits or otherwise of this proposal without knowing what is meant here by cases of any substance. Is one talking of cases likely to last more than two days, two weeks or two months? There is no indication. The suggestion that there should be a move in the direction of fixed dates obviously implies that Auld considers that there should be more. But, so far as I am aware, there is no current information as to the proportion or number of fixed date listings nor as to the length of cases involved.

Listing is a subject that provokes an enormous amount of grumbling from practitioners. In the Crown Court Study’s barrister questionnaires the section for free comment was more often devoted to this topic than to any other. It was therefore interesting that when the barristers were asked whether listing in that particular case had caused problems, the answer in the main was No. Prosecution barristers said that listing caused “No problems” for the prosecution in 86 per cent of cases, defence barristers said the same in regard to the defence in 81 per cent. “Serious problems” were said to occur in only 1-2 per cent of cases.121

We looked to see whether the likelihood of problems was associated with the amount of notice give as to the trial date. Unsurprisingly, there was such an association. Thus prosecution barristers said there were problems in 8 per cent of cases where there was more than one week’s notice to chambers, compared with 18 per cent where there were only two to three days notice, 20 per cent where notice was only given on the day before up to 4pm and 24 per cent where notice was given on the day before after 4pm.

The results for defence barristers showed a greater proportion of problems close to the hearing: problems in 11 per cent of cases where notice was over a week, 24 per cent where it was only two to three days, 34 per cent where it was on the day before up to 4pm, and 44 per cent where notice was given on the day before after 4 pm.

Still, even when notice was given at the last moment, the majority of the barristers said it created no problems.

The judges were asked whether the case had started on the date for which it was listed. In the great majority of cases (87%) the answer was Yes. A variety of reasons were given when the answer was No: witnesses unavailable or didn’t show up, counsel’s previous case part-heard, counsel asked for more time, defendant failed to appear, no judge available, listing errors, unexpected new evidence.122

Time estimates Auld (p.524) recommends “that advocates should regard it as of the highest importance to attempt accurate estimates of the likely length of their principal witnesses’ evidence”. Obviously I agree. But it is worth noting that a high proportion of

121 op.cit.,p.38.
122 op.cit., sect. 2.2.14.
such estimates will prove to be wrong. (In the Crown Court Study the judges said that almost half (45%) the time estimates were out.)

**Judge’s directions on law and summing-up** (pp.532-538)

Auld (p.532) proposes that in his summing-up the judge should be required to use the case and issues summary. Obviously, if there is no such summary, that recommendation would fall.

In a very important passage, Auld then proposes a new way of handling the problem of directing the jury on the law. The Report adopts a suggestion made by the late Professor Edward Griew that the judge should not direct the jury on the law as such, rather he should pose questions of fact which reflect the state of the law. (“He should simply identify for the jury the facts, which, if found by them, will render the defendant guilty”, p.534, para.45.)

The Report proposes (p.535, para.49) that an expert body, perhaps drawn from the judiciary and the Judicial Studies Board, could undertake the task of working out a scheme. The questions should correspond with those in the up-dated case and issues summary, supplemented as necessary in a separate written list prepared for the purpose. “Each question would be tailored to the law as the judge knows it to be and to the issues and evidence in the case”.(p.535, para.50).

In my view this is to make a terrible meal of it – or to change the metaphor, it is the proverbial sledge hammer to crack what is probably no more than a small nut.

In the Crown Court Study, the jurors were asked whether they found it difficult to follow any of the judge’s directions on the law. Very few did. Over 90 per cent of the 7,303 jurors who responded said it was “Not at all difficult” (61%) or “Not very difficult” (33%). Only six per cent said it was “Fairly difficult”.

They were then asked for their opinion as to how easy it was for their fellow jurors to understand the judge’s direction on the law. Two-thirds (65%) of the 5,682 jurors who responded said none of the jury found it difficult to follow; just under a third (30%) said that a few jurors found it difficult; only four per cent said that most found it difficult.

We also asked the judges for their view as to how easy it was for the jury to understand the summing up on the law. Over two-fifths of the 667 judges who replied (42%) thought it was “easy” and another 43 per cent thought it was “fairly easy”. Three per cent said they thought it was “difficult” and 13 per cent that it was “fairly difficult”.

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123 op.cit., sect.2.2.15.
124 op.cit., Table 8.14, sect.8.6.2.
125 op.cit., Table 8.15, sect.8.6.3.
126 op.cit., sect.6.2.12.
Questions were then put to the jurors and to the judges as to how difficult it was to grasp the facts in the case.

We asked jurors whether it would have made it harder a) for the juror him or herself and b) for the other jurors, if the judge had not summed up on the facts. Of the 6,728 jurors who gave a clear reply for themselves, one-fifth (19%) thought it would have made it “Much harder”; one third (33%) thought it would have made their task “A little harder”; whilst almost half, (48%) thought it would have made “No difference”. Foremen gave almost identical replies – 19 per cent, 35 per cent and 46 per cent respectively. 127

Unsurprisingly, the longer the case, the higher the proportion who said it would have been “Much harder” to have managed without a summing up on the facts. Where the case lasted under a day, the proportion was 13 per cent; where it lasted 1-3 days, it was 17 per cent; where the case lasted 3-5 days, it was 22 per cent; where it lasted a week or more, the proportion was 34 per cent. 128 Even, therefore, in the very long cases, only a third of jurors thought it would have made it much harder.

When it came to giving a view in respect of their fellow jurors, a quarter of the respondents said they did not know. Of the remaining 4,893 jurors, over three-fifths thought it would have made it “Much harder” (24%) or “A little harder” (37%), whilst two-fifths thought it would have made “No difference”. 129

The judges were asked, “Do you think the jury could have managed without the summing up on the facts?” A quarter (25%) of the 667 judges who responded thought the jurors “Would not have managed”; a third (32%) thought “They might have managed”; and over two-fifths (42%) thought they would have managed well enough without the summing up.

The judges were then asked “How easy was it for the jury to understand the summing up on the facts?” Over two-thirds (68%) thought it was “Easy”, and 29 per cent thought it was “Fairly easy”. Only one per cent thought it was “Difficult” and 3 per cent thought it was “Fairly difficult”. 130

Obviously these findings are not as solid evidence as would be obtained from research based on observation and recording of the jury’s actual deliberations. But they do tend to suggest that the jury on the whole does not have much of a problem with the judge’s summing up either on the facts or the law. That is not to say that there is no need for considering whether they can be helped more. But it does suggest that there is no case for establishing a major new system to deal with the problem when the problem, if there is one, may be quite minor.

127 op.cit., sect.8.6.1.
128 op.cit., Table 8.13, sect. 8.6.1.
129 op.cit., p.215.
130 op.cit., sect.6.2.11.
If the senior judiciary and the Judicial Studies Board think there is merit in Sir Robin’s proposal, I would suggest that there be an experiment in long cases, say, those lasting over two weeks. His proposed system could be tried experimentally on a series of such long cases with a control group of other long cases where the judges would operate as they normally do. The jurors could then be asked what they made of the way in which they were assisted (or not).

My own opinion, for what it is worth, is that judges would find it difficult to formulate the detailed questions to put to the jury and that jurors would find such detailed questions more difficult to cope with than the normal broad question simply asking them in a broad brush way to say Guilty or Not Guilty. In other words, contrary to Sir Robin’s view, I believe that his proposal would lead to greater complication as opposed to greater simplification.

Auld (p.536) proposes two options. One is to leave the jury to answer the questions with a single answer as now - Guilty/ Not Guilty. The second, preferred by Auld, would be to ask the jury to give a structured “special verdict” by way of answers to specific questions. Of the two, I greatly prefer the former. As Auld makes clear, one of the chief purposes of the proposed “special verdict” would be to reduce the jury’s capacity to give the decision it believes to be right. Auld seems to believe that any verdict that is not strictly consistent with the judge’s view of the law and the weight of the evidence is perverse. My definition of a perverse verdict is one that cannot be supported by any reasonable appreciation of the law, the weight of the evidence and a reasonable jury’s overall sense of justice or fairness. I believe that such verdicts are very infrequent. When a perverse verdict results in conviction, the Court of Appeal can rescue the situation by quashing the conviction. I am prepared to accept the occasional perverse acquittal that cannot be justified by any sensible person as a small price to pay for our jury system. I am therefore strongly opposed to the proposal that juries be asked to give special verdicts.

The role of the victim (pp.543-546)
I agree with Auld’s view that the victim should not be given a role equivalent to that of partie civile.

Evidence (pp.546-82)
I agree with Auld (p.546,para.77) that reform of the law of evidence should be undertaken as part of a “principled and comprehensive exercise in the reform and codification of the criminal law” – but that is a project that would take many years.

I agree also with Auld’s suggestion that in general the law of criminal evidence should “move away from technical rules of inadmissibility to trusting judicial and lay fact finders to give relevant evidence the weight it deserves”. (p.547)
Auld goes on to consider and to indicate a preference in regard to different specific rules (pp.548-582). Since he proposes that they should be the subject of study by others, I do not regard it necessary here to evaluate Auld’s recommended approach on those topics.

**Appeals** (Chap.12, pp.611-655)
I may decide to put in a supplementary memorandum regarding appeals but for the present, with one exception, I do not feel moved to comment on the recommendations in this Chapter.

**Prosecution appeal against an acquittal on grounds of fresh evidence** (pp.627-634)
The exception concerns prosecution appeals against acquittals. Auld proposes a broadening of the Law Commission’s recommendation for an exception to the double jeopardy rule. The Law Commission\(^\text{131}\) proposed that this be confined to murder cases. Auld would extend the exception to other grave offences punishable with life and/or long terms of imprisonment such as Parliament may specify. (p.634)

Once the principle of an exception along the lines proposed by the Law Commission is accepted, Auld is clearly right that there is no difference in principle between murder and the other very serious offences the Report says should be included.

My view, which I submitted to the Law Commission in response to its Consultation Paper, was that, on balance, one should stick with the classic rule and not allow the prosecution any right of appeal against an acquittal on the grounds of fresh evidence. I have not changed my mind as to my preference but I take it that that option is unlikely to be accepted by the Government and that the choice is likely to be between what the Law Commission recommended and what Auld now recommends. Given that choice, I prefer what the Law Commission recommended. I believe, however, that even those who tend to favour Auld’s broader approach should be prepared to agree that it would be wiser to proceed cautiously with a very narrow exception. This is novel and potentially very difficult and controversial terrain. Testing the workings of the concept for a few years in murder cases would enable everyone, including the general public, to get the feel of it in order to decide whether it should be retained, scrapped or extended.

**Conclusion**
In my first published reaction to the Auld Report, written under a tight deadline on the day after it became available, I said that the Report had covered its vast remit “most impressively” and that “this is a report that makes a distinguished contribution to the field, not least in the way in which issues are discussed and arguments for and against the options are canvassed in depth”.\(^\text{132}\) I said that everyone would disagree with some of the 328 recommendations but that probably most people would agree with most of them, as I

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myself did. (It will seem from the length of these comments that I am opposed to much of the Report. In fact I am only opposed to around twenty of the 328 recommendations.)

Having now read the Report with the care it deserves, I have not changed my mind as to those basic conclusions. I still think that the Report is a distinguished contribution to the subject. At the same time I have reservations and criticisms, some of them serious.

The Report deals with a vast range of topics. One that was not addressed at all, however, is the role of empirical research as a way of improving the way the system works. The role of research as a means of investigating defects in the system is much better recognised today than it was, say, twenty years ago, though there is still room for much more of it and we are, in particular, not good at inquiring into what happens after reforms are introduced. Systems research is the best way of both identifying the defects and of monitoring reforms that are put in place to address them. It would have been excellent if Sir Robin had specifically identified that as something deserving greater official focus and support.

I finished my short initial piece, “Lord Justice Auld has fulfilled his brief. . . The ball is now in our court to assist the process of reform by careful study of his proposals and formulation of our considered and detailed responses”. This memorandum represents my attempt to respond to the invitation of the present Consultation exercise.

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133 For the case for an official agency to conduct such systems empirical research see M.Zander, “Promoting change in the legal system”, Modern Law Review, September 1979, 489, 502-505. I drew in particular on the outstanding contribution in this regard of the Vera Institute of Justice in New York. An example of this approach in this country has been the research done especially by Professor Lee Bridges and colleagues on the quality of legal advice in police stations and the efforts to address that problem by the Law Society and the Legal Aid Board. The Legal Services Commission is in a position to play a major role in future in promoting better quality criminal work by those it funds.