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The Criminal Justice Bill: **Juries and Mode of Trial**

Bill 8 of 2002-03

This paper is concerned with the *Criminal Justice Bill*, which is due to be considered on second reading on Wednesday 4 December.

The Bill is to introduce major reforms to the criminal justice system designed to rebalance it in favour of victims, witnesses and communities. Most of the reforms are based on proposals made in two major reviews commissioned by the Government, of the legal framework of sentencing, and of the criminal courts.

This paper considers the provisions of the Bill relating to mode of trial and juries. Other research papers in this series provide a general background to the Bill and consider the provisions relating to police powers, drug testing requirements, bail, conditional cautions, sentencing, double jeopardy, prosecution appeals, disclosure and evidence

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Summary of main points

The *Criminal Justice Bill* is designed to implement some of the proposals contained in the Government's White Paper *Justice for All*, to reform the criminal justice system and rebalance it in favour of victims, witnesses and communities. Some of the other proposals are to be implemented in the Courts Bill which has been introduced in the House of Lords.

This paper is concerned with the provisions in the Bill affecting mode of trial and the composition of the jury. It discusses some of the provisions which are likely to have the result that some criminal trials which would now be heard by a judge sitting with a jury would either be heard by a judge sitting without a jury, or on summary trial in the magistrates' courts.

The paper goes on to consider provisions designed to make juries more representative by modifying the present regime under which many people are not required to do jury service, because of their jobs, or for other reasons such as incompatibility with their religious beliefs.

The final part of the paper provides some historical and constitutional background on jury trial.

These provisions of the *Criminal Justice Bill* apply to England and Wales only.

Other provisions of the Bill, relating to police powers, drug testing requirements, bail, conditional cautions, sentencing, double jeopardy, prosecution appeals, disclosure and evidence are discussed in separate Library Research Papers on the Bill.

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I Introduction

English criminal law classifies offences into those triable only summarily by magistrates, those triable only on indictment by a judge and jury at the Crown Court, and those triable either way. Where offences are triable either way an accused person may elect to be tried by a judge and jury at the Crown Court or the magistrates' court may decide that trial on indictment would be more suitable. The court also has power to send a convicted defendant to the Crown Court for sentence if it considers that its own powers of sentencing are inadequate in the particular case.

According to the White Paper,¹ the proportion of either-way cases which are heard by magistrates has increased in recent years, and in 2000, 87% of them were heard in the magistrates' courts, with 9% going to the Crown Court because the magistrates declined to take the case and 4% because defendants elected.

During the last 30 years it has often been suggested, by various bodies, that defendants should not have the right to elect to be tried by a judge and jury, and that the decision should be made by the court. The main justification put forward has been that too many defendants have been "working the system", demanding Crown Court trial purely to delay proceedings, causing suffering and distress to victims and witnesses, and costing the taxpayer substantial sums in extra court costs. The Government's *Criminal Justice (Mode of Trial) Bills*, in the 1999-2000 Session, would have given magistrates, rather than defendants, the choice of where the case should be tried. In his Report², Lord Justice Auld recommended that the magistrates' court should allocate all "either-way" cases according to the seriousness of the alleged offence and the circumstances of the defendant.

The *Criminal Justice Bill* does *not* propose that the defendant's right of election should be taken away. It does, however, contain a number of other provisions which would have the effect of reducing the number of jury trials. By increasing the sentencing powers of magistrates from the present maximum of 6 months imprisonment for adult offenders, to 12 months initially, and possibly later to 18 months (and also abolishing magistrates' powers to commit for sentence) the Government envisages significant reductions in the number of cases going to the Crown Court and in "the abuse of the right to elect for jury trial".

In addition, *Part 7* of the *Criminal Justice Bill* would introduce, for the first time in English law, trials in the Crown Court by a judge sitting alone, without a jury. The judge would hear cases sitting alone:

¹ *Justice for All*, Cm 5563, Home Office, July 2002, http://www.cjsonline.org.uk/library/pdf/CJS_whitepaper.pdf

² *Review of the Criminal Courts of England and Wales* by the Right Honourable Lord Justice Auld, September 2002, <http://www.criminal-courts-review.org.uk/ccr-00.htm>

- on the application of the defendant
- on the application of the prosecution in complex or lengthy trial
- on the application of the prosecution on the ground of real and present danger of jury tampering
- where the judge has discharged a jury because of jury tampering and either continues the trial or orders a new trial, without a jury

These provisions and the background to them are discussed in Part II of this Paper. Part III addresses the proposed amendments to the *Juries Act* 1974, removing most categories of ineligibility and all categories of excusal as of right, from jury service. Part IV reproduces the sections of the Library Research Paper³ on the *Criminal Justice (Mode of Trial) (No.2) Bill* which set out the origins and history of trial by jury and the question of trial by jury as a constitutional right.

II Mode of trial

A. Summary trial of either-way offences

1. The right to elect for jury trial

During the Session 1999-2000, the Government introduced Bills⁴ seeking to give the decision as to mode of trial in either way cases to magistrates rather than defendants. The *Criminal Justice (Mode of Trial) Bill*⁵ which was introduced in the House of Lords was designed to implement the Government's proposals. The Bill had its second reading in the House of Lords on 2 December 1999 . It was withdrawn following a Government defeat on an amendment introduced at the committee stage in the House of Lords but the then Home Secretary, Jack Straw, said that he intended to re-introduce a similar Bill in the House of Commons. A new Bill, introduced in the House of Commons, was needed to enable the Government to invoke the Parliament Acts if the House of Lords were to reject the Bill once it had passed through the House of Commons.

The *Criminal Justice (Mode of Trial)(No 2) Bill*⁶ was introduced on 22 February 2000 and had its second reading on 2 March 2000. It completed its Commons stages on 25 July and had its first reading in the House of Lords on 26 July 2000. However, it was defeated by a wrecking amendment in the Lords second reading debate on 28 September 2000. The mechanism was explained by Lord Cope of Berkeley who rose to move, as an amendment to the Motion that the Bill be now read a second time, to leave out ("now") and at end to insert ("this day six months").

³ Research Paper 00/23

⁴ Further details of the Bills' provisions, and the history, are described in Library Research Paper 00/23 The *Criminal Justice (Mode of Trial) (No. 2) Bill* <http://hcl1.hclibrary.parliament.uk/rp2000/rp00-023.pdf>

⁵ HL Bill 3 of 1999-2000

⁶ Bill 73 of 1999-2000

The noble Lord said: My Lords, for the benefit of those who follow our procedures from outside, I should perhaps make clear, which the amendment does not in a direct form, that the effect of the amendment, if carried, would be to kill the Bill.

Meanwhile, on 14 December 1999, the Lord Chancellor, the Home Secretary and the Attorney-General had appointed Lord Justice Auld to conduct a Review into the working of the Criminal Courts and to report within a year. The Report of the Review was published in October 2001. During the Lords' second reading debate on the *Criminal Justice (Mode of Trial)(No 2) Bill*, the Government responded to questions about the relationship between the Bill and the Review, as follows:

Lord Alexander of Weedon: My Lords, I am grateful to the noble and learned Lord for giving way. [-] will he give a specific response to the question why, given that this very issue is in the specific terms of reference of the Auld review, the Government do not want to know the views of Sir Robin Auld before proceeding to legislation?

Lord Williams of Mostyn: My Lords, I said right at the outset that when Lord Justice Auld carried out his review it was never suggested that no further proposals for interim reform would be brought forward.

Lord Ackner: My Lords, with the greatest respect, that is not an answer to the question. Now we know that Sir Robin is to produce a report by the end of the year, why must this measure be forced through by use of the Parliament Act?

Lord Williams of Mostyn: My Lords, it is an answer, but it may not be the answer that everyone wants. It is exactly the same position that obtained when noble Lords debated the issue the first time round. Sir Robin Auld was never asked to do the work on the basis that no further proposals for reform would be brought forward.⁷

In a written answer a month later, the Government indicated that further legislation would be introduced.

Simon Hughes: To ask the Secretary of State for the Home Department if he will make a statement on his plans in respect of the Criminal Justice (Mode of Trial) (No 2) Bill.

Charles Clarke: The Criminal Justice (Mode of Trial)(No 2) Bill was defeated on Second Reading in the House of Lords on 28 September. The Government remain convinced that the courts, rather than defendants, are best qualified to reach a view on what is the right venue for trial, and intends to bring forward further legislation when parliamentary time allows.⁸

No new Bill was introduced during the short 2000-2001 Session preceding the General election. In the next Session the Government responded to questions about its intentions as follows:

⁷ HL Deb 28 Sept 2000 : Col 1031

⁸ HC Deb 26 October 2000 col 212W

Mr. Sedgemore: To ask the Secretary of State for the Home Department (1) when he intends to bring forward the Mode of Trial Bill; (2) if he will abandon his previously announced plans to restrict trial by jury.

Mr. Charles Clarke: As was affirmed in the speech from the Throne, the Government propose to give the courts, rather than the defendant, the power to decide where an either-way case should be tried. No decisions have been taken on the timing of this measure.⁹

In his Report, Lord Justice Auld did recommend¹⁰ that in all ‘either-way’ cases, magistrates’ courts, not defendants, should determine venue after representation from the parties. His recommendations went further, however, as he also recommended that there should be an intermediate tier in a unified criminal court system, consisting of a judge sitting with at least two experienced magistrates, with jurisdiction over ‘either-way’ offences limited to those of, say, two years custody. It was anticipated that such arrangements would result in about two thirds of cases currently heard by judge and jury.¹¹

The President of the Law Society, Michael Napier was reported as having said:

While the Government has said it does not plan to introduce the deeply unpopular Mode of Trial Bill, which would remove the right to jury trial in some cases, the next key move would be Lord Justice Auld’s report on the criminal court system. ‘We don’t know what he will say but if he won’t allow defendants to elect jury trial out of the so-called middle tier courts manned by district judges and magistrates, that would just be another way of doing what the government wants, and we would oppose that.’¹²

Joshua Rozenberg wrote in *The Daily Telegraph*:

Roy Amlot, QC, the chairman of the Bar, challenged Tory leadership ‘to make clear its continued opposition to any attempts to do away with this important and historic safeguard’. It was ironic, he added, that a Labour party ‘so wedded to the use of focus groups in shaping public policy should content itself with removing the role of the lay jury in thousands of cases tried each year’.

But why should Labour worry about tinkering with trial by jury when it is planning ‘the most comprehensive reform of the criminal justice system since the war’? And we are not just talking about the introduction of computers in the courtroom.

⁹ HC Deb 5 Mar 2001 : Col: 36W

¹⁰ *Review of the Criminal Courts of England and Wales* by the Right Honourable Lord Justice Auld, September 2002, <http://www.criminal-courts-review.org.uk/ccr-00.htm> p. 282

¹¹ “Drastic cut scheduled in cases of trial by jury”, 31 December 2001, *The Daily Telegraph*

¹² 26 June 2001, Butterworths Law Direct

[-]

Labour had been hoping to go into the election campaign with the backing of Lord Justice Auld, the appeal judge who was asked to report on reform of the criminal justice system by the end of last year. However, when he belatedly realised how he might be used by the party machinery, he took good care not to submit his views before the election was called.

That has not stopped Labour from dropping his name into its manifesto: ‘Pending the findings of the Auld report, we see a strong case for a new presumption that would allow evidence of previous convictions where relevant.’¹³

2. Increase of magistrates’ sentencing powers

In his Report, Lord Justice Auld recommended that there should be no general change to the level of summary jurisdiction, although he recognised that the matter might need review in the light of the Halliday recommendations for the introduction of a new sentencing framework including combined custody and community sentence orders.¹⁴ He said:-

20 There have been some suggestions in the Review for a general increase or decrease in summary jurisdiction, but I can discern no wide or well-based support for a change in the general limit of six month's custody or £5,000 fine now applicable to District Judges and magistrates alike. Whilst magistrates have a generally higher jurisdiction than that given to lay tribunals in other jurisdictions, they are increasingly well-trained for their task and have their legal advisers to assist them, where necessary, on points of law or procedure.¹⁵

It should, however, be borne in mind that he was recommending an intermediate tier of the criminal court with a suggested jurisdiction to impose sentences of two years’ custody. The Government were not convinced that there was a strong enough case to justify introducing a new tier, believing that the benefits could be achieved in other ways. Their commitment was to -

legislate to increase magistrates’ sentencing powers to 12 months and to allow us to increase them up to a maximum of 18 months, depending on the results of evaluations, and taking account of any additional training requirements.¹⁶

3. Magistrates to know about previous convictions in deciding suitability for summary trial

¹³ “Can we trust the political promises? The party election manifestos contain some potentially alarming proposals for the law and lawyers”, 22 May 2001, *The Daily Telegraph*

¹⁴ For the background to the Halliday recommendations, see RP 02/72

¹⁵ p 101

¹⁶ *Justice for All* para 4.19

The White paper proposed that magistrates courts should know about any previous convictions recorded against a defendant before deciding whether they could try a case.¹⁷

4. Committal for sentence

The White Paper proposed that when magistrates did hear a case, and convicted the defendant, they should sentence him themselves, and that the option of committing him to the Crown Court for sentences should be abolished.

5. Criminal Justice Bill

Part 6 of the *Criminal Justice Bill* consists of one clause, *clause 35*, on allocation of offences triable either way, and sending cases to the Crown Court. It simply brings in *Schedule 3*, which would amend provisions of the *Magistrates Courts Act 1980* and the *Powers of Criminal Courts (Sentencing) Act 2000*. A replacement *section 19* of the *Magistrates Courts Act 1980* would, inter alia, require the court to give the prosecution an opportunity to inform the court of the defendant's previous convictions, if any, and give the prosecution and the accused an opportunity to make representations as to which mode of trial would be more suitable. In making the decision, the court is to consider those representations, the adequacy of its sentencing powers, and definitive guidelines to be made under a new power in the Act by the Sentencing Guidelines Council. Paragraphs 18 to 25 amend the *Powers of Criminal Courts (Sentencing) Act 2000*: the power of committal to the Crown Court for sentence on either-way offences will no longer be available, except where a guilty plea has been indicated at a plea before venue.

Clause 137, in *Part 12* would provide that a magistrates' court does not have power to impose imprisonment for more than 12 months¹⁸ in respect of any one offence, while *clause 139* would give the Secretary of State a limited power to amend the provision¹⁹. The power could not be used otherwise than to substitute "18 months" for "12" months.

6. Comments

The virtual abolition of committal for sentence has been generally welcomed, as has the retention of the defendant's right to elect for trial in the Crown Court. Serious concerns have, however, been expressed about informing magistrates of the previous convictions of a defendant who they might then go on to try, and increasing their sentencing powers.

In their response to the White Paper, Liberty said:

¹⁷ para.4.23

¹⁸ section 78 of the *Powers of Criminal Courts (Sentencing) Act 2000*, which provides for 6 months, would be amongst the repeals.

¹⁹ and a corresponding provision amending the power in relation to consecutive sentences.

Whilst we welcome the fact that the government is preserving the right of a defendant to elect the mode of trial in either way cases, we do not see a need to extend magistrates' powers. We also believe that the provision to extend sentencing power to eighteen months without the need for primary legislation is wholly unacceptable.

4.23 The proposal to allow magistrates to hear of previous convictions when determining venue for contested cases raises issues about fairness of trial that are discussed at length further on and in detail in our response to the separate consultation on previous misconduct. However, it is worth mentioning that this will mean that magistrates who have determined that their powers are sufficient will have heard of the defendant's previous convictions even if they decide after further consideration that they are not relevant. As it is proposed that nearly all convictions be heard in any event this may not have any further impact in the magistrates' court. However, it will provide further incentive for the defendant to elect trial in the crown court where there is less chance that the jury will be aware of previous convictions. Crown court trials are more costly and take longer than those in the magistrates. Apart from in those situations where already permitted we would not wish for magistrates to be aware of previous convictions prior to sentence.

4.24 We support the proposal that magistrates should no longer be able to commit cases they have heard to the Crown Court for sentence. Once the magistrates have accepted jurisdiction it is counterproductive to allow defendants to plead or are found guilty to be committed to the Crown Court to face longer sentences.

Similar misgivings were expressed by Justice:-

52. The White Paper proposes to extend, from six months to twelve, the maximum custodial sentence available to magistrates and to abolish the power to commit to the Crown Court for sentence those cases that magistrates have agreed to take. The aim is to reduce the number of cases going to the Crown Court which can be dealt 'more effectively and appropriately in the Magistrates' Courts'. In fact, as the White Paper points out, most either-way cases are dealt with by magistrates. Further, after the introduction of the plea before venue procedure and the case law which followed, the number of cases committed to the Crown Court has begun to fall.

53. Justice notes with approval that the White Paper does not pursue the idea of 'third tier' court, and we very much welcome the fact that the right to elect for trial by jury is to be retained. We also agree with the proposal that a defendant who elects trial by magistrates should be sentenced by them. This, by itself, may well substantially increase the number of cases that remain in the magistrates' court.

54. Justice is concerned at the proposal to increase the power of the magistrates to sentence up to 18 months, with 12 months as the limit in the first instance. First, the defendant in the magistrates court does not have the same protections as in the

Crown Court, for example in relation to prosecution disclosure. Second, there are fundamental problems with decision-making and the quality of legal advice to the magistrates in the Magistrates' Court. Neither the White Paper nor the Auld Review tackles them. These problems affect public confidence. A recent MORI poll, commissioned by the Institute of Public Policy Research (IPPR), indicated that only 29 per cent of people thought the lower courts do a good job. This confirms many other findings of the same kind over the last 25 years.⁴⁵ IPPR suggests that lay magistrates should only take decisions on guilt in a bench with a district judge. Justice would argue that their jurisdiction to try cases remains as is, but that extended sentencing powers only be exercisable by a bench comprising a district judge.

55. There is also a very real danger that an increase in the sentencing powers of magistrates will lead to a general increase in all sentences handed out. This 'sentence creep' means that, for example, someone currently receiving four months would now get six and so on. We note with concern a study of sentencing behaviour indicating that between 1989 and 1999 the increase in the number of adults sentenced to custody in the magistrates' courts greatly exceeded the increase in the Crown Court. The White Paper's sentencing reforms are discussed later but, even if proposals like 'custody plus' are introduced, it is possible that, without reform, magistrates may use the power to imprison in circumstances where it was not previously imposed, or imprison for longer periods than was previously the case.

In its submission to the Home Affairs Committee, the Bar Council agreed:

We have concerns about the proposal that magistrates' sentencing powers should be increased. We believe that the lasting effect of such a change would be to increase the prison population (currently 72,000, a great deal higher than in the rest of Europe). The Halliday report found that magistrates are the prime reason for an increase in the use of short sentences. Research shows that it is these short-term sentences that do not work. We see no benefit to society as a whole in increasing the prison population when the effect of short sentences is negative. There is already a substantial disparity between magistrates' courts over sentencing. Increasing powers will magnify that disparity. Real alternatives to short sentences need to be made effective.

B. Trial on indictment without a jury

At present, when a defendant is tried in the Crown Court, he is always tried by a judge sitting with a jury. Previous proposals for serious fraud trials to be heard without a jury have not been pursued. There are UK precedents for trial by a professional judge sitting without a jury, including summary trial by a district judge, the "Diplock Courts" in Northern Ireland, and summary procedure in the sheriff and district courts in Scotland.. The Bill proposes that there should be trials on indictment by judges sitting without juries in three situations, namely at the defendant's election, in complex and serious cases, and where there has been or may be jury tampering.

1. Serious and complex fraud and other trials

For some years, complex fraud trials have been considered potential candidates for a form of trial which would not include a jury. The majority of the Fraud Trials Committee, appointed in 1983, and chaired by Lord Roskill, recommended²⁰ that serious and complex fraud cases should be tried by a special Fraud Trials Tribunal consisting of a judge and a small number of specially qualified lay members, instead of a jury. Although many of the Committee's recommendations were implemented, the proposal for a special tribunal was not pursued.

In 1998, the Home Office issued a consultation document²¹ setting out four possible options. Lord Justice Auld also considered the issue. In his Report, he marshalled the arguments for and against jury trial, as follows:

Arguments for, include:

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

Arguments against, include:

- if jurors are truly to be regarded as the defendant's peers, they should be experienced in the professional or commercial discipline in which the alleged offence occurred;
- although the issue of dishonesty is essentially a matter for a jury, the volume and complexities of the issues and the evidence, especially in specialist market frauds, may be too difficult for them to understand or analyse so as to enable them to determine whether there has been dishonesty;

²⁰ Fraud Trials Committee Report, 1986

²¹ *Juries in serious fraud trials*, Feb 1998, Home Office

- the length of such trials, sometimes of several months, is an unreasonable intrusion on jurors' personal and, where they are in employment, working lives, going way beyond the conventional requirement for such duty of about two weeks' service;
- that has the effect of making juries even less representative of the community than they are already, since the court excuses many who would otherwise be able and willing to make short-term arrangements to do their civic duty;
- such long trials are also a great personal strain and burden on everyone else involved, not least the defendant, the victim and witnesses;
- judges, with their legal and forensic experience, and/or specialist assessors would be better equipped to deal justly and more expeditiously with such cases;
- that would also have the benefit of greater openness, since there would then be a publicly reasoned and appealable decision instead of the present inscrutable and largely unappealable verdict of the jury; and
- the length of jury trials in fraud cases is very costly to the public and also, because of limited judicial and court resources, unduly delays the efficient disposal of other cases waiting for trial.²²

He was “firmly of the view that we should wait no longer before introducing a more just and efficient form of trial in serious and complex fraud cases”, believing that the arguments in favour of change had become more pressing since the Roskill Committee reported, “given the ever lengthening and complexity of fraud trials and their increasingly specialised nature and international ramifications”. The option which he preferred was that the nominated trial judge should be empowered to direct trial by himself sitting with lay members or, where the defendant so opts, trial by the judge sitting alone, and that a panel of suitable experts should be set up. He thought that the category of cases to which such a direction might apply should, in the first instance, be frauds of seriousness or complexity within *sections 4 and 7 of the Criminal Justice Act 1987*. (The Home Office had estimated that those criteria would produce a potential total of 80 – 85 cases a year, but the Government’s estimate in the White Paper was that 15 to 20 fraud cases would be affected.).²³ He saw these criteria as a starting point –

despite a strong logical case for, at the same time, extending the reform to other serious and complex cases. There is something to be said for establishing and developing these new procedures first on a limited and readily identifiable category of cases where there is urgent need for a more just and efficient process. If the reform is a success then consideration can be given to extending it in the light of the experience gained.

²² p 202

²³ para 4.30

In accepting the proposal, subject to the reservation that trial should be by the judge sitting alone, not with lay members, the Government took it a stage further in the *White Paper*, and made the suggestion (one of the issues on which they invited views) that-

the court should have the power to direct trial by judge alone in any case that involves such a lengthy and complex hearing that justice would be better served by this alternative.²⁴

2. Jury tampering

In the *White Paper*, the Government went on to suggest that trial without a jury might be a solution to the problem of jury tampering. They said:-

4.32 We have been looking at ways to deter jury intimidation. A number of trials are stopped each year because an attempt has been made to intimidate or influence the jury. The court currently has no option other than to dismiss the jury and order a re-trial. We intend to legislate to give the judge power to continue the trial with him or her sitting alone, if necessary with police protection, or to order that the case be retried before another judge sitting alone.

4.33 We are also considering whether the option of trial by judge alone should be available in cases where there is a serious risk that the jury will be subject to bribery or intimidation. The courts currently order police protection for the jury in such cases. This protection, which may have to continue over a period of months, can be extremely disruptive and an unreasonable intrusion on the lives of individual jurors. We would welcome views on this.

3. Defendant's option for trial by judge alone

Lord Justice Auld had been much struck by the widespread use in other common law jurisdictions of "jury waiver" under which defendants were permitted, with the consent of the court after hearing both sides, to opt for trial by judge alone. He recommended that there should be such an option in all cases now tried on indictment, although he did not doubt that there would be all sorts of practical questions²⁵ that would require careful attention. In the *White Paper*, the Government said that the introduction of such a provision had been widely supported by those commenting on the Auld recommendation, and they proposed to implement it. The judge would have discretion whether to grant the application and would have to give reasons for the verdict.

²⁴ para 4.31

²⁵ such as prevention "judge shopping" and the problem of co-defendants opting for different modes of trial

4. Part 7 of the *Criminal Justice Bill*

Part 7 of the Bill includes provisions for trial by judges sitting alone in all those categories of case.

Clause 36 provides that a defendant who is to be tried on indictment may apply to a judge for the trial to be conducted without a jury. Under subsection (2), the judge must grant the application unless –

- two or more defendants are to be tried and any of them opposes the application (*subsection (5)*)
- a defendant holds or has held an office or employment concerned with the administration of justice and certain questions which would arise on conviction give rise to exceptional circumstances which make it desirable in the interests of justice for the trial to be conducted with a jury (*subsection (6)*)
- issues which will arise at the trial relating to the administration of justice give rise to exceptional circumstances which make it desirable in the interests of justice for the trial to be conducted with a jury (*subsection (7)*)
- the judge is otherwise satisfied that exceptional circumstances exist which make it necessary in the public interest for the trial to be conducted with a jury (*subsection (8)*)

in which case he must not grant the application.

Clause 37 provides that applications may be made by the prosecution for the trial to be conducted without a jury. Provided two conditions are fulfilled, the judge must make an order. Otherwise he must not make the order. The conditions are:-

- (4) The first condition is that the complexity of the trial or the length of the trial (or both)—
 - (a) is likely to make the trial so burdensome to the members of a jury hearing the trial that it is necessary in the interests of justice for the trial to be conducted without a jury, or
 - (b) would be likely to place an excessive burden upon the life of a typical juror.
- (5) The second condition is that that complexity or length (or both) will be attributable—
 - (a) to the fact that the issues likely to be material to the verdict of a jury hearing the trial relate to arrangements, transactions or records of a financial or commercial nature or which relate to property, and
 - (b) to the likely nature or volume of the evidence relating to those issues.

Clause 38 provides for applications to be made by the prosecution for the trial to be conducted without a jury on the ground that there is real and present danger of jury tampering. The judge must make the order if satisfied that that condition is fulfilled and either that—

- (a) the danger is such that it would be necessary to provide police protection for the members of a jury hearing the trial, and

(b) the level and duration of that protection would be likely to place an excessive burden upon the life of a typical juror. (*subsection (5)*)

or

notwithstanding any steps (including the provision of police protection) which might reasonably be taken to prevent jury tampering, the likelihood that it would take place would be sufficiently high to make it necessary in the interests of justice for the trial to be conducted without a jury. (*subsection (6)*)

There is no definition of “jury tampering” which, according to the *Explanatory Notes* –

is intended to be understood from [the common law] context as covering a range of circumstances in which the jury's independence is, may be or may appear to be compromised, for example, because of actual or attempted harm or threats to, or intimidation or bribery of, a jury or any of its members. It could also include improper approaches to a juror's family or friends, or threats etc in respect of a juror's property.²⁶

Clause 40 makes provision for cases where the judge is minded to discharge a jury because or partly because jury tampering appears to have taken place. The parties have an opportunity to make representations. If the judge discharges the jury he must make an order that the trial is to continue without a jury, unless he considers it necessary in the interests of justice for the trial to be terminated, in which case he may (subject to the fulfilment of conditions as in *clause 38*) order that any new trial must be conducted without a jury.

Clause 42 provides for the effect of such orders to be that the trial is to be conducted without a jury, and requires a judge who convicts a defendant at a trial without a jury to give a judgment which states the reasons for the conviction at or as soon as reasonably practicable after the conviction. The defendant's time limit for appealing will run from the date of the judgment.

5. Comments

The responses to the White Paper show that there is considerable opposition to the introduction of trial by a judge without a jury, particularly if it is to be against the will of the defendant. The Bar Council responded to the proposals at some length, and the greater part of that response is reproduced below.

INTRODUCTION

1. The Government in the White Paper has adopted some of the proposals advanced by Auld in his review of the criminal justice system as regards trial by judge alone, and as regards the youth court, sitting with two justices. We note at

²⁶ Bill 8-EN: Home Office, November 2002, para210
<http://pubs1.tso.parliament.uk/pa/cm200203/cmbills/008/en/03008x-d.htm#end>

the outset of this response that the White Paper reveals little of the reasoning that lies behind the Government's suggested abolition of jury trial in selected areas, and we have proceeded on the basis that, unless otherwise stated, Auld's approach has been accepted.

2. The removal of juries, often in very serious cases, if implemented, will have occurred without any proper research into the views of those who have regular involvement in the criminal justice system. In the result, these critical changes will have occurred without the benefit of the unique insight into the strengths and weaknesses of the present system that could be provided by those who are the true and, in the case of judges, wholly impartial observers. As Auld recognised in the third sentence of his chapter on juries:

“In the van of such confidence [in the jury system] are the judges and legal practitioners who, when asked, invariably say that, in general, juries ‘get it right’”.

3. We believe that a significant defect in these proposals lies in the total failure by either the Government or Auld to canvass properly, or indeed at all, the views of those who habitually either preside over trials or who present the cases for the prosecution or the defence. Regrettably, anecdote and assumption have replaced the unique assistance that could have been provided by those who have an informed understanding of whether the system of trial by jury is serving the interests of justice. We indeed are aware of strong “anecdotal” evidence from a significant number of senior judges, both at circuit and high court level, who have recently tried substantial fraud cases, and who are wholly in favour of retaining juries in all circumstances.

4. The strength of the case for retaining juries in all serious trials lies not only in the experience of the judges and advocates, but also in legal and constitutional history. For centuries, jurists have regarded trial by jury as the fairest form of trial. In 1713 Sir Matthew Hale wrote that “Trial by a Jury of Twelve Men” by “all Accounts as it is settled here in this Kingdom seems to be the best Trial in the World”. Further, Blackstone's Commentaries observed that trial by jury is “the grand bulwark of [every Englishman's] liberties”. The importance of jury trial extends far beyond the jurors' role of being fair fact finders at criminal trials. As K. Dubrovsky observed, in an article for the Media Awareness Project, the jury in Bushells case of 1670 by:

“the stubborn exercise of all the rights of a jury – exercised despite the fact that four jurors spent nine weeks in prison for refusing to heed the instructions of the court – was instrumental in establishing not only the rights of juries but freedom of religion, the right to free assembly, freedom of speech and habeas corpus.”

5. Juries have long been regarded as being democratic as they provide an important check on the abuse of government powers and also provide citizens with a role in the government of the country. For example, Blackstone's Commentaries state that:

“The antiquity and excellence of this trial, for the settling of civil property, has before been explained at large. And it will hold much stronger in criminal cases; since, in times of difficulty and danger, more is to be apprehended from the violence and partiality of judges appointed by the crown, in suits between king and the subject, than in disputes between one individual and another, to settle the metes and boundaries of private property. Our law has therefore wisely placed this strong and twofold barrier, of a presentment and a trial by jury, between the liberties of the people and the prerogative of the crown.”

6. Similarly, Lord John Russell wrote that:

“It is to trial by jury more than even by representation ... that the people owe the share they have in the government of the country; it is to trial by jury also that the government mainly owes the attachment of the people to the laws; a consideration which ought to make our legislators very cautious how they take away this mode of trial by new, trifling and vexatious enactments.”

7. The democratic role of the jury remains relevant today. Jurists in the recent past have acknowledged the democratic nature of the jury. For example, Lord Devlin wrote that:

“In a democracy law is made by the will of the people and obedience is given to it not out of fear but from goodwill The jury is the means by which people play a direct part in the application of the law.”

8. Not only have sentiments such as these been the conclusion of jurists, they have been shared by the public at large. By the 19th century, when the right to elect trial by jury was introduced, jury trial enjoyed a high reputation with the public at large. There is every reason to suppose, and certainly no basis for concluding otherwise, that that public support has continued until the present day. It is critical to observe that Auld clearly acknowledged this continuing support, and he accepted the historical importance of the jury system both as a basis for public confidence in the criminal justice system and as a right or duty of citizenship.

9. We believe that the overwhelming merits of the system of trial by jury can be summarised as follows:

a. Jury trial is democratic. It is society as a whole who suffer from crime and who pay both for its effects and for the incarceration of many of those convicted by the courts. It is highly desirable that society as a whole should be represented within the system that determines guilt or innocence.

b. Twelve jurors provide a breadth of experience and insight that no judge can hope to match. Defendants come from a wide range of ethnic and social backgrounds. Often their case will stand or fall on their judgments, actions or beliefs at the time of the alleged crime. If there is to be an accurate assessment of those matters, it will only come about by having a fact-finding tribunal with some

insight or experience as to how a person such as the defendant might think and behave.

c. Juries keep the law honest and comprehensible. Honest because they oblige lawyers and judges to deal with what is right and wrong by the standards of the general public, as well as what is the letter of the law, and comprehensible because of the consequent obligation to explain the law and rules by which the courts operate. A system that becomes removed from the morality and ethics of society at large, and that does not have to explain itself to those outside the legal profession would fast lose public support and approval.

d. Juries are wholly free of the suggestion that they are either ‘pro-prosecution’ or ‘pro-defence’, and their independence is accordingly uncompromised. However trial judges are selected and however much a trial judge may strive to be impartial, this will not prevent public misgivings that the tribunal is less than independent, to say nothing of the defendant’s perception. It will only be a matter of time before a judge brought in to try a high profile case will be perceived by the public as a “man brought in to do a job”. To have convictions imposed in serious cases by “government nominees” is likely to undermine public confidence in our judicial system. Further, there is an increasing, and wholly welcome, practice of taking positive steps in sensitive cases to ensure that jurors are “bias free”, in the sense that they should not have links with people or organisations who might be thought to incline them to favour one side or the other. With judges with a longstanding prosecuting background, particularly as Treasury or Standing Counsel, the perception will be that their history has created an inbuilt tendency to be inclined to favour one party.

e. Juries are currently asked a series of questions in long fraud trials to ensure they are “independent and impartial” and have no “stake” in the outcome. Were judges to replace juries in such cases, it is inevitable that the judge would have to answer similar questions as to his (and his family’s) direct and indirect interest in matters relevant to the trial. The present system has ensured that our judiciary is universally respected and is perceived as being impartial. We are concerned that there will be an unwelcome and new tendency by some defendants or their advisers to engage in pre-trial “investigation” of the proposed judge’s background, to ensure that he is not biased, or to unsettle him. We believe that removing juries would involve training a spotlight of interest on the trial judge, to the long-term detriment of our judiciary. Particular judges will come to be known for their role in “acquitting” or “convicting” certain notorious defendants, and it will be only be a matter of time before the tabloid press begins either praising or vilifying particular judges, depending on the popularity of their track record.

10. In a nation that has no written constitution, great care ought to be taken when interfering with the institutions that are central to democracy. Society has become more democratic and that has brought significant benefits. As a consequence, changes that reduce democracy should be resisted. Whatever the exact constitutional position as regards the right to trial by jury, the writings of jurists over several centuries, and the strong enduring public support, show that jury trial is an institution that has been regarded, and is still regarded, as an

important element of the democratic process. Changes that limit the use of trial by jury need powerful and cogent justification.

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DEFENDANTS' OPTION FOR TRIAL BY JUDGE ALONE

12. The Government's proposal is that defendants, with the consent of the court, should be able to opt for trial by judge alone, presumably in all cases now tried on indictment. The judge would be required to give a reasoned decision.

13. In our view this is an area of high principle. We believe that the arguments in favour of determination of serious allegations by a jury are so well founded that defendants should not be liable to a more than limited term of imprisonment otherwise than by a jury verdict. This is the historical principle traced by Lord Devlin back to 1688.

14. The critical issue in most trials is as to the honesty/reliability of witnesses. We fundamentally oppose entrusting this judgment to a judge. The standards that should apply as regards both honesty and reliability are those of ordinary members of our society, and full time judges are most assuredly not "ordinary members of our society". The standards and approach that they would apply to themselves are not likely to be those they should apply in most trials to the defendant or the witnesses.

15. The likelihood would be that with certain limited kinds of defendants, or with particular "unpopular" charges, those facing criminal proceedings would forgo trial by jury for the perceived advantage of trial by a judge alone. Rather than trying a cross section of cases and defendants, judges are likely under these proposals to have a diet of unpopular sexual allegations; unattractive middle or upper class fraudsters; and cases where the defence lawyers hope for a technical victory, either in the court of trial, or on appeal following defects in the reasoned judgment. We oppose allowing such opportunistic incursions into what we believe to be the best and fairest form of trial. To permit variation of this form of trial so that defendants can seek to exploit perceived advantages of the professional judge, risks bringing the law into disrepute. For the public at large, it is likely to be perceived that certain kinds of defendants can sometimes avoid justice by removing the guardians of our democratic values from the decision making process.

16. We also acknowledge our profound anxiety that if this proposal is implemented, at some later date it may not seem such a great variation to relocate the right to elect for trial by the judge alone from the defendant to the judge. This suggested change would undoubtedly pave the way for a future Home Secretary to remove the "right" to jury trial entirely, leaving it at most as a form of trial that is within the discretion of the judge at the directions hearing.

17. It is of note that while Auld relied in part on the experience of the Diplock Courts to justify proposals of this kind, he acknowledged that they have secured only a "fair degree of public acceptance", and that there is a public commitment to abolish them once the emergency is lifted. Given that the rules of evidence would perforce be applied in exactly the same way as in a jury trial,

we do not anticipate that this procedure would be either simpler or more efficient. Indeed, if there were to be an absolute right of appeal in all cases resulting in conviction, as proposed by Auld, the consequences for the appellate workload would be substantial.

SERIOUS AND COMPLEX FRAUD TRIALS

18. The proposals contained in paras 4.28-4.30 of the White Paper are only briefly justified with what appear to be a vivid example of the assumptions and anecdotal material that have replaced proper research and investigation. The “small number” of serious and complex fraud trials, many “lasting six months or more” that supposedly “highlight the difficulties” in trying these types of cases with a jury are not in anyway identified, and similarly we are not told who has reported to the Government on these suggested deficiencies. We doubt whether any properly conducted research would reveal the difficulties argued for in the White Paper.

19. One of the cornerstones of the Auld Report was that jury service is an important public duty that should be undertaken by the widest cross-section of the public. The objective that Auld expressed, and we support, is that in the long-term juries should be representative of the public at large. If Auld’s recommendations, together with the amendments we have proposed, are introduced, then the suggested difficulty advanced by the Government, namely of finding representative panels of jurors, would be fully met. Accordingly, these proposals involve a strong element of prejudging the success of key recommendations that Auld has made.

20. It is instructive to consider the figures produced by the SFO in relation to the cases brought by that relevant prosecuting body. The figures available set out conviction rates by defendant and by trial. The latter figure includes as “convictions” a trial in which any defendant is convicted, regardless of how many are acquitted. As this method of counting may produce a figure that misrepresents the overall outcome, we have preferred the percentage conviction rates of individual defendants. As the SFO prosecutes relatively small numbers of cases, we have taken the figures in three-year batches, so as to even out the statistical effect of a single, atypical case. On this basis, one can compare the conviction rate of individual defendants in the period 1988 – 1991 of 63.6%, with the same rate in the period 1999 – 2002, which gives a figure of 86%. Even allowing for the fact that the SFO may be able to deploy greater care and scrutiny to the launching of proceedings than the CPS, these are still figures that are both high and are on the upward slope. They provide a proper basis for having substantial confidence in the present system.

21. We are wholly unaware of any reliably reported trial histories that support the contention that “prosecutors often pare down cases to try to make them more manageable and comprehensible by a jury” resulting in the “full criminality of such a fraud ... not always [being] exposed”. To the contrary, the lengths of the trials complained of suggest that sometimes still insufficient attention is given to assessing what material is really necessary for the proper presentation of a prosecution and the investigation of the real issues in any

particular case. We note that Auld, in supporting his proposals in this area, did not rely on any concern relating to overly simplified or emasculated prosecutions, as suggested by the Government.

22. As already observed, for both these proposals, and those advanced by Auld, we note with deep concern that fundamental and wide-ranging proposals are based on the shortest written consideration. They are founded, not on the fruits of detailed contemporary research into the current realities of complex cases but instead on ad hoc submissions, anecdote, assumption and reports that are now substantially out of date.

23. Since allegations of serious and complex fraud constitute grave potential offences carrying heavy penalties, these offences particularly merit trial by the best and fairest means available, as we believe jury trial to be.

24. Further, any suggestion of an inability on the part of jurors to understand fraud trials is made wholly without the assistance of any research on this issue, not least because of the limitations imposed by the Contempt of Court Act. Further, this suggestion runs counter to the views of practitioners and judges, as Auld acknowledged, “usually juries get it right”. In most cases, at the end of long trials, the “professionals” are impressed at how, with multiple count indictments, juries bring a variety of verdicts that are wholly consistent and logical.

25. All cases are susceptible to straightforward explanation, particularly if juries are helped with schedules, admissions, flow charts and similar presentational devices. For a whole range of reasons, cases are too frequently burdened with unnecessary detail, particularly as a result of the overuse of the photocopier, and complex issues are not sufficiently reduced to their constituent parts, and then treated to sensible presentation. There is still much that can be done as regards case management, by both the parties themselves and with the assistance/direction of the trial judge. In our view, greater concentration needs to be paid at the pre trial stage as to exactly what the issues are; the material that is really necessary to go before the court in resolving those issues; and the aids needed for explaining them in a comprehensible way.

26. It is our view that the dissenting remarks of Walter Merricks, solicitor and secretary to the Professional and Public Relations Committee of the Law Society in the Roskill Report bear repeating here and deserve continued respect and support:

“It has always been the function of the lawyer to outline and present to the lay jury the evidence of the offences explaining such background as may be necessary. Complex and unfamiliar medical or forensic evidence may have to be given in a rape or wounding case; in murder cases psychological evidence may be crucial in distinguishing between murder and manslaughter; technical and scientific evidence identifying tissues and fibres may be relevant in any criminal case. An understanding of the background, say to a company’s procedures, may be necessary in a case of embezzlement. In all these cases it is the task of prosecuting counsel to convey to the jury sufficient background information to enable them to follow the case.

This public explanation of the charges performs a further vital function – that of ensuring that members of the public and the press are also informed of the nature of the case. The jury not only represents the public at the trial, its presence ensures a publicly comprehensible exposition of the case. There is a danger in trial by experts that the public dimension will be lost. The assumption appears to be that some cases are so complex that only experts are capable of understanding the allegations and that consequently there could be no public explanation comprehensible to the layman. The trial might then be reduced to exchanges between lawyers and the tribunal, conducted in impenetrable jargon. The tribunal would pronounce to the public that as a result of its proceedings, which neither the public or the press were expected to follow, it had concluded on the guilt or innocence of the accused. I do not think that the public would or should be satisfied with a criminal justice system where citizens stand at risk of imprisonment for lengthy periods following trials where the state admits that it cannot explain its evidence in terms commonly comprehensible.”

27. We do not believe that trials conducted by judges sitting alone will be significantly, or indeed at all, shorter. As with judge-alone civil trials, the rules of evidence will continue to be followed scrupulously, and it will be necessary for the judgment delivered at the end of the trial to reveal that the court has approached the law, the evidence and the decision-making process in a proper manner. Few, if any, of the rules of evidence have been designed, or survive, merely to compensate for the inadequacies of members of our society in carrying their important role as jurors. Rather, they have been created and retained because they demonstrate and ensure that the accused has received a fair trial, with prejudicial and irrelevant material excluded. As the Diplock Courts in Northern Ireland well illustrate, criminal courts sitting without juries have to demonstrate in reasoned judgments that all proper procedures have been followed. This includes a full rehearsal of the salient facts. Accordingly, whether it constitutes part of a summing up or a judgment, a full summary will always form part of the final stage of a criminal trial.

28. We have grave concerns about the impact these proposals will have on the system that currently exists for the sifting and excluding of information/evidence on the basis of Public Interest Immunity (PII) considerations. The trial judge would be the ultimate fact finder, and yet he would also decide whether or not to disclose to the defence material that may be highly prejudicial to the defendant. Typically the judge will be privy to material from an informant, not investigated or evaluated during the trial, but which is highly damaging to the accused. The defendant and the public are unlikely to have confidence that the judge has been wholly uninfluenced by this information if withheld.

29. It may be suggested that the answer lies with the appointment of a further judge to deal with PII (as with the Diplock Courts in Northern Ireland).

However, the PII judge has a continuing duty to review the withheld material against the backcloth of a developing trial that may generate new evidence and issues. A judge who does not preside over the trial in question cannot have a sufficiently comprehensive overview to ensure that this critical task is undertaken fairly and in the interests of justice.

30. A further problem arises from the trial judge's determination of issues of fact when considering admissibility. If a trial judge rejected a defendant's evidence in the course of a voir dire before or during the prosecution case, the perception will be held legitimately that the defendant's evidence, given during his defence case, commenced with a profound handicap. The trial judge, having already found against him on issues of relevance to the trial, will be perceived as coming to the central issue of credibility already prejudiced against the defendant.

31. We note that the Law Commission has recently recommended a single catch-all offence of fraud with a straightforward definition, which simplify cases. We suggest that this is a modification that can and should be made to the trial process, further rendering the present proposals otiose.

32. In considering these proposals to remove the right to jury trial in serious and complex fraud trials, we have looked abroad, to investigate the experience and approach of other common law jurisdictions as regards jury trial. We have examined the systems in the United States, New Zealand and Canada, as follows.

33. In the United States of America the right to jury trial is regarded as a right of fundamental importance. The Declaration of Independence included in the objections to the King a complaint that he was "depriving us in many cases, of the benefits of Trial by Jury". That concern resulted in the right to trial by jury being protected in article 111.2 of the United States' Constitution. We know of no circumstances in any of the many jurisdictions that make the United States in which it would be possible to deny a defendant facing a serious criminal charge the right to be tried by a jury.

34. In New Zealand the position is more complicated. There has for many years been a right for a defendant to choose trial by judge alone, but that right is not available in more serious cases. There are currently proposals to allow the prosecution to apply for judge only trials in longer cases, but the aim is to allow a defined discretion to try some long and complex property offences, in practice fraud trials, without juries. The overriding test for a judge to apply in deciding whether to accede to such a demand is fairness to the accused. These changes are controversial and yet to be subject to scrutiny by a select committee. The changes also come only after more than 10 years of research and debate, including 4 Law Commission reports.

35. In Canada the right to jury trial is enshrined in the Canadian Charter of Rights and Freedoms and provides that any person charged with an offence having a maximum punishment of imprisonment for 5 years or more has the right to the "benefit of trial by jury". Whilst at first glance this might seem to set the lower limit of seriousness at a much higher level than that in the United Kingdom, one has to bear in mind it is the maximum sentence for that category of

offence that is used as the defining characteristic. The effect is very similar to the current division of work in this country, where the obvious examples of either way offences such as theft and assault occasioning bodily harm have maximum sentences of 5 and 7 years respectively.

36. The overall picture drawn from this cross section of other relevant jury systems is that there is a strong and abiding commitment to maintaining the principle of trial by a defendant's peers. The only partial proposed exception we have identified from all common law jurisdictions is the contentious proposal in New Zealand with regard to fraud trials. In our view the route that country has travelled before even advancing proposals is instructive; the careful research and debate has led to clear principles, aims and safeguards.

OTHER COMPLEX AND LENGTHY TRIALS

37. The Government is contemplating extending these proposals to cases where organised crime has created complex financial and commercial arrangements, justifying giving the trial judge the power to direct trial without a jury. The test under consideration is one of "length and complexity".

38. The objections to this are identical to those set out above, but with the added ingredient that any assessment of length of trial is notoriously unreliable. In cases where the investigation has revealed or produced large quantities of paper work, the use of a photocopier can often disguise a simple and short case as a long and complex one. There is still a considerable tendency on the part of prosecuting authorities to copy and serve everything that might just be of relevance in the volumes of exhibits that are served early on the court and the defence. This reflects a "just in case" approach, while the issues crystallise and the parties get to grips with the material. Thereafter, and long after allocation under any new system, only when the trial advocates have completed a full review of the papers is the case seen for what it really is, with jury bundles bearing little or no relationship to the original served exhibits, if the advocates have undertaken their work properly.

39. We consider, therefore, that a continuation of this approach of providing full exhibit bundles will be coupled with a strong temptation to copy and serve "everything" as part of the pre-trial strategy to persuade the allocating judge to dispense with a jury.

JURY TAMPERING

40. While there is no doubt that jury intimidation is a problem that requires vigilant monitoring, history reveals that our criminal justice system has been highly successful in dealing with the instances when such tactics have been attempted. The cases where this is a problem are statistically very small, and we believe the occasional cost of a re-trial is a legitimate price to pay for the continuation of the system of trial by jury.

41. We are deeply concerned as to how a judge would be able to make a fair or truly informed decision as to whether "there is a serious risk that the jury will

be subject to bribery or intimidation”. The possibility of this occurring must exist in all cases that involve criminal gangs or organised crime and, indeed, even with determined criminals, acting alone, but who have the support of friends or family “on the outside”. A judgment as to “serious risk” would almost undoubtedly be founded on the opinion of the investigating officers, who may perceive it to be to the prosecution’s advantage to have trial by judge alone.

42. If the judge were to proceed to conduct the trial without a jury, having heard on a PII basis damaging, secret and unresolved allegations concerning jury tampering, the defendant and the public would not be able to accept that those revelations, untested in evidence, had not influenced his decisions on the indictment.

43. Finally, we are unaware of any significant body of evidence, or any proper research, that reveals that police protection of juries has constituted an unreasonable burden on those being protected.

AN INTERNATIONAL VIEW OF THESE PROPOSALS

44. Dato Param Cumaraswamy, the UN Rapporteur on the Independence of the Judiciary, has warned²⁷ that these proposals run the risk of diminishing public confidence in the judiciary:

“The potential for this is not purely theoretical. As I noted in the report of my mission to the United Kingdom in 1997, the establishment of trial by a single judge without a jury in certain cases, known as Diplock courts, had affected the perception of the administration of justice. In that report I stated,

‘The absence of a jury and the unique role that judges play in these cases (e.g., the inferences that may be drawn if the accused remains silent) has altered the manner in which judges are viewed. This has led, as reported to the Special Rapporteur, a large segment of the population of Northern Ireland to view the administration of justice in such cases as not being independent and impartial. In the view of the Special Rapporteur, restoration of the jury system, which has been a culture within the criminal justice system in England, would help restore public confidence in the administration of justice.

In other countries the creation of exceptional courts or the treatment of certain cases in a procedurally different way has undermined the public’s faith in the fair administration of justice. Further there is a substantial public interest in the law being formulated in a clear and straightforward manner, not only to ensure that the public can comply with it but to ensure their acceptance of it. The growing complexity in the law marginalises access to the law and the courts for a substantial proportion of the population. Removing access to a jury trial because of this issue would seem to sacrifice an important issue of principle in order to find a simpler solution to a substantive problem.

²⁷ speaking at the Bar Conference on 28 September 2002, London

In conclusion in my 1996 report to the Commission on Human Rights I described the United Kingdom as the country which “cradled the common law and judicial independence”. Trial by jury is embedded in the criminal justice system of England and Wales. It is today in essence part of its independent judicial process. Any attempt to dilute it selectively under the umbrella of reform will see the beginning of the end of jury trials. What is done once, if it be allowed, may be done again in less serious cases and thus a very important additional safeguard to judicial independence in England and Wales will be eroded.”

The Human Rights organisation Justice was also firmly opposed to the proposals:

58. The White Paper proposes that a defendant may waive their right to jury trial. A defendant’s waiver of jury trial is, in substance and principle, different from the proposal to compel a defendant to forego his right to a jury trial against his will and preference. The procedure is widely used in the USA, Canada, New Zealand and a number of Australian States. There are perceived advantages to the defendant with such a procedure, for example;

- (i) the provision of a fully reasoned decision, e.g. those with 'technical' defences may wish a verdict to be accompanied by appealable reasoning;
- (ii) defendants charged with offences that attract particular public hostility, e.g. sexual and/or brutal violence may consider a judge to be a more objective tribunal than a jury;
- (iii) if there has been much adverse publicity prior to trial, a defendant may prefer to be tried by a judge alone.

49 For any indictable offence an accused person can elect trial by judge alone or with a jury. This is entirely his/her choice (except for murder, for which a judge alone election requires the Crown's consent) up to 15 days past the preliminary hearing. Thereafter any change requires the consent of the Crown. A defendant may only elect trial by judge alone in cases where the maximum sentence is less than 14 years (s 361B Crimes Act 1961 (NZ)). The option for a defendant to elect for trial by judge alone exists in the Australian Capital Territory, South Australia, New South Wales and Western Australia. The Commonwealth Constitution prevents trial by judge alone in respect of Commonwealth indictable offences - *Cheatle v The Queen* (1993) 177 CLR 541. Lord Bingham has said, when calling for a defendant to be able to choose to be tried by judge alone that this should happen ‘if, but only if, he freely wishes it’ and that ‘provided the exercise of the right were free and informed, I cannot see that any right of individual liberty would be infringed.’

59. Justice does not agree with this proposal. Although the arguments in favour are initially attractive, we are concerned that there may be public perception that trial by judge alone is ‘trial by lawyer’, and that public confidence in such procedures, and the criminal justice system generally, would be undermined. In cases of a violent and/or sexual nature, where adverse publicity may well prompt election for trial by judge alone, were a defendant acquitted ‘on a technicality’ by a court with no jury, the public perception may well be that it had been excluded

and justice was not seen to be done. If further consideration is to be given to this proposal, as the Auld Review suggested, careful consideration needs to be given to the following:

- (i) the type of offences eligible for this type of election. In New Zealand, for example, a jury trial is mandatory in cases carrying a maximum sentence of 14 years or more;
- (ii) defendant safeguards to ensure that the election is voluntary. For example, the judge should ensure, in open court, that the defendant has been properly and comprehensively advised;
- (iii) the issue of non-consenting co-defendants. JUSTICE supports the approach in New Zealand where all defendants must elect trial by judge alone for it to take place.

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JUDGE ALONE TRIALS FOR FRAUD ETC.

60. The jury raises emotive issues, as the Government will be all too aware. Clearly, however, the role of the jury (and perhaps its patience) is tested to the extreme in long and complex cases which involve significant periods of time away from home and work and highly technical issues. It is worth noting that this British export has taken deep root in other common law countries. Essentially, the jury acts as the conscience of the community. Given its fundamentally democratic nature, the arguments for the removal of cases from its consideration must be particularly strong.

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It is anticipated that the change to judge alone trial should affect between 15-20 cases a year. The daily cost for a complex fraud trial is put at £10,700.56 This alone, no doubt, provides a motivation for change. The Home Office has put forward two other main reasons:

- (i) complexity – The idea that fraud cases are intrinsically more unusual or uniquely complex than other cases
- (ii) length – Long trials can affect the quality of justice and can result in a jury with a less representative composition than other juries.

62. In addition, it is argued that the presence of a jury means that the courts tend to sever complex fraud cases into smaller trials to make them more manageable and that this makes it difficult for the prosecution to present the overall criminality of a particular case in one trial. The Maxwell pension fraud case is invariably cited as an example of the difficulties that can arise at subsequent trials.

63. However, there has been little research into the reality of jury practice in fraud cases, largely because of legislation which prohibits systematic jury research. Focus on high profile cases like the Maxwell case can distort the more general picture. Further, as the Fraud Advisory Panel has pointed out, some of the complex issues which would have formed the subject matter of the second Maxwell trial were fully ventilated in a civil case that lasted for nine months in 1993 before an experienced High Court Judge. Even without a jury, some cases just take time.

64. It is by no means clear that juries acquit in serious cases because they cannot understand complex evidence. The Home Office has itself acknowledged that the assertion that fraud cases can be too complex for most jurors to comprehend is hard to substantiate from empirical evidence, not least because research into jury room deliberations is not permitted. The simulation studies that exist have in fact shown that in assessing the prosecution and defence cases, the majority of participants did not use poor quality reasoning and that comprehension was related to length and manner of presentation.

65. The New Zealand Law Commission has also noted that calls for trial by judge alone or a specialist tribunal to hear fraud cases are not based on any evidence suggesting juror incompetence and in fact that fraud and lack of comprehension are not necessarily associated. In fact, if there is a failure of juror comprehension, it suggested that this 'indicates a need for better procedures and better tools to ensure that complex evidence is presented clearly and in an understandable form.'

66. Ultimately, it is the responsibility of professionals to ensure that juries understand the case presented in court. This may include better trial procedures. For example, research for the Roskill Committee by psychologists at Cambridge showed that juror comprehension of complex information could be significantly improved by providing aids such as glossaries and written summaries and using visual aids to present information. It should also be noted that it is not always necessary to have a detailed understanding of complicated financial procedures in order to determine the question of dishonestly. The core issue in fraud cases is usually dishonesty and juries often deal with equally difficult issues, for example, questions of diminished responsibility. Put another way, juries 'are capable of forming a judgment about the integrity of what happened without their being able to function as if traders in the City'.

67. Turning to comparative law, other common law jurisdictions provide the right to elect trial by judge alone but this does not generally include a power to order it against the accused's wishes. However, some countries, like New Zealand, have considered the possibility of allowing judge alone trials for complex fraud.

68. The New Zealand Law Commission recommended trial by judge alone on the specific, practical grounds of length after a very detailed consideration of the value of jury trial and the importance of maintaining adversarial protection. Its limited recommendations, which are still the subject of political debate, are based on the belief that such applications would rarely be granted except in case of property crime. Then, various factors should be considered before a direction could be made by the court. They include:

- (i) the prosecution's case should be beyond a certain length. It suggested a minimum of 30 days.
- (ii) the complexity of legal issues
- (iii) the number of defendants
- (iv) the nature of the offence. The more serious the charge, the more the public interest lies in having the charge determined by a jury
- (v) the volume of evidence adduced and witnesses to be called.

69. The Diplock Courts in Northern Ireland provide an illustration of the potential for injustice caused by the restriction of jury trial. Jackson and Doran's study of the Diplock trials in Northern Ireland is instructive. They concluded that there are a number of ways that judge alone trials differ from jury trials:

- (i) judges tend to make their views known to counsel before making a final decision;
- (ii) judges are less inhibited about questioning witnesses;
- (iii) there is less scope for counsel to put forward broad, sympathy-based arguments;
- (iv) counsel tend to agree on more of the evidence, thus paring the evidence down more than in jury trials;
- (v) the pervasive influence of the professional judge;
- (vi) the absence of the 'community' element.

They suggest that some fundamental rethinking needs to take place before these trials can be viewed as an acceptable substitute for trial by jury, largely because of the 'adversarial deficit' caused by the factors listed above. Also, clear recognition is required that the judge's assumption of a fact-finding responsibility actually changes the nature of proceedings. They conclude that the outcome of jury trials will not always be more favourable to defendants, but that the trial process, with a judge alone, is rendered less adversarial by the pressures on the defendant not to contest the prosecution case fully on the merits as is the norm with jury trial. They claim that 'there is an important connection between adversarial protection and the present system of trial by jury, and that such protection ought not readily to be sacrificed even if one is prepared to sacrifice the institution of the jury itself.' To do so may have an adverse effect on public confidence.

70. Any proposed system for judge alone trials should be based on thorough research of its potential for unbalancing the adversarial system. Care will have to be taken in identifying the offences to which any new provision will apply.

71. The process of delivering a judgment in judge alone trials could be long and protracted and it is also possible that a detailed judgment alone will not be enough to meet the adversarial deficit. Jackson and Doran suggest that:

- (i) Judges should make a provisional statement of their conclusions which could be challenged by the parties in advance of the final determination;
- (ii) There is need for recognition by the appellate courts that they need not be bound by those constraints which inhibit their review of a jury's findings of fact.

Heed might be taken of the wise old sage, Blackstone, commenting on proposed new methods of trial:

however convenient these may appear at first (as doubtless all arbitrary powers, well executed, are the most convenient), yet let it be again remembered, that delays and little inconveniences in the forms of justice are the price all free nations must pay for their liberties in more substantial matters; that these inroads on the sacred bulwark of the nation are fundamentally opposite to the spirit of our constitution; and that,

though begun in trifles, the precedent may gradually increase and spread, to the disuse of juries in question of the most momentous concern.

Justice is against the proposal to introduce judge alone trials in fraud cases. The case has not been made out despite the years of debate since the Roskill Report in 1986. The government should abandon this proposal once and for all.

JURY TAMPERING

72. Justice can see the argument for proposals to enable a judge alone to continue to hear a case where bribery or intimidation of jurors has occurred or where it is thought to be a serious risk. However, we consider that the special measures set out in the Youth Justice and Criminal Evidence Act 1999 designed to protect vulnerable or intimidated witnesses, and which are beginning to come into effect, should be given a chance to work before the question of removing the right to trial by jury is contemplated.

Neither the Law Society nor Liberty considered that the case for change had been made out. Liberty was concerned at the risk of popular perception that certain defendants who chose trial before a single judge might be dealt with in a different manner to other defendants, and that to take away jury trial from serious fraud cases would set it aside from normal criminal procedure, making it appear more like a regulatory or professional disciplinary procedure. Public perception was that white collar crime (a large part of serious fraud) should not be treated as different from other offences. John Wadham, its Director, said:-

The Government's efforts yet again to cut jury trials show a contempt both for trial by jury – the very core of our criminal justice system – and for Parliament, which has twice already rejected schemes to deny more people this basic right. Just as people should not be allowed to avoid jury service without very good reason, so juries should not be discarded by the Government or courts at the least excuse.²⁸

The Chairman's Report in the *Criminal Bar Association Newsletter* suggested that –

For all the protestations by politicians claiming they are wholly in favour of juries, a deep mistrust of them is betrayed. Public confidence in the criminal justice system depends on juries. The Government ignores the importance of their collective wisdom, their anonymity and their lay validation of verdict at its peril. The unequivocal view of the CBA committee is that since jury trial is well recognised to be the fairest form of trial, all cases above a certain level of seriousness should be heard by juries. Ministers must trust the people or they risk undermining public confidence in the criminal justice system.²⁹

Writing in *the Daily Telegraph*, its legal editor Joshua Rozenberg asked –

²⁸ Liberty press release 17 July 2002

²⁹ "Tilting the balance too far away from juries", September 2002, Peter Rook QC

how long would it be before defendants in “simple” cases were put under pressure to waive the right to jury trial? Perhaps there could be sentence discounts, such as those the White Paper is offering for an early plea of guilty. Eventually a perception would emerge that someone unwilling to be tried by a professional judge was hoping to befuddle a lay jury. Those juries, in resisting the implication that they were stupid, would be more likely to convict. Thus the system would be irreparably damaged.³⁰

He also commented that the White Paper did not explain how defendants being tried without a jury because of jury tampering concerns could expect a fair hearing from a judge who had decided that they were the sort of people who would interfere with witnesses.

III The composition of the jury

1. Who serves on juries

The potential pool of jurors has been progressively enlarged, by the removal in 1919 of the disqualification of women³¹, the removal of the property qualification in 1972³² and, most recently by increases in the upper age limit, from 60 to 65 in 1972³³ and up to 70 in 1988³⁴. In 1956, Lord Devlin concluded that the jury was “not really representative of the nation as a whole”, and attributed this mainly to the property qualification but to some extent to the character of exemptions.³⁵ In October 2001 Sir Robin Auld concluded that –

Despite all the reforms of the latter half of the last century, juries in England and Wales mostly still do not reflect the broad range of skills and experience or ethnic diversity of the communities from which they are drawn. Jury service may be an important incident of citizenship, but many in this country do not qualify for this civic privilege and duty. And many who do qualify, do not regard it as a privilege and do their best to avoid it. If the jury is to fulfil its valued role of giving the community a say in the administration of justice, it should reflect the community better than it does.³⁶

A person may be ineligible for, or disqualified or excusable as of right from jury service. The lists under those three categories are set out in the three parts of *Schedule 1* to the *Juries Act 1974*, as amended. The groups which are ineligible are the judiciary, others concerned with administration of justice,(including police and probation officers) the

³⁰ “Jury tampering with fairness in mind” 16 July 2002, *The Daily Telegraph*

³¹ *Sex Disqualification (Removal) Act 1919* s.1

³² *Criminal Justice Act 1972*

³³ *Criminal Justice Act 1972*, s.25

³⁴ *Criminal Justice Act 1988*, s.119

³⁵ “Trial by Jury”, Sir Patrick Devlin, 1956

³⁶ <http://www.criminal-courts-review.org.uk/chpt5.pdf>

clergy and mentally disordered persons. Those who are disqualified are those who have at any time been sentenced to long custodial sentences, or recently been given other specified sentences. Those who are excusable as of right include those over 65, members and officers of the parliaments³⁷, and full-time members of the armed forces. Practising members of medical and other similar professions are also included as are practising members of religious societies or orders the tenets or beliefs of which are incompatible with jury service. A person can also claim excusal if he has served or been called in the previous two years. Any person summoned may be excused, or have his service deferred if he satisfies the appropriate officer that there is a good reason why he should be excused or have service deferred.³⁸

2. Reform

Lord Justice Auld's view was that-

no-one should be automatically ineligible or excusable from jury service simply because he or she is a member of a certain profession or holds a particular office or job.³⁹

He accepted that there may be good reason for excusing individuals in the main categories now excusable as of right, where it was vital that they be available to perform their important duties over the period covered by the summons, but thought they should be subject to the same regime of discretionary excusal as the self-employed or others to whom jury service was costly and burdensome. In his report, he considered the objections for removing ineligibility from particular professions or occupations but found none of them compelling. He acknowledged that there would be more work for officials and judges in deciding whether to grant discretionary excusals or deferrals. His recommendations were:

- everyone should be eligible for jury service, save for the mentally ill, and the law should be amended accordingly; and
- there should be no change to the categories of those disqualified from jury service.
- save for those who have recently undertaken, or have been excused by a court from, jury service, no-one should be excusable from jury service as of right, only on showing good reason for excusal;

The Government's comment on accepting those recommendations, in the White Paper: *Justice for All*, was-

³⁷ including members of the National Assembly for Wales

³⁸ *Juries Act 1974* s 9

³⁹ p 140

Juries make an invaluable contribution to the CJS, and we believe that members of the community have a responsibility and a duty to carry out jury service if they possibly can. We plan to legislate so that eligibility for jury service will cover all registered electors between 18 and 70 years old, who have been resident in the UK for five years, unless they have a criminal record or mental illness.⁴⁰

A further recommendation, that in cases where race was a significant issue, the judge should have the power to arrange for a multi-ethnic jury to hear the case, was rejected, on the grounds that to do so would potentially:

- undermine the fundamental principle of random selection and would not achieve a truly representative jury of peers;
- assume bias on the part of the excluded jurors when no prejudice has been proved;
- place the selected minority ethnic jurors in a difficult position – they might feel that they are expected to represent the interests of the defendant or victim;
- generate tensions and divisions in the jury room instead of reaching consensus on the guilt or innocence of the accused based upon the evidence put before it;
- place undue weight on the views of the specially selected jurors; and
- place a new burden on the court to determine which cases should attract an ‘ethnic minority quota’ and provide a ground for unmeritorious appeals.⁴¹

3. Part 13 of the *Criminal Justice Bill*

Schedule 22, introduced by *clause 258*, would implement those proposals by amendment to the *Juries Act 1974*. The whole category of excusal as of right would go. The only category of persons for whom special provision would be made is full-time serving members of the armed forces. New *subsection 9(2A)* would remove the discretion to *refuse* excusal where the member’s commanding officer has certified “that it would be prejudicial to the efficiency of the service if that member were to be required to be absent from duty”. There is corresponding provision, inserted in *section 9A*, on an application for deferral.

A new *section 9AA* would require the Lord Chancellor to issue guidance as to the manner in which the functions of the appropriate officer were to be exercised.

⁴⁰ response to recommendation 20

⁴¹ Justice for All, para 7.29

4. Comments

These proposals have been generally welcomed although some reservations have been expressed as to whether it is appropriate for some people, who are closely connected with the criminal justice system, to serve on juries. For example, the Criminal Bar Association thought that it was absolutely right that measures should be taken to prevent the so-called middle class opt-out of jury service. An editorial in the *Criminal Law Review* commented that the representativeness of juries generally would be improved if the promise to cut down on the number of excusals from jury service can be made to work.⁴²

But the Bar Council cautioned that the proposal went too far –

Jurors bring to the courtroom their experience of life and common sense. Those with a close connection to the justice system would have a disproportionate influence on the workings of a jury. For example a police officer or a judge serving upon a jury will inevitably carry undue weight in the deliberations of the jury in the privacy of the jury room

IV The origins and history of trial by jury and trial by jury as a constitutional right

A. Origins and History of Trial by Jury

The early form and role of the jury was quite different from its form and role today. In the *Oxford Companion to Law* David Walker says that:

The origin of the jury is probably to be found in the importation, from Normandy, of a system of inquisitions in local courts by sworn witnesses. This was found in England shortly after the Norman Conquest, and from the first, combined with the existing procedure of the shire-moot. The earliest jury was a body of neighbours summoned by a public officer to give an oath as answer to some question.⁴³

The *Oxford English Dictionary* gives as the origin of the word jury the Old French noun “jurée”, meaning an oath, judicial inquiry or inquest (as in the verb “jurer”, to swear), and the mediaeval Latin “jurata” from the verb “jurare”.

From early on the sworn inquest was used to enable the recognition on oath of a number of *probi nomines*⁴⁴ selected to represent the neighbourhood and to testify of facts of which they had personal knowledge. David Walker notes that Henry II applied

⁴² CLR [2002] 688

⁴³ David M. Walker *The Oxford Companion to Law* (1980) p.686

⁴⁴ roughly translated, this means “good, upstanding names”

recognition by jury to all types of legal and fiscal business and that this type of procedure subsequently came to be used in many types of legal action. He adds that jurors were witnesses rather than judges of fact:

As originally established, the function of the jury was not to weigh evidence but to decide on the basis of their own knowledge, or the general belief of the district, and for this reason they were always selected from the hundred or district where the question for decision arose. If they did not have the knowledge they could readily ascertain it. They were accordingly witnesses rather than judges of fact.⁴⁵

As far as criminal cases were concerned, Walker notes that at the end of the twelfth century, a person accused of crime by another could, on payment, obtain the right to be tried by jury. The presenting jurors decided as to the mode of proof. When trial by ordeal was prohibited by Pope Innocent III in November 1215 and other methods of establishing guilt, such as compurgation (which involved an accused seeking to clear himself by his own oath, bolstered by the oaths of others, usually friends and neighbours, who testified as to his character rather than the facts) also fell from favour, the need arose to find a new method of establishing guilt. In his book *Trial by Jury*, published in 1956, Sir Patrick Devlin (as he then was) suggested that it was natural that the judges who went out on circuit in England, who were left more or less to improvise a new method, should choose the jury.⁴⁶ Gradually the practice developed of selecting a trial jury of 12.

Those crimes which were categorised as felonies were always tried “on indictment” with a jury. The accused had to consent to jury trial. The Statute of Westminster I (1275) provided that felons who refused jury trial should be committed to “a hard and strong prison” (*prison forte et dure*). Walker notes that the words *prison forte et dure* became transformed into *peine forte et dure*, a form of torture whereby, in the sixteenth century, the prisoner was placed between two boards on which increasingly heavy weights were placed until he “consented” to trial by jury or died.⁴⁷ The last recorded case of crushing a prisoner to death is reported to have been at Cambridge in 1741. The practice was abolished in 1772. From 1827 onwards a plea of not guilty was ordered to be entered if an accused person declined to plead.

As the James Committee noted in its 1975 report on *The Distribution of Criminal Business between the Crown Court and the Magistrates’ Court*, trial on indictment by a judge and jury remained the normal mode of trial for criminal offences until the middle of the nineteenth century.⁴⁸ Before the establishment of professional police forces in the nineteenth century justices of the peace had general responsibilities for law enforcement and the investigation of crime and were not regarded as independent. They had an

⁴⁵ David M. Walker *The Oxford Companion to Law* (1980) p.686

⁴⁶ Sir Patrick Devlin *Trial by Jury* (1956) p.10

⁴⁷ David M. Walker *The Oxford Companion to Law* (1980) p.943

⁴⁸ *The Distribution of Criminal Business between the Crown Court and the Magistrates’ Court*. Report of the Interdepartmental Committee Cmnd 6323 November 1975 paragraph 12.

extensive criminal jurisdiction when sitting in quarter sessions with a jury, but their summary jurisdiction to try cases without a jury was very limited. There were two categories of offence: those triable on indictment by a judge and jury and a much smaller category of offences triable only summarily by magistrates. Those offences which were categorised as felonies were always tried on indictment.

The middle decades of the nineteenth century saw the enactment of a number of statutes permitting the summary trial of certain indictable offences, with the consent of the accused. In particular, an Act of 1855 “for diminishing Expense and Delay in the Administration of Criminal Justice in certain cases” permitted certain cases of larceny, which was a felony, to be tried by magistrates, rather than by a judge and jury, as long as the accused person consented to this type of trial. In these cases an accused person who would otherwise have had to be tried by a jury could therefore waive this requirement and elect to be tried by magistrates instead.

The debates in Parliament on the Bill that became the 1855 Act reflect general concern that delays and expense resulting from the need for every felony to be tried by a judge and jury were bringing the criminal justice system in England and Wales into disrepute.⁴⁹ Some peers were equally concerned, however, about the competence of the magistrates of the day to deal appropriately with the cases that came before them.⁵⁰ In the debate on the committee stage of the Bill in the House of Lords the jurist and future Lord Chancellor, Lord Campbell, said he was glad that the maximum amount of imprisonment to be inflicted under the Bill was to be limited to one year, which he thought sufficient to be imposed without the intervention of a jury. Hansard adds⁵¹:

He was glad also that the noble and learned Lord had given the option of trial by jury; for had he not done so he must have opposed the Bill as unconstitutional.

The arrangements under the 1855 Act enabling people accused of certain indictable offences to consent to summary trial by magistrates was subsequently extended to other offences. The *Summary Jurisdiction Act 1879* consolidated much of the earlier legislation and listed for the first time those indictable offences which were triable summarily with the accused’s consent. Section 17 of the 1879 Act also set out for the first time a general right to claim trial by jury, exercisable where the maximum sentence on summary conviction exceeded three months’ imprisonment.

In their book *The Emergence of Penal Policy in Victorian and Edwardian England*, published in 1990, Leon Radzinowicz and Roger Hood suggest that the extension of magistrates’ summary jurisdiction to a mass of indictable offences that had previously been tried by juries at the courts of Assize and Quarter Sessions was a major factor

⁴⁹ See eg. HL Deb 26 February 1855 c1871-1880; HL Deb 27 February 1855 c1958-1961

⁵⁰ *ibid.*

⁵¹ Parliamentary Debates Third Series N.S Vol 136 c1959, 27.2.1855

behind the “retreat from incarceration” that took place in the second half of the nineteenth century.⁵² They note that there was a steady decline in the number of prosecutions from the 1880s onwards, which could be interpreted as the result of the deterrent effect of punishment for offences having been made speedier and more certain, if less severe.⁵³ It could alternatively be seen as the result of a substantial decrease in crimes of all kinds and by all offenders which took place during this period.⁵⁴ Radzinowicz and Hood go on to say that:

Whatever the interpretation, - and any interpretation must remain conjectural, - the movement for summary jurisdiction stands out as one of the most significant developments of the nineteenth century in the perception and control of crime. It also provides a classic example of how a change in criminal procedure can transform the perception of criminality.⁵⁵

The Government’s consultation paper *Determining Mode of Trial in Either-Way Cases*, published in July 1998, summarises developments in the categorisation of offences following the 1855 Act as follows:⁵⁶

In the course of time the same arrangement was extended to some other indictable offences, and ‘hybrid’ offences (triable either summarily or on indictment) were created, some of which could be dealt with by magistrates *without* the defendant’s consent. By 1975 the Inter-Departmental Committee on the Distribution of Criminal Business between the Crown Court and Magistrates’ Courts (the James Committee) found that, as a result of these largely unrelated developments in the summary jurisdiction of magistrates’ courts, the categories of case had multiplied to include, in addition to cases triable only on indictment or only summarily, indictable cases triable summarily with the defendant’s consent, hybrid cases with and without a right to elect trial by jury, and summary cases which in certain circumstances could be tried on indictment. The James Committee sought to simplify these arrangements, and its recommendations led to the present classification of offences as summary, either way and indictable only.

The current classification of offences dates from the *Criminal Law Act 1977* that followed the publication of the James Committee report. The provisions of the 1977 Act were later repealed by the *Magistrates’ Courts Act 1980*, which was largely a consolidation measure and maintained the classification set out in the 1977 Act.

⁵² Leon Radzinowicz and Roger Hood, *The Emergence of Penal Policy in Victorian and Edwardian England*, (1990) p.618

⁵³ *ibid.* p.623

⁵⁴ *ibid.*

⁵⁵ *ibid.* p623-4

⁵⁶ Home Office, *Determining Mode of Trial in Either-Way Cases*, July 1998 paragraph 5

B. Trial by Jury as a Constitutional Right.

Clause 39 of the *Magna Carta* of 1215, as translated from the original Latin, provides that:

No free man shall be seized or imprisoned, or stripped of his rights or possessions, or outlawed or exiled, or deprived of his standing in any other way, nor will we proceed with force against him, or send others to do so, except by the lawful judgement of his equals or by the law of the land.⁵⁷

In his *Commentaries* the eighteenth century jurist Sir William Blackstone said that the *Magna Carta* had “secured to every Englishman that trial by his peers which was the grand bulwark of his liberties”. He went on:

So that the liberties of England cannot but subsist so long as this palladium remains sacred and inviolate; not only from all open attacks (which none will be so hardy as to make), but also from all secret machinations, which may sap and undermine it; by introducing new and arbitrary methods of trial; by justices of the peace, commissioners of the revenue, and courts of conscience. And however convenient these may appear at first (as doubtless all arbitrary powers, well executed, are the most convenient), yet let it be again remembered, that delays and little inconveniences in the forms of justice, are the price that all free nations must pay for their liberty in more substantial matters; that these inroads upon this sacred bulwark of the nation are fundamentally opposite to the spirit of our constitution; and that, though begun in trifles, the precedent may gradually increase and spread, to the utter disuse of juries in questions of the most momentous concern.⁵⁸

In his book *Trial by Jury*, published in 1956, Sir Patrick Devlin said:

For more than seven out of the eight centuries during which the judges of the common law have administered justice in this country, trial by jury ensured that Englishmen got the justice they liked and not the sort of justice that the government or the lawyers or any body of experts thought was good for them.⁵⁹

He famously went on to say:

Each jury is a little parliament. The jury sense is the parliamentary sense. I cannot see the one dying and the other surviving. The first object of any tyrant in Whitehall would be to make parliament utterly subservient to his will; and the next to overthrow or diminish trial by jury, for no tyrant could afford to leave a

⁵⁷ Translation from the Latin by the British Library at <http://www.bl.uk/diglib/magna-carta/magna-carta-text.html>

⁵⁸ Blackstone's *Commentaries* Book 4 pp.349-350

⁵⁹ Sir Patrick Devlin *Trial by Jury* (1956) p. 159-160

subject's freedom in the hands of twelve of his countrymen. So that trial by jury is more than an instrument of justice and more than one wheel of the constitution: it is the lamp that shows that freedom lives.⁶⁰

In his *History of English Law* William Holdsworth comments that it is clear that the words in Clause 39 of the Magna Carta do not refer to trial by jury. He adds:

A trial by a royal judge and a body of recognitors who found the facts was exactly what the barons did not want. What they did want was first a tribunal of the old type in which all the suitors were judges both of law and fact, and secondly a tribunal in which they would not be judged by their inferiors. Some of them did not consider that the royal judges, none of them would have considered that a body of recognitors, were their peers. It is in this respect that the clause is reactionary.⁶¹

William Holdsworth set out his view of the significance of Clauses 38, 39 and 40 of the Magna Carta in the following terms:

It was said in the seventeenth century that these clauses embodied the principles of the writ of Habeas Corpus and of trial by jury; and for these interpretations early mediaeval authority could be cited. It is not difficult to show that, taken literally, these interpretations are false. Trial by jury was yet in its infancy. The writ of Habeas Corpus was not yet invented; and, as we shall see, it was long after it was invented that it was applied to protect the liberty of the subject. But there is a sense in which these interpretations are true. These clauses do embody a protest against arbitrary punishment, and against arbitrary infringements of personal liberty and rights of property: they do assert a right to a free trial, to a pure and unbought measure of justice. They are an attempt, in the language of the thirteenth century, to realise these ideals [...] This is the real sense in which trial by jury and the writ of Habeas Corpus may claim descent from these clauses of the Charter. The historian may prove that there is not strict agnatic relationship: he must admit that there is a natural – a cognatic link.⁶²

In recent years Penny Darbyshire has been a notable critic of the way in which discussion of the criminal justice system has in her view tended to focus on trial by jury rather than trial in the magistrates' court, although it is in the magistrates' court that most offenders are now tried.⁶³ In an article published in the *Criminal Law Review* in 1991 she suggested that the traditional justifications used in praise and defence of the jury were conceptually unsound. She argued that defenders of the jury system inflated its importance by portraying the "right" to jury trial as central to the criminal justice system and as a guardian of due process and civil liberties and commented:

⁶⁰ *ibid.* p.164

⁶¹ William Holdsworth, *A History of English Law* (Seventh Edition, reprinted 1966) Volume I p.59-60

⁶² William Holdsworth, *A History of English Law* (Third edition, 1923) Volume II p.214-215

⁶³ See e.g. Penny Darbyshire, "An Essay on the Importance and Neglect of the Magistracy" [1997] *Crim LR* 627-643 at p.627

If the jury is such as “palladium” of English justice (Blackstone) why is it reserved for such a small number of cases, most defendants being treated to the cheaper, less flamboyant “trivial” justice of the magistrates’ court? If the jury is such a guardian of our liberties and of justice, are we implying that magistrates dispense some lesser form of justice? Are we implying that, since we invest so much cash and rhetoric in the jury system, that it is more likely to do justice and get the verdict right, whatever that means, than the magistrates? If so, why do we, in this, the fairest of legal systems, allow most of our defendants to be processed by magistrates’ courts? And, this being the case, why have academics invested so much argument and research into the jury?⁶⁴

Penny Darbyshire went on to criticise the notion that there is a “constitutional right” to jury trial, noting that three problems arose in connection with this:

- a. the supposed guarantee of a right to jury trial in Magna Carta as a matter of historical accuracy. Having noted the views of a number of legal historians and constitutional lawyers she comments that:

As these and other historians have pointed out, by Magna Carta the barons simply sought to secure a deal from King John, within which they safeguarded their right to be judged by judges of no lesser rank than themselves. *Liber homo* has been translated as either “freeman” or “freeholder” and “freeman” did not mean what it does today. As we should remember from school history, freemen were a limited class in the feudal system.⁶⁵

- b. what is meant by a “constitutional right” to jury trial in the English legal system. She suggests that some writers speak as if there were an entrenched right to jury trial, as there is in the United States Constitution or the Canadian Bill of Rights, when in fact the sovereignty of the UK Parliament means that “we do not have any entrenched rights, especially in issues beyond the grasp of EC or international law”,⁶⁶

⁶⁴ Penny Darbyshire, “The Lamp That Shows That Freedom Lives – Is it Worth the Candle?” – [1991] *Crim LR* 740-752 at p.741

⁶⁵ *ibid.* p.743

⁶⁶ *ibid.*

- c. What is meant, in jurisprudential terms, by asserting that there is a right to jury trial. She notes that the term “right”, at least to “will” theorists, implies a choice, something which a person charged with an either-way offence has in respect of mode of trial, but which is not available to a person charged with an offence triable only on indictment, who must be tried by a jury at the Crown Court and whose only choice is as to plea.

She goes on to say:

Not only does the concept of a right to jury trial in indictable offences fail to accord with “will” theories of rights, it also fails to satisfy classical “interest” theories of rights and I would extend my argument here to include triable either-way offences. According to interest theories, as I would apply them here, jury trial can only be described as a “right” if the intended beneficiary of the court’s duty to provide that right is the defendant. If the purpose of jury trial is primarily ideological, as I argue here, as a symbol to legitimate the criminal justice system, then the defendant is the unintended beneficiary and thus, cannot be said to have a real right to jury trial.⁶⁷

Darbyshire also criticised what she suggests is a failure by jury protagonists to distinguish between randomness and representativeness when celebrating jury trial as a “trial by peers”. She noted that random selection from the community was unlikely to produce a cross-section of that community unless some form of stratified sampling were used. She also criticised the argument that the jury was a defence against state power, noting that for every case which was held up as an example of this, such as the acquittal of Clive Ponting, there were many more instances, such as the convictions of the Guildford Four and the Birmingham Six, in which people had been wrongly convicted by juries.⁶⁸

In an article published in the *Criminal Law Review* in 1997 responding to the points raised by Penny Darbyshire Bruce Houlder Q.C. suggested that while the use of language by those who argued that there was a “constitutional right” to jury trial could reasonably be criticised, the term was a loose, somewhat inaccurate, shorthand expression well understood by those who used it.⁶⁹ He also noted that Penny Darbyshire had not suggested a practical alternative to “random” selection, although he himself thought it might be possible for the selection of jury members to be better targeted to individual cases under trial. On the subject of whether or not the jury was “an injection of democracy into the legal system” he said he preferred Lord Devlin’s view to Penny Darbyshire’s, adding that:

A jury is indeed a symbol of “participatory democracy”. Penny Darbyshire concedes that the magistracy is not representative of the community as a whole

⁶⁷ *ibid.* p.744

⁶⁸ *ibid.* p.747

⁶⁹ Bruce Houlder Q.C. “The Importance of Preserving the Jury System and the Right of Election for Trial” [1997] *Crim LR* 875-881 at p.879

(although it is becoming more so). This however is not the point. We cannot all be magistrates but all of us can be jurors.⁷⁰

Bruce Houlder argued that the notorious cases involving miscarriages of criminal justice in recent years were not the fault of juries, but of shortcomings in the investigation and trial process. He set out the following further arguments in support of the defendant's continued right of election:

1. We are now a sophisticated democracy which has learned the wisdom of involving individuals in the administration of justice.
2. The effect of an apparently inconsequential crime on a particular victim, and the effect on a particular defendant of a conviction, may have no relationship. Offences often described as petty may have devastating consequences for the defendant as much as the victim. The consequences to a defendant, sometimes an innocent one, may last for a lifetime.
3. Jury trial has an educating effect on those who participate in its process and is not separate from responsibility to society in general.
4. A conviction by a jury is usually something that even a convicted defendant can live with, however he may resent it. He feels he has a better chance of being understood by a jury and that there is some justice in that. The decision of a less representative tribunal may ultimately do little to rehabilitate an offender and may serve to increase his sense of separateness from society in general.
5. Seeing justice done is equally as important to most people as an elusive certainty in the correctness of the conviction or acquittal. Any judgment by a cross-section of society is far more satisfactory than a system of justice that depends on the State for the selection of fact-finders as well as its investigator, prosecutor and sentencer.
6. The person principally affected by the decision to prosecute is the defendant himself. He did not ask to be charged, and at the point when mode of trial is decided, the law deems him to be innocent. He has a diminishing number of protections available to him now and needs a right to a jury trial more than ever before.
7. We should trust a jury. It is not their fault if they get it wrong, but that does not mean that others would get it right. We should ask ourselves perhaps what would happen if the spotlight were turned on convictions, albeit less headline grabbing, by magistrates. It is unlikely that the correctness of their decisions could not be equally assailed. I do not know a single fair-minded magistrate who would disagree with that.⁷¹

⁷⁰ *ibid.*

⁷¹ *ibid.*

