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The *Criminal Justice Bill*: Disclosure and evidence

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 disclosure and evidence. 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, mode of trial and juries.

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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 describes the Government's proposals, in Part 5 of the Bill, to simplify the rules relating to disclosure by the prosecution to the defence of unused material, and to require more extensive disclosure by the defence, which would have to provide more information in its "defence statement" and disclose details of experts they have instructed, as well as details of all the witnesses they propose to cal.

The paper goes on to explain the fundamental reforms, proposed in Part 11 of the Bill, of two of the rules which govern the admissibility of evidence in criminal proceedings. Common law rules, under which "hearsay" evidence and evidence of a person's bad character, are generally inadmissible, subject to some exceptions which are complex and difficult to understand, would be replace by statutory provisions designed to ensure that the widest possible range of relevant material is available.

Part 11 of the Bill, extends to England and Wales only. Part 5 also extends to Northern Ireland.

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

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I Introduction

The *Criminal Justice Bill* is intended to introduce reforms to the criminal justice system as outlined in the Government's White Paper *Justice for All*, which was published in July 2002.[1] General background to the Bill and the White Paper is set out in the first of the Library Research Papers on the Bill.

Part 5 of the Bill would amend parts of the *Criminal Procedure and Investigations Act* 1996, to modify both the provisions governing disclosure of unused prosecution material to the defence, and the defence disclosure requirements. These proposals are based on recommendations made by Lord Justice Auld in October 2001, following his Review of the Criminal Courts, in his Report which is usually referred to as "The Auld Report".[2]

> It was with typical prescience, equanimity and optimism that Professor Cross looked forward to the day when the law of evidence would be rendered redundant by the liberalisation of the rules for the admissibility of evidence. There can be no doubt but that some such liberalisation has taken place, for example in the increasingly relaxed attitude to the admission of hearsay, and to the competence of children. He could not have appreciated the force of countervailing tendencies which have subsequently emerged. For example in the shape of restrictive rules designed to protect the vulnerable, such as those connected with the incorporation of the European Convention on Human Rights, or those proposed in the Youth Justice and Criminal Evidence Bill 1999. The clash of these factors has complicated the exposition of the law of evidence …
>
> There can be no doubt that the law of evidence is in a state of flux. It is well illustrated by the different states of reform in different areas. Thus some measures have been enacted and come into force since the last edition […] others have been proposed and approved by the government, but not yet introduced in the form of a bill, such as the Law Commission's proposals to reform the law of hearsay in criminal proceedings; and others are still at the stage of consultation awaiting final approval, such as the Law Commission's preliminary proposals for reform of the law relating to admissibility of evidence of bad character in criminal proceedings.[3]

Part 11 of the Bill would continue that process. It would introduce major reforms to the rules governing the admissibility of evidence in criminal proceedings. *Chapter 2* of *Part 11*, which deals with hearsay evidence, reflects work which had been done on the subject by the Law Commission. The Law Commission had published a consultation paper *Evidence in Criminal Proceedings: Hearsay and Related Topics*,[4] in 1995, followed by a

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

2 *Review of the Criminal Courts of England and Wales, Report by the Right Honourable Lord Justice Auld*, October 2001, http://www.criminal-courts-review.org.uk/ccr-00.htm

3 Preface to the ninth edition of "Cross and Tapper on Evidence", May 1999

4 Consultation Paper No 138.

report[5] with final recommendations and a draft Bill, in June 1997. Although Lord Justice Auld reviewed the Law Commission work, he recommended further consideration of the reform.

Chapter 1 of *Part 11* deals with evidence of bad character, a subject on which Lord Justice Auld chose to make no detailed recommendations, as he was aware that the Law Commission (whose consultation paper *Evidence in Criminal Proceedings: Previous Misconduct of a Defendant*,[6] had been published in July 1996) was shortly to produce its final report. *Chapter 1* draws on the report[7], which was published, with recommendations and a draft Bill, in the same month as Lord Justice Auld's own report, in October 2001.

This paper discusses those three areas of reform in turn. Most of the proposals arise from reform projects which have been subject to public consultation on at least one occasion, and there has been little opportunity for those interested to make comments on the clauses of the *Criminal Justice Bill* since its publication on 21 November 2002. Accordingly, this paper includes reference to some comments made at earlier stages, where they seem to have continued relevance to the provisions of the Bill as introduced. *Explanatory Notes* to the Bill were published on 29 November 2002. [8]

II Disclosure

A. The present rules

The *Auld Report* summarised the present rules for disclosure of unused material, and its apparent defects as follows:

> 121 In 1997 the Criminal Procedure and Investigations Act 1996 replaced the common law rules of prosecution disclosure of unused material, introducing a staged procedure of primary prosecution disclosure, defence disclosure of the issues taken with the prosecution case and then additional and secondary prosecution disclosure informed by the defence identification of the issues. The 1996 Act has not worked well, prompting two lively questions in the Review. First, should the statutory scheme be abolished and be replaced by some other and, if so, what, scheme? Second, should and could the statutory scheme be made to work better, in particular, by the wider use of information technology for speedier collation, transmission and examination of documents?

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5 *Evidence in Criminal Proceedings: Hearsay and Related Topics*, Law Com No 245, http://www.lawcom.gov.uk/files/lc245.pdf

6 Consultation Paper No 141, http://www.lawcom.gov.uk/files/cp141.pdf

7 *Evidence in Criminal Proceedings: Evidence of Bad Character in Criminal Proceedings*, Law Com No 273, http://www.lawcom.gov.uk/files/lc273.pdf

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

127 Some consider that the system operates unfairly against defendants at the most critical, the primary, stage, for two main reasons. First, they say that the test, material that "might undermine" the prosecution case, is too narrow and that, if there is to be a test at all, it should simply be one of relevance or potential relevance to issues in the case and common to both stages of disclosure, as the Runciman Royal Commission recommended. Many go further and suggest that there should be no filtering test for disclosure and that the prosecutor should disclose everything gathered or engendered by the police in the course of their investigation,135 much as happens in many continental jurisdictions where the defence are entitled to see the prosecution 'dossier'.

128 Second, critics say that it is wrong and unfair to defendants and the police to consign to, mostly, poorly trained junior police officers the heavy responsibility, often in large and complex cases, of identifying all the unused material and the candidates from it of potentially disclosable documents.[9]

[…]

Defects of the present system

163 The Crown Prosecution Service Inspectorate, in its Thematic Review of the Disclosure of Unused Material found that the 1996 Act was not working as Parliament intended and that its operation did not command the confidence of criminal practitioners. It highlighted: the failure of police disclosure officers to prepare full and reliable schedules of unused material; undue reliance by the prosecutors on disclosure officers' schedules and assessment of what should be disclosed; and "the awkward split of responsibilities, in particular between the police and the Crown Prosecution Service", in the task of determining what should be disclosed. The Inspectorate's principal recommendations were for greater involvement of prosecutors in the collation and examination of unused material and, from the start, in deciding on what should be disclosed; more involvement of counsel in the prosecution's duty of continuing review of unused material; and firmer reaction by prosecutors to no or inadequate defence statements. In making those recommendations, the Inspectorate acknowledged that, if implemented, they would have "very significant resource implications" for the Crown Prosecution Service and the police. More prosecutors would be needed to spend more time examining more material and deciding on disclosability, and police officers would have to copy more material than they do at present.

164 Plotnikoff and Woolfson, covering much the same ground, confirmed most of these all too apparent defects.

[…]

167 To summarise, the main concerns about the disclosure provisions of the 1996 Act are: a lack of common understanding within the Crown Prosecution Service and among police forces of the extent of disclosure required, particularly at the primary stage; the conflict between the need for a disclosure officer sufficiently familiar with the case to make a proper evaluation of what is or may be disclosable and one sufficiently independent of the investigation to make an

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9 *Review of the Criminal Courts of England and Wales, Report by the Right Honourable Lord Justice Auld*, October 2001, p.447 http://www.criminal-courts-review.org.uk/ccr-00.htm

objective judgement about it; the consignment of the responsibility to relatively junior officers who are poorly trained for the task; general lack of staffing and training for the task in the police or the Crown Prosecution Service for what is an increasingly onerous and sophisticated exercise; in consequence, frequent inadequate and late provision by the prosecution of primary disclosure; failure by defendants and their legal representatives to comply with the Act's requirements for giving the court and the prosecutor adequate and/or timely defence statements and lack of effective means of enforcement of those requirements; seemingly and confusingly different tests for primary and secondary prosecution disclosure; and the whole scheme, whether operated efficiently or otherwise, is time-consuming and otherwise expensive for all involved. The outcome for the criminal justice process is frequent failure to exchange adequate disclosure at an early stage to enable both parties to prepare for trial efficiently and in a timely way.[10]

B. The proposals

Lord Justice Auld's recommendations were:

• retention of the present 1996 Act scheme of material disclosure in particular, of two stages of prosecution disclosure under which the second stage is informed by and conditional on a defence statement indicating the issues that the defendant proposes to take at trial;

• replacement of the present mix of primary and subsidiary legislation, Code, Guidelines and Instructions by a single and simply expressed instrument setting out clearly the duties and rights of all parties involved;

• the same test of disclosability for both stages of prosecution disclosure providing in substance and, for example, for the disclosure of "material which, in the prosecutor's opinion, might reasonably affect the determination of any issue in the case of which he knows or should reasonably expect" or, more simply but tautologically, "material which in the prosecutor's opinion might weaken the prosecution case or assist that of the defence";

• in addition, automatic primary disclosure in all or certain types of cases of certain common categories of documents and/or of documents by reference to certain subject matters;

• retention by the police of responsibility for retaining, collating and recording any material gathered or inspected in the course of the investigation; police officers should be better trained for what, in many cases, may be an extensive and difficult exercise regardless of issues of disclosability, and subject, in their exercise of it to statutory guidelines and a rigorous system of 'spot audits' by HM Inspectorates of Constabulary and/or of the Crown Prosecution Service;

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[10] ibid p.463

> • removal from the police to the prosecutor such responsibility as they have for identifying and considering all potentially disclosable material;
>
> • the prosecutor should retain ultimate responsibility for the completeness of the material recorded by the police and assume sole responsibility for primary and all subsequent disclosure;
>
> • the requirement for a defence statement should remain as at present, as should the requirement for particulars where the defence is alibi and/or the defence propose to adduce expert evidence;
>
> • there should be more effective use of defence statements facilitated by the general improvements to the system for preparation for trial that I have recommended, and encouraged through professional conduct rules, training and, in the rare cases where it might be appropriate, discipline, to inculcate in criminal defence practitioners the propriety of and need for compliance with the requirements;
>
> • a clearly defined timetable for each level of jurisdiction for all stages of mutual disclosure unless the court in any individual case orders otherwise; and
> • the Prison Service should introduce national standards for access to due process for remand prisoners that ensure that they experience no greater difficulty than bailed defendants in preparing for their trials.[11]

In response the White Paper announced:

> 3.48 The tests to be applied at these two stages are different and described as a dual test. Much of the material that must be disclosed will meet both tests. The defence statement is intended to assist the management of the trial by identifying the issues in dispute and providing details of any alibi witnesses. We propose that this two-stage disclosure scheme should remain but that there should be a single test of disclosability at both stages.
>
> 3.49 The process of prosecution disclosure is too complicated. It frequently leads to the prosecution failing to disclose all the material covered by the rules, and the issue of prosecution disclosure becoming a battleground between prosecution and defence in which the defence hope to 'trip the prosecution up' at an early stage.
>
> 3.50 In addition the defence statement can sometimes give no real indication of what the defence case is. The defence is under no obligation to identify witnesses it may call, except when they are alibi or expert witnesses. It is perfectly possible therefore for the trial to be the first time the defence have indicated what their defence is. This can sometimes lead either to adjournments or trials proceeding

[11] *Review of the Criminal Courts of England and Wales, Report by the Right Honourable Lord Justice Auld*, October 2001, p.472 -3, http://www.criminal-courts-review.org.uk/ccr-00.htm

without the prosecution having an adequate opportunity to check out the defence's case.

3.51 Action is already in progress to improve prosecution disclosure through work being undertaken by the CPS and ACPO. They are taking forward recommendations made by the CPS Inspectorate and the Attorney General's Guidelines on disclosure issued in November 2000, and are developing revised joint operational guidance. This will ensure consistent and efficient delivery of prosecution disclosure duties. This will in turn ensure that the defence has the necessary information to play its part in the disclosure procedure more effectively.

3.52 As part of our aim to ensure a fairer balance between prosecution and defence, we will introduce legislation to remove the restrictions on the jury being invited to draw inferences from discrepancies between the pre-trial defence statement and the defence case at trial, specifically by:

- widening the matters on which an inference may be drawn to include any significant omission or anything that the defendant could reasonably be expected to have mentioned in the defence statement; and
- removing the present requirement for permission from the judge before making comment on discrepancies between the defence statement and the defence at trial.

3.54 We propose to introduce immediately a variety of incentives and strengthened sanctions to encourage the parties to comply with their disclosure requirements and to play their part in preparing their case more effectively for trial. Among the measures under consideration are:

- requiring prosecuting counsel to play a more active role in advising on and challenging the adequacy of the defence statement;
- giving the prosecution a right to apply for an early judicial ruling in circumstances where the defence statement is accompanied by unreasonable requests for long lists of prosecution documents;
- equipping the judiciary with the right case management skills to take a robust line at preliminary hearings, to ensure that both prosecution and defence have complied with the disclosure process to identify the triable issues;
- enhancing the requirements of the defence statement; and
- requiring the judge to alert the defence to inadequacies in the defence statement from which adverse inference may be drawn.

3.55 We believe these changes will substantially improve prosecution disclosure and reduce the scope for tactical manoeuvring by the defence. They will reinforce the professional obligation on defence lawyers to assist decision-making by the courts by defining and clarifying the issues in the case.

3.56 In every Crown Court we are determined that before the case starts, the defence and prosecution will set out their cases so that the issues are clear and irrelevant material is stripped away. We will consider whether both the defence

and the prosecution should have the right of appeal in the case of important evidential rulings. [12]

C. The *Criminal Justice Bill: Part 5*

1. Prosecution disclosure

The new single test for disclosure of unused prosecution material is to be effected by amendment to *section 3(1)* of the *Criminal Procedure and Investigations Act 1996*, which would then read:

> **3 Primary disclosure by prosecutor**
>
> (1) The prosecutor must—
>
> (a) disclose to the accused any prosecution material which has not previously been disclosed to the accused and which might reasonably be considered capable of undermining the case for the prosecution against the accused or of assisting the case for the accused, or
>
> (b) give to the accused a written statement that there is no material of a description mentioned in paragraph (a).

The provisions it would effectively replace are *subsection (1)(a)* which requires the prosecution, on primary disclosure, to:

> (a) disclose to the accused any prosecution material which has not previously been disclosed to the accused and which *in the prosecutor's opinion* might undermine the case for the prosecution against the accused,

and *section 7(2)* , providing that on secondary disclosure:

> The prosecutor must—
> (a) disclose to the accused any prosecution material which has not previously been disclosed to the accused and which might be reasonably expected to assist the accused's defence as disclosed by the defence statement

The whole of s*ection 7* will be repealed. So the present two separate stages of prosecution disclosure, applying different tests, will be replaced by an initial obligation to disclose with a continuing duty to keep under review the question whether at any given time – especially following the defence statement – there is prosecution material which meets the new single test, that it might reasonably be considered capable of undermining the case for the prosecution *or* of assisting the case for the accused *(clause 32).*

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[12] "Justice for All", July 2002, Cm 5563, http://www.cjsonline.org.uk/library/pdf/CJS_whitepaper.pdf

2. Defence statements

The Bill also requires more information to be given in the defence statement, and imposes greater sanctions for failures. *Section 5* of the *Criminal Procedure and Investigations Act 1996* now requires a defence statement to:

- set out in general terms the nature of the accused's defence,
- indicate the matters on which he takes issue with the prosecution, and
- set out, in the case of each such matter, the reason why he takes issue with the prosecution.

The new *section 6A (1)* would require that it:

- set out the nature of the accused's defence, including any particular defences on which he intends to rely,
- indicate the matters of fact on which he takes issue with the prosecution,
- set out, in the case of each such matter, why he takes issue with the prosecution, and
- indicate any point of law (including any point as to the admissibility of evidence) which he wishes to take, and any authority on which he intends to rely for that purpose.

3. Sanctions and safeguards

A replacement *section 11* of the *Criminal Procedure and Investigations Act* 1996 is to provide sanctions where the defence fails to comply with the regime. Where the accused -

- fails to give a defence statement
- fails to do so at the right time
- sets out inconsistent defences in the defence statement

or at his trial

- puts forward a defence which was not mentioned in his defence statement
- puts forward a defence which is different from any defence set out in it
- relies on a matter which, in breach of the requirements imposed by or under section 6A, was not mentioned in his defence statement
- adduces evidence in support of an alibi without having given particulars of the alibi in his defence statement
- calls a witness to give evidence in support of an alibi without having complied with section 6A(2)(a) or (b) as regards the witness in giving his defence statement.

then

s.11(5)(a) the court or any other party may make such comment as appears appropriate;

and

s.11(5)(b) the court or jury may draw such inferences as appear proper in deciding whether the accused is guilty of the offence concerned.

Under *clause 31* (new *s.6E*) the judge is to have a discretion to disclose the defence statement to the jury. The court's leave will no longer be required for making comment on defence disclosure failures.

The safeguards are that where the accused puts forward a defence which is different from any set out in his defence statement, the court must have regard to the extent of the differences and any justification for it in deciding whether to do anything under *subsection (5)* and a person is not to be convicted of an offence solely on an inference drawn under that subsection. Also, new *section 6E* will provide that the judge must warn the accused if it appears to him at a pre-trial hearing that the accused has failed to comply fully with the disclosure obligations, so that there is a possibility of comment being made or inferences drawn.

4. Comments

The provisions of the Bill would appear to meet concerns expressed by Justice and by the Law Society about the test to be applied for prosecution disclosure, but not other objections such as the effect on equality of arms of the increased burden on the defence. Justice had said:

> 38. The CPIA challenges key adversarial principles because proper disclosure by the prosecution should not be connected with participation by the defence in an adversarial system. The current disclosure system is open to abuse principally because it allows the police to decide what should be disclosed. The most obvious consequence is that no one now knows how much injustice is being created simply because no one knows how much valuable material is being withheld. In addition, by making secondary disclosure dependent on a defence statement, the CPIA legitimates the withholding of relevant material from the defence. It was because CPIA was not compliant with ECHR standards that the Attorney General's Guidelines were introduced. It is our view that if these guidelines are followed the problems currently experienced by the defence would not occur. The prosecution should make primary disclosure of any material that may assist any known defence, as this would undermine its case. The defence statement should then alert the prosecution to any unanticipated defence, enabling it to consider whether to make secondary disclosure.
>
> 39. The White Paper acknowledges the existence of problems with the system, particularly with late and inadequate prosecution disclosure, but it also lays blame at the door of the defence by asserting that disclosure is used on occasion as 'a procedural tactic to delay the process and cloud the issues.' No evidence is proposed to substantiate this statement.
>
> 40. There is a pressing need to undertake a review of disclosure because there is significant and widespread concern by defence lawyers with the way the CPIA operates. Of primary concern is the fact that the CPIA provides no sanction against the prosecution for failing to act properly. The Act just 'assumes that prosecutors will act in a more fastidious counsel-like manner, acting in a detached

objective way as ministers of justice'. This assumption is, of course, contestable. Sharpe writes that it is not feasible in an adversarial system to 'operate on the premise that the Crown is a natural seeker of the truth and that there will therefore be a total transparency between police, prosecutors and the courts.'

41. In an independent report produced for the Home Office by Plotnikoff and Woolfson, the inadequacies of the disclosure regime were exposed. The report found that 'poor CPS and police practice in relation to disclosure was widespread.' It also discovered 'widespread dislike of the legislation' and 'a mutual lack of trust between participants both in the disclosure process and in the differences of approach to the principles that underpin the CPIA'. Further, it concluded that '(t)here is enormous scope to improve and monitor the working practices of all those involved.' The report urges reconsideration of the link between the defence statement and secondary disclosure; the disclosure timetable; guidelines on what constitutes an adequate defence statement; the range of sanctions for non-compliance; and whether powers are needed to impose sanctions on the police. Justice agrees with these proposals.

42. The White Paper has taken little of these criticisms on board. It proposes only that the two stage CPIA procedure will remain but that there will only be a single test for disclosure at both stages. There is no detail about the nature of the new single test. Clearly, an important start would be for any test to be based on an objective view of the evidence and not simply on the prosecutor's personal view. Further, there has been no consideration of the compatibility of the current system with the ECHR. The European Court of Human Rights has read a right to disclosure into the right to a fair trial in articles 6 (1) and 6 (3)(b) through the principle of "equality of arms" and it is clear that the compatibility of the CPIA's system of disclosure with the ECHR is questionable. In particular, the lack of judicial supervision and control of disclosure could also violate the Convention. However, it should be remembered that the ECHR is merely a set of minimum standards and compliance should not necessarily confirm the legitimacy of any proposal.

43. Instead of addressing these major problems, the White Paper adds to general concerns by proposing to add to the defendant's disclosure burden, claiming that late or incomplete disclosure of the defence's case causes delays and adjournments. There is no evidence for this assertion. In fact, in 1993, prior to the introduction of the CPIA, The Crown Court Study by Henderson and Zander showed that the Crown Prosecution Service reported problems with so-called 'ambush defences' in only 10 per cent of cases. Nevertheless, the White Paper proposes that:
(i) the court will be able to draw more inferences from an inadequate defence case statement by:
i. widening the matters on which an inference may be drawn to include any significant omission or anything the defendant could reasonably be expected to have mentioned in the defence case statement
ii. removing the requirement to get permission from the judge before commenting on discrepancies between the defence case statement and the defence at trial;

(ii) the defence will have to produce details of any unused expert evidence and any witnesses they may call at trial;
(iii) sanctions are being considered for incomplete defence disclosure.

44. The aim of these proposals is to 'reduce the tactical manoeuvring by the defendant' and ensure greater CPS compliance. However, although the burden on the defence is increased, there is no mention of how prosecution compliance can be guaranteed. As Zander has said, '(e)xhortation that people should do their job better is harmless but useless.'

45. Justice believes that these proposals are unacceptable. They would actively introduce inequality of arms into criminal trials. In effect the defence would be forced to let the prosecution know of, and potentially destroy the defence case, without the prosecution having even to establish a case to answer. However, we have no objection to a defence statement being used as a case management tool, provided it could not be put in evidence or used to attack a defendant in cross-examination. The current systems in place for defence statements under the Criminal Justice Act 1987 and the Criminal Procedure and Investigations Act 1996 contain adequate measures to discourage departure from defence statements and, under the CJA 1997, this applies to the prosecution as well as the defence.[13]

The Law Society considered the issues of disclosure and admissibility as perhaps the most important proposals in the White Paper, and went on -

29. The White Paper states that only 55% of contested files were timely and of adequate quality This means that 45% of the files were inadequate. The Law Society has long contended that delays to the system were not caused by defence practitioners and that defence disclosure is hampered by poor prosecution disclosure. We are glad to see that this has been acknowledged not merely in the White Paper but also the Audit Commission report.

30. The Law Society still considers that the current disclosure regime requires root and branch reform, and that the limits to the right to silence and the use of adverse inferences cause increased confusion and delay rather than improve the progress of a case. We are mindful of the research by Plotnikoff and Woolfson and accept that the relevant provisions of the Criminal Proceedings and Investigations Act need to be properly enforced before the effects can be properly assessed.

31. We accept single disclosure test as long as the effect is to combine the current tests rather than to create a new one.[14]

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[13] Justice's response to the White Paper, Justice for All?, October 2002, http://www.justice.org.uk/inthenews/index.html

[14] The Law Society's response to the White Paper, October 2002, http://www.lawsoc.org.uk/dcs/pdf/ResponseToWhitePaperJusticeForAll.pdf

Liberty added-

> 3.52 Liberty is extremely concerned at the increased requirement for a defendant to assist the prosecution in its presentation of the case against him through increasing obligations of defence disclosure. If there are to be grounds for widening the matters on which inference may be drawn, it should also be a requirement that the judge gives permission to avoid the jury drawing unfair inference in situations where discrepancies occur. The effect of this will be to make it unlikely that defendants will be able to introduce a material fact that may have been omitted for good reason without the truthfulness of that fact being presented as prima facie questionable.
>
> There may be good reasons for omitting a fact. Memory is not perfect and no one can remember all the facts relating to their case. A fact which may not have been considered important may become more relevant under examination in chief, cross-examination or following the evidence of another witness. Simply to say that any inconsistency can be seized upon by the prosecution without judicial discretion will make the existence of possibly irrelevant discrepancies gain disproportionate importance.
>
> 3.58 We would agree that the principle of rewarding good case preparation, presentation and disposal is sound. However, we are concerned by the approach taken in the White Paper. It indicates that there "should be appropriate financial incentives and sanctions to encourage the defence…to play a proper part in the process of their case going through the criminal justice system." This has been suggested as fining solicitors because their cases 'take too long'. This raises a number of obvious questions. The difficulties of ensuring that fines are only levied for genuine time-wasting, rather than thorough and professional work on a case, are obvious. And there is a risk that solicitors who have been fined before may be more inclined to suggest clients plead, rather than face a further penalty.
>
> It is also, of course, an approach that cheerfully hammers at defence lawyers, ignoring the fact that by no means all the delays in the criminal justice system are down to the defence. The system needs streamlining in numerous other ways to help cases be brought more promptly (a point made forcefully by both Brooke LJ and the Audit Commission recently in relation to IT inadequacies).
>
> It should also be emphasised that solicitors and barristers acting in criminal cases are under different duties to those acting in civil cases. Instructions come from the client and, unless those instructions would cause a conflict with professional duties, the representative is obliged to follow them. For example in a civil case the representative is obliged to inform the Legal Services Commission if they feel the client's certificate should be revoked. In criminal cases what the White Paper identifies as 'time wasting' is more likely to be the fulfilment of professional obligation.[15]

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[15] Liberty's response to the White Paper, October 2002

5. Defence disclosure of witness lists and unused expert witness reports

In the consultation on disclosure which preceded the *Criminal Procedure and Investigations Act 1996*, the then Government had envisaged that the defence would be required to provide sufficient particulars of its case to identify the issues in dispute between the defence and the prosecution before the trial and that –

> the details will include, as they currently do in an alibi defence, the name and address of any witnesses the defendant proposes to call in support of that defence, or a written statement of fact or opinion which the defendant proposes to adduce as expert evidence, or any evidence which might support a defence of, for example, consent or self-defence or duress.[16]

The responses to that consultation were not published by the Home Office[17] but in explaining what would be required, the then Solicitor-General, Sir Derek Spencer said:

> In providing a defence statement it is not intended that the accused should have to provide every last detail of the defence, such as the names and addresses of witnesses and so on. That was originally intended by the Consultation Document. But we have now decided that it is not necessary. [18]

The present Government indicated a possible return to the issue, in its strategy *The Way Ahead:*

> **Pre-trial disclosure by prosecution and defence**
> 3.42 Both prosecution and defence are obliged to inform the court of the issues in Crown Court trials at a Plea and Direction Hearing (PDH). These hearings vary in their effectiveness. As part of the Crown Court Programme case management project, the Court Service is working with the judiciary to make PDHs more effective. Other issues for consideration could include:
> • Disclosure in advance of a list of intended defence witnesses (as applies already in Scotland).
> • Disclosure of any report prepared by an expert witness (as applies already in civil proceedings), so as to discourage the defence from 'shopping around' for a sympathetic opinion. [19]

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http://www.liberty-human-rights.org.uk/resources/policy-papers/policy-papers-2002/pdf-documents/oct-2002-cj-white-paper.pdf

16 "Disclosure, a consultation document" , Home Office, May 1995, Cm 2864

17 HL Deb 20 Nov 1995 Col 222. Some responses eg from Law Society and Justice and London solicitors have been made available, see references in "Building on the decade of disclosure in criminal procedure", 2001,Epp.

18 S C Deb (B) 16 May 1996 C 68

19 Cm 5074, *Strategy for the reform of the criminal justice system*. Feb 2001

Such additional requirements did not find favour with Lord Justice Auld, who said in his Report:

> 180 As to the defence statement, I have already indicated that the present requirements, if observed, seem to be adequate to enable identification of the issues, not only for the purpose of securing disclosure of any, so far, undisclosed unused material that might be relevant, but also for the purpose of determining the scope and form of prosecution evidence required for trial. I have considered whether to recommend any additional requirements, for example, a general obligation to identify defence witnesses and the content of their expected evidence similar to that where the defence is alibi or it is intended to call expert evidence for the defence. Whilst, as a matter of efficiency, there is much to be said for them, many would find them objectionable as going beyond definition of the issues and requiring a defendant to set out, in advance, an affirmative case. And they would be difficult to enforce.[20]

It was re-opened again, as a new consultation issue, in the White Paper:

> 3.57 The defence already has to disclose, in advance of the trial, details of alibi and expert witnesses. We also wish to make it a requirement for the defence to provide, in advance, details of any unused expert witness reports. We are currently considering introducing legislation to make it a requirement that they must disclose details of any witness that the defence may call. This would allow the court and prosecutor to comment adversely on surprise witnesses. We will consult with the legal profession on both these issues.[21]

Some consultees have published their critical reactions to these proposals, which would be implemented by *clauses 29* and *30* of *the* Bill, inserting two new clauses into the *Criminal Procedure and Investigations Act 1996*. Under a new *section 6C*, the defence would be required to provide a witness list:

> **6C Notification of intention to call defence witnesses**
> (1) The accused must give to the court and the prosecutor a notice indicating whether he intends to give or call any evidence at trial and, if so—
> (a) giving the name, address and date of birth of each proposed witness (other than the accused himself), or as many of those details as are known to the accused when the notice is given;
> (b) providing any information in the accused's possession which might be of material assistance in identifying or finding any proposed witness in whose case any of the details mentioned in paragraph (a) are not known to the accused when the notice is given.[22]

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[20] Review of the Criminal Courts of England and Wales, Report by the Right Honourable Lord Justice Auld, October 2001, p.447 http://www.criminal-courts-review.org.uk/ccr-00.htm

[21] Justice for All", July 2002, Cm 5563, http://www.cjsonline.org.uk/library/pdf/CJS_whitepaper.pdf

[22] *Clause 29* of the Bill

Under a new *section 6D* it would also be required to provide the names of any experts consulted. Since section 6C requires the defence to give details of all witnesses they intend to call, the obligation under *section 6D* is effectively limited to those it has decided not to call.

> **6D Notification of names of experts instructed by accused**
>
> (1) If the accused instructs a person with a view to his providing any expert opinion for possible use as evidence at the trial of the accused, he must give to the court and the prosecutor a notice specifying the person's name and address.

6. Sanctions and other consequences

The new *section 11* of the *Criminal Procedure and Investigations Act 1996* would provide, inter alia that where the accused gives a witness notice out of time, or calls a witness who was either not included in the witness statement at all, or was not adequately identified:

> (5)(a) the court or any other party may make such comment as appears appropriate;
>
> and
>
> (5)(b) the court or jury may draw such inferences as appear proper in deciding whether the accused is guilty of the offence concerned.

The safeguards are that no other party may comment on the failure without the leave of the court and the court is to have regard to whether there is any justification for the defence failure in deciding whether to do anything under *subsection (5)*, and a person is not to be convicted of an offence solely on an inference drawn under that subsection. Also, new *section 6E* will provide that the judge must warn the accused if it appears to him at a pre-trial hearing that the accused has failed to comply fully with *s6C*, so that there is a possibility of comment being made or inferences drawn. There does not appear to be any sanction in the Bill for non-compliance with the obligation to give the names of unused experts.

7. Comments

The inclusion of these additional requirements has provoked a great deal of criticism and no apparent support.

a. Professor Michael Zander

Professor Michael Zander[23] has made his full response to the mini-consultation available online.[24] It is also summarised in an article in the *Solicitors Journal*.[25] Professor Zander

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[23] Emeritus Professor of Law at LSE

was highly critical of the limited circulation (only to those who had responded to Auld's proposals on disclosure, which had expressly excluded these additional requirements) and the short consultation period (one month) allowed. He suggested that any proper consultation exercise should have been noted in a Home Office Press Release and on the Home Office website.[26]

He challenged the alleged advantages of the proposals as follows:

Advance disclosure of defence witness lists

> **1.If dates of birth were also required, it would permit checks of criminal records**
> If this were restricted to a rule requiring that, a short time before the trial, the defence supply just the name and date of birth of those who at that time are seen as possible witnesses I would not oppose it on principle. But I foresee significant problems of enforcement. What sanction could there be? If the rule stated that the judge could in his discretion refuse to allow a witness to be called if his name and date of birth had not been supplied, it is inconceivable that judges would enforce it. (Lord Justice Auld in his Report went so far as to say "There can be no question of the court punishing a defendant by depriving him at trial of the right to advance an unannounced defence . . . ."
>
> **2 If addresses were required it would allow the police to interview defence witnesses before the trial and make further inquiries**
> When prosecution witness statements are supplied to the defence they are supplied without addresses. The reason is obvious. It is to avoid the danger that the defendant or his associates will seek out the witness and intimidate, bribe or otherwise persuade the witness to change his evidence. If the defence do not have the witness' address the only way they can contact a prosecution witness is therefore through the prosecution.
> If the defence know the identity and whereabouts of potential prosecution witnesses, the defence solicitor does not contact such a witness without informing the police.
> […]
> The proposal in the present Home Office consultation exercise gives as one of the advantages of advance disclosure of defence witness lists that if addresses are given, the police could interview those witnesses.
> If addresses were given, the obvious danger is that the police would use the interview to browbeat, cajole or wheedle the witness to change his evidence or, failing that, not to testify for the defence. If the danger is thought to exist in the interviewing of witnesses for the other side by solicitors it is obvious that it exists equally in regard to interviews carried out by police officers.
> As has been seen, the defence can only contact prosecution witnesses through the prosecution or after giving notice to the prosecution of their intention. The same

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24 at http://www.lse.ac.uk/Depts/law/adv.discl..pdf

25 Advance Disclosure 20 Sept 2002 Solicitors Journal

26 the consulation letter does not appear to be on the Home Office website yet

would have to be the case for prosecution interviews with defence witnesses. Indeed, since the prosecution do not provide addresses for the defence, why should the defence have such an obligation? If the rule were introduced, the police should be required to make contact with defence witnesses solely via the solicitors – and subject to a requirement that any such interview be tape-recorded and that the defence solicitor be invited to have a representative attend.

3. It would assist the prosecution take decisions on whether to proceed with the case and, if so, how best to handle the prosecution

This point is only of any weight if such interviews would assist the police to a significant extent in important cases and/or in a significant number of cases.

The concern mainly addressed is that of ambush defences. …. So far as I am aware, there is no empirical evidence as to how often the prosecution is surprised by unexpected evidence from a witness. Nor is there empirical evidence regarding the extent of a problem of such evidence in "important" cases – however they might be defined.

[…]

But there is empirical evidence about the frequency and effect of ambush defences of all kinds. I set this out in some detail as the detail gives a sense of the nature of the issue – and one that is very different from that conveyed by the usual rhetoric associated with this debate.

4 Such a requirement would impose an increased rigour on the investigation, preparation and presentation of the defence case and so would assist in weeding out incomplete, inadequate or false defences. It may also encourage defendants who are guilty to face the issues earlier and answer the case against them.

My view of this argument is that it is pitifully weak. The defence disclosure regime works extremely badly – as Woolfson and Plotnikoff's recently published research has shown. If the defence disclosure regime does not impose enough rigour on defence preparation it is fanciful to imagine that having to disclose the names and addresses of potential witnesses would do anything worthwhile to increase that rigour. Nor is it obvious how it might encourage defendants to face the issues or to answer the case against them earlier.

5. Assists trial management

It is not obvious in what way. But in any event assistance to trial management would be likely to be de minimis.

He confirmed all the possible disadvantages identified in the consultation letter, but thought several of them understated. They were:-

1.Defence assertions of undue police influence on its witnesses may generate more defence abuse of process applications

2. Such a requirement might be regarded as going beyond what should be required of the defence under the ECHR

3. Might increase trial delays resulting from additional exchange of information, requiring analysis and particularly if the prosecution delayed finalising its case

while making further enquiries in the light of the defence witness list. This would have implications for custody time limits.
4.The witness list could only be tentative since the defence will not decide on what witnesses to call until after completion of the prosecution evidence
5.The requirement would be difficult to enforce because of late new defence witnesses, defence changes in response to the prosecution case as presented at trial and a delay in the decision whether to call a witness until after the defendant has completed his evidence
6.The defence would have to establish the identity, location and availability of a witness and may have difficulty in securing client co-operation for full compliance

He concluded:

> Quite apart from the immense and wholly disproportionate waste of police resources involved, implementation of this proposal would weaken rather than strengthen the criminal justice system. The requirement would frequently be disregarded by the defence and would not be enforced by the prosecution or the courts. Insofar as there were attempts to enforce it, these would largely be feeble and unavailing.
>
> Insofar as it was complied with, in the great majority of cases it would add nothing of value to the prosecution. In only a small minority even of contested cases is there anything that can sensibly be described as ambush evidence. There is no way of accurately predicting whether an interview will be warranted in the particular case. The only way of discovering whether the named witnesses could significantly assist the prosecution would be to interview them – and in most cases the resources involved would be expended to no purpose.
>
> Lastly – and by far the most important of all – implementation of the proposal would give the police a new weapon against the defence that is bound to lead to abuse in the form of exertion of undue influence on witnesses. The degree of such abuse will vary from case to case from very mild to very serious - but even mild "undue influence" is to be deplored.

Advance Disclosure of Defence Unused Expert Witness Reports

Professor Zander explained that –

> The problem here is whether the system should tolerate the fact that the defence can "shop around" trying one expert after another in the hope that one or more can be found to support the defence case. In theory the defence might try a succession of experts who reject the defence view of the case and use only the one who supports it.
> Some would say that it is not in the public interest that the defence should be entitled to conceal the fact that experts they had approached did not support the defence view – and that their expert views should be unavailable to the jury.

Again he was sceptical about the proffered advantages, but concluded that one of the alleged disadvantages identified in the consultation letter would be an immovable obstacle to implementation. In response to the suggested disadvantage that:

> **There are likely to be ECHR implications insofar as an expert report may contain information covered by legal professional privilege and the contents may also reveal incriminating material**

he commented:

> The Home Office covering note asks whether it might be possible to implement the proposal without infringing the defendant's rights in relation to confidentiality, legal professional privilege and self-incrimination – for example by editing out any privileged and confidential material. I am not sufficiently familiar with practice to be confident about offering an opinion as to whether that would be possible. I imagine that the editorial White-ex leaving an intelligible text might be an option in some instances and not in others. But it would be a difficult and troublesome task to undertake. (Who would undertake it? The expert who does not know about the rules of legal professional privilege or the lawyer who may thereby alter the effect of the expert's report? And would the legal aid system pay for the extra work involved?)
>
> If it is not practicable, what then? Is it suggested that the defendant in such a case would be protected by the traditional rule whilst the defendant in another case where it was possible to sever the privileged material would have to have unfavorable expert reports revealed to the prosecution? That surely could not be right.
>
> The legal professional privilege and self-incrimination considerations would I believe be an immovable obstacle to implementation of this proposal.

His reaction to the alleged advantages was as follows:

> **It may dissuade the defence from shopping around for experts**
>
> No doubt it would discourage this but why is that thought to be an advantage? What legitimate interest does the Home Office - or anyone else - have in discouraging the defence from seeking whatever help it think it needs from experts? There is not even a legitimate Treasury concern. A solicitor representing a legally aided client would normally seek prior consent to incur the expenditure from the Legal Services Commission (LSC). Failure to do so would mean that he would risk having to bear the cost himself if he failed to justify the expense ex post facto. The LSC does not allow "shopping around" of the kind in issue here. In the rare case where they agree to fund a second opinion it is because they are persuaded that there is good reason for it – for instance because the first report is inadequate or inconclusive But if the solicitor feels sufficiently strongly on the matter to risk having himself to finance additional expert advice why should he not do so?
>
> **It would enable the prosecution to call these experts as witnesses**

> It is precisely this that would discourage the defence from seeking such assistance. But the discouragement would apply not only to the second or subsequent expert opinion. It would apply equally to the first expert. If the rule were changed as proposed, the prosecution would be entitled to access to every expert opinion sought. Asking any expert for his view would risk creating evidence for the prosecution. This would be intolerable for the defence. The fact that the first expert sees the problem much as the prosecution obviously does not mean that view is the only valid view. Nor does the number of expert opinions stacked up on one side or the other guarantee correctness.
> This proposal would risk denying defendants the scientific expertise they need simply out of fear that to the extent that the expert opinion is unhelpful to the defence it is positively helpful to the prosecution. The solicitor may reasonably feel that this is a risk he should not take.
>
> **The prosecution could refer to the other expert reports in cross-examination of the expert actually called by the defence**
> Whilst this would be an advantage to the prosecution it would be a significant disadvantage to the defence. From the jury's point of view, the adverse view of an expert originally consulted by the defence might indeed carry even more weight than that of the prosecution's expert – simply because it would seem to the jury to be evidence coming from the defence stable.
> The proposal would therefore not merely level the playing field but would tilt it in favour of the prosecution.

He concluded:

> The legal professional privilege and self-incrimination considerations would I believe be an immovable obstacle to implementation of this proposal.
> In my view this proposal can fairly be described as an undesirable and unnecessary sledge hammer to crack a minuscule nut – and one moreover that would generally miss its target. It should not be implemented.

b. The Bar Council

The Bar Council also opposed both these disclosure proposals. They considered that a requirement to disclose details of unused expert reports would violate the common law, statute and current case law. Among their reasons for opposing a requirement to give details of defence witnesses were:

- It is an unfortunate fact of life that potential defence witnesses are often those very people who harbour, rightly or wrongly, a deep mistrust of authority in general and the police in particular. Knowing that their details will be disclosed and that they may be investigated and interviewed by the police will provide a powerful incentive for them not to come forward and assist the defence, thereby depriving the defendant of relevant, truthful evidence that might exonerate him
- there would be a real risk of interference by the investigating authorities in the due administration of justice. We see scope for intimidation of the witness by over-zealous or unscrupulous police officers.

- Given all the other demands on police time and the public purse, we question whether this is an efficient and appropriate use of police resources and public money.[27]

Similar concerns have been expressed by other groups. Nony Ardill, Policy Director at the Legal Action Group, said:

> These worrying proposals suggest that the Home Office is confusing the principles of criminal justice with those of the civil courts. Criminal prosecutions are not a level playing field; they involve the State, with all its resources, bringing a case against an individual who has to be treated as innocent until proved guilty beyond all reasonable doubt. Forcing the defence to assist the prosecution with its case is wholly inappropriate.[28]

Justice added similar criticisms:

> 46. Justice also has concerns about pre-verdict disclosure of unused expert witness statements obtained by the defence. This would involve a breach of legal professional privilege, the importance of which has been underlined in numerous decisions, most notably by the House of Lords in Derby Magistrates' Court ex parte. The rule is important for two reasons: firstly it is absolutely essential that clients have faith in their ability to speak candidly with their lawyer in the certain knowledge that the information imparted will be kept in confidence; secondly, it is because of that trust and ability that defence lawyers are able to provide robust advice, and 'solve' the vast majority of cases by way of guilty plea. Forced disclosure of expert reports would have the effect of dissuading the defence from seeking them. Often unexpected expert evidence can turn a case – for example, a handwriting test that establishes conclusively that a defendant could not be the author of a forged document. It would be unfair for the defence to be dissuaded from seeking evidence that may exonerate, for fear that it must be disclosed, with potentially negative consequences. However, we acknowledge that in the limited case of medical evidence indicating that a person is dangerous it may be arguable that such evidence should be disclosed to the prosecution and the sentencing court, but only after conviction. This would still involve a significant interference with legal professional privilege and clear statutory provisions would be needed to control such disclosure.[29]

c. The Law Society

The Law Society had pointed out, in the 1995 consultation:

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[27] The Bar Council and Criminal Bar Association response to the White Paper, October 2002, http://www.barcouncil.org.uk/document.asp

[28] "Verdict on the Criminal Justice White Paper" 18 Oct 2002, *New Law Journal*

[29] Justice's response to the White Paper, Justice for All?, October 2002, http://www.justice.org.uk/inthenews/index.html

> The Government proposes that the details of what will need to be disclosed by the defence "will include, as they currently do in an alibi defence, the name and address of any witness the defendant proposes to call in support of that defence". This was not proposed by the Royal Commission and the Law Society is opposed to it as the only purpose in requiring this information is to enable the police to interview the witness. A police officer who is convinced of the accused's guilt will be equally convinced that any defence witness is lying. There is a significant risk that when the officer interviews the witness he or she will put pressure on the witness not to assist the defence and will threaten the witness with criminal proceedings for perjury if the witness gives evidence. There is already concern about the vulnerability of alibi witnesses in these circumstances. In the Society's view, interviews of alibi witnesses should always be recorded on audio tape and the defence should always be given an opportunity to be present.

In responding to the Home Office mini-consultation the Law Society was perplexed as to why these issues were the subject of separate treatment.[30] They also found the assertion that lack of information about defence witnesses leads to adjournments to be astonishing, commenting that they were unaware of any such case in practice. They remained opposed to the proposal for disclosure of defence witness lists, which they thought would divert the court from the real issues of the case, but also argued that any legislation would have to be reciprocal:

> Some years ago the addresses of prosecution witnesses were removed from witness statements over concerns of intimidation. Is it suggested that these be reinstated? Release of addresses of any witness must cause considerable concern and we suggest would be contrary to current policy on witness care, particularly in light of the IPPR report The Reluctant Witness. These concerns apply to defence as well as prosecution witnesses, many of whom have genuine fears about coming forward to assist the police or prosecuting agencies.
>
> The proposals are unacceptably vague. What safeguards are to be in place for unmonitored approaches, and what safeguards are there to be to ensure the integrity of both prosecution and defence witnesses during such a procedure? Reciprocal rights will surely require all witnesses both prosecution and defence to be interviewed on neutral ground, with representatives from both sides present possibly even video recorded.
>
> […]
>
> The Committee also considers that giving the prosecution details of defence witnesses might well deter people from being witnesses for the defence. This does not require a belief or assertion that the police will routinely intimidate defence witnesses. Many witnesses would be deterred merely if there were a possibility that an officer might come to their home.

They warned of practical consequences :

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[30] letter 13 September 2002

> There will be increased hearings and satellite litigation. If the enforcement mechanism is to be inferences, then the defence will often want to put in evidence and argument about why a witness listed was not called, and vice versa. This could lead to lengthy argument as to whether inferences should be left to the jury, or be drawn. Further, if inferences are to be the enforcement mechanism, how is this to be reciprocated in respect of prosecution witnesses who are listed and not called? We believe the proposals will lead to a considerable lengthening of cases, increased hearings, and increased costs, with no significant benefit.

The Law Society were equally opposed to the disclosure of unused expert reports, suggesting that the proposal indicated little understanding of how the system works in practice:

> In legally aided cases, prior authority must be obtained from the Legal Services Commission before an expert can be instructed. To obtain prior authority, three financial estimates from three experts must be submitted to the Legal Services Commission with justification as to the need for expert reports in the interests of justice. In these circumstances it would be extremely difficult for defence practitioners to 'shop around'. In any event, it is neither in a defence practitioner or defendant's interests to instruct an expert whose evidence was not credible and which would be subject to cross examination.

They were also concerned at the conflict with legal professional privilege:

> The government recognises that it is in the interests of justice that a person who consults his lawyer should be able to do so in confidence, as other wise he may not be able to confide openly. The document goes on to state 'this might be able to impede his ability to protect his rights or defend himself properly in any subsequent action'.
>
> Without this openness and without legal professional privilege, the whole purpose of independent legal advice is negated. If the government accepts that legal professional privilege serves the public interest we are surprised that the disclosure of expert reports should be under consideration. As the Home Office consultation paper recognises the defence expert report is based on legally privileged communications and as such cannot be disclosed without the client's consent. If unused expert reports are to be disclosed, then defence practitioners will be circumspect in disclosing legally privileged information to experts and reluctant about obtaining expert reports. This will deprive the client of expert advice and weaken the independence and vigour of the accused's defence representation.

The clauses introduced do avoid a difficulty anticipated in an article written before the publication of the Bill by David Corker[31], namely that an obligation to disclose "reports", as indicated in the White Paper, would require a definition of "report" and that the defence might be able to evade the obligation by ensuring that no adverse reports were ever completed. The obligation in the clause is to disclosure the identity of experts who have been instructed. The article continues, referring to the effect on the accused's legal privilege, and the way in which the obligation might prove a deterrent for defendants to seek any expert evidence:

> If the reformers have their way, and such reports would have to be disclosed, we may well find defence lawyers advising clients not to retain experts in the first place. This encroaches on the fundamental principles associated with the presumption of innocence and thereby undermines justice. If defendants are to be intimidated away from retaining expert help, will this encourage a culture of sloppiness amongst scientists employed by the State? Are these proposals another route which may lead us back to those infamous cases involving miscarriages of justice?

III Hearsay evidence

> The hearsay rule has often been regarded as one of the most complex and most confusing of the exclusionary rules of evidence. Lord Reid said that it was 'difficult to make any general statement about the law of hearsay which is entirely accurate.' Both its definition, and the ambit to the exceptions to it were unclear. It led to the exclusion of much reliable evidence, and, on that account, exceptions were created ad hoc, often without full consideration of their implications.
> […]
> a statement other than one made by a person while giving oral evidence in the proceedings is inadmissible as evidence of any fact stated. The rule applies to all kinds of statement, whether made orally, in writing, or by conduct, and equally to hearsay of all degrees. It is less clear how far it extends to assumptions of fact inferred from words or deeds. This formulation conflates two common law rules, the rule that the previous statements of the witness who is testifying are inadmissible as evidence of the facts stated (sometimes spoken of as the 'rule against narrative', or the 'rule against self-corroboration') and the rule that statements by persons other than the witness who is testifying are inadmissible as evidence of the facts stated (the rule against hearsay in the strict sense).[32]

The *Royal Commission on Criminal Justice*, which reported in 1993, considered the law on hearsay in criminal cases to be "exceptionally complex and difficult to interpret".[33] It

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31 "Disclosure of defence unused expert evidence reports", 22 Nov 2002 *New Law Journal*, David Corker, Corker Binning, Solicitors

32 Cross and Tapper on Evidence", 9th edn., 1999, pp.529-30

33 Cm 2263

concluded that in general, the fact that a statement is hearsay should mean that the court places rather less weight on it, but not that it should be inadmissible in the first place. But it recommended that, before the present rules were relaxed the issues should be thoroughly and expeditiously explored by the Law Commission. Accordingly, in 1994, the Home Secretary made a reference to the Law Commission:

> to consider the law of England and Wales relating to hearsay evidence (1) and evidence of previous misconduct (2) in criminal proceedings; and to make appropriate recommendations, including, if they appear to be necessary in consequence of changes proposed to the law of evidence, changes to the trial process.

A. The Law Commission consultation and report

In 1995, the Law Commission published a Consultation Paper *Evidence in Criminal Proceedings.*[34] In it, the Law Commission put forward seven options :

- Preserving the present law – an option which was immediately rejected on the basis that some change was needed
- The free admissibility approach – complete abolition of the hearsay rule
- The "best available evidence" principle – under which the court would be required to hear first hand evidence when it was available, but otherwise would have to take the best evidence it could obtain
- An exclusionary rule with an inclusionary discretion – so that hearsay would be prima facie inadmissible, but there would be a discretion to include it if it were shown to be reliable and that it was necessary to admit it in the interests of justice
- Adding an inclusionary discretion to the existing scheme – retaining the hearsay rule and existing exceptions but adding a residual judicial discretion
- Categories of automatically admissible evidence – providing certainty, but with the risk that some unforeseeable category of cogent hearsay evidence might fall outside, however carefully the categories were drafted
- Categories of automatic admissibility plus a limited inclusionary discretion – remedying the inflexibility of the previous option by the addition of a very limited discretion

The last of those was the Law Commission's preferred option, and was approved by a clear majority of those who responded. Broad support came from a number of judges and from professional bodies such as the Law Society, London Criminal Courts' Solicitors' Association, General Council of the Bar and the Serious Fraud Office.[35]

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[34] Consultation Paper No 138

[35] Evidence in Criminal Proceedings: Hearsay and Related Topics, Law Com No 245, para 6.51, http://www.lawcom.gov.uk/library/lc245/pt1.htm#para1.1

Accordingly, in its Report published in 1997,[36] the Law Commission recommended that there should continue to be an exclusionary hearsay rule, to which there would be specified exceptions, plus a discretion to admit hearsay evidence which would otherwise be inadmissible, where this was in the interests of justice.

> **The rule against hearsay**
> 1.32 We recommend a statutory formulation of the rule against hearsay. Our formulation would mean that any statement not made in oral evidence in the proceedings is inadmissible if it is adduced as evidence of any matter stated; but a matter is "stated" only if it appears to the court that the purpose, or one of the purposes, of the person making the statement was to cause another person to believe the matter, or to cause another person to act, or a machine to operate, on the basis that the matter is as stated. Thus the rule would not preclude evidence of "implied assertions" by persons whose words or conduct are not intended to communicate any information at all.
>
> 1.33 We believe that it is also necessary to have a rule governing statements which are not made by a person but depend for their accuracy on information supplied by a person, and that such a statement should not be admissible as evidence of any fact contained in it unless the information on which it is based is proved to have been accurate.

The categories of case in which the Law Commission recommended hearsay evidence should be admissible were:

1. Hearsay to be automatically admissible:
    - where the declarant of the statement is unavailable
    - where the hearsay is “reliable” (e.g. business documents)
    - admissions and confessions
2. Hearsay to be admissible at the discretion of the court:
    - frightened witnesses
    - experts’ assistants
    - previous statements of witnesses
    - previous inconsistent statements
    - “the safety valve”
    -

They also recommended the retention of a number of common law exceptions. A short explanation of these categories is contained in Part XIV of the Report. The Law Commission’s explanation of “the safety valve” was:

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[36] Evidence in Criminal Proceedings: Hearsay and Related Topics, Law Com No 245, http://www.lawcom.gov.uk/library/lc245/pt1.htm#para1.1

> We are conscious that however much thought goes into defining the limits of the automatic categories, some unforeseeable instances of very cogent hearsay will fall outside them. We therefore recommend a limited inclusionary discretion (a "safety-valve") to admit hearsay where the court is satisfied that, despite the difficulties in challenging the statement, its probative value is such that the interests of justice require it to be admissible.[37]

In accordance with their usual practice, the Law Commission's Report included a draft Bill giving effect to their detailed recommendations:

> Our aim has been to produce a single Bill which contains the rules on the admissibility of hearsay evidence (including previous statements of witnesses) and all exceptions, whether arising originally at common law or by statute; but, where we have concluded that existing common law or statutory exceptions should be retained without amendment, we have not sought to restate them in the Bill, but merely to preserve them.[38]

B. The Auld Report

Lord Justice Auld did not agree with the Law Commission. He thought that there was a strong case for reversing the rule so as to render all relevant hearsay admissible, leaving its weight for determination by the tribunal. He said that:

> 100 A number of contributors to the Review have suggested that those recommendations do not go far enough in their relaxation of the rule. And there is much distinguished academic support, past and present, for substituting for the present, exclusionary rule subject to exceptions, an inclusionary approach, leaving the fact finders to assess its weight …[39]

His recommendation was:-

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

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[37] ibid para 1.39

[38] Law Com No 245, para 1.14

[39] Review of the Criminal Courts of England and Wales, Report by the Right Honourable Lord Justice Auld, October 2001, p.558, http://www.criminal-courts-review.org.uk/ccr-00.htm

C. The White Paper

Three paragraphs were devoted to the subject of hearsay evidence in the White Paper*: Justice For All*, where it was said:

> … the right approach is that, if there is a good reason for the original maker not to be able to give the evidence personally (for example, through illness or death) or where records have been properly compiled by businesses, then the evidence should automatically go in, rather than its admissibility being judged. Judges should also have a discretion to decide that other evidence of this sort can be given. This is close to the approach developed in civil proceedings.[40]

D. The *Criminal Justice Bill*: Chapter 2 of Part 11

Nevertheless, *clauses 98* to *120* of the *Criminal Justice Bill* are based very closely on the clauses in the Law Commission's draft Bill. Whereas the Law Commission's draft begins:

> **Hearsay:main provisions**
> 1.—(1) In criminal proceedings a statement not made in oral evidence in the proceedings *is not admissible* as evidence of any matter stated *unless*—
> (a) this Act or any other statutory provision makes it admissible,
> (b) any rule of law preserved by section 6 makes it admissible, or
> (c) all parties to the proceedings agree to it being admissible.
> *(emphasis added)*

and provides in a separate clause that:

> 8. In criminal proceedings a statement not made in oral evidence in the proceedings is admissible as evidence of any matter stated if the court is satisfied that, despite the difficulties there may be in challenging the statement, its probative value is such that the interests of justice require it to be admissible.

The Bill's provisions begin –

> **98 Admissibility of hearsay evidence**
> (1) In criminal proceedings a statement not made in oral evidence in the proceedings *is admissible* as evidence of any matter stated *if, but only if*—
> (a) any provision of this Chapter or any other statutory provision makes it admissible,
> (b) any rule of law preserved by section 102 makes it admissible,
> (c) all parties to the proceedings agree to it being admissible, or

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[40] "Justice for All", July 2002, CM 5563, http://www.cjsonline.org.uk/library/pdf/CJS_whitepaper.pdf para.4.61

> (d) the court is satisfied that, despite the difficulties there may be in challenging the statement, it would not be contrary to the interests of justice for it to be admissible
>
> *(emphasis added)*

and goes on in subsection (2) to provide a non-exhaustive list of factors to which the court must have regard in deciding whether such a statement should be admitted. These are: -

> (a) how much probative value the statement has (assuming it to be true) in relation to a matter in issue in the proceedings, or how valuable it is for the understanding of other evidence in the case;
> (b) what other evidence has been, or can be, given on the matter or evidence mentioned in paragraph (a);
> (c) how important the matter or evidence mentioned in paragraph (a) is in the context of the case as a whole;
> (d) the circumstances in which the statement was made;
> (e) how reliable the maker of the statement appears to be;
> (f) how reliable the evidence of the making of the statement appears to be;
> (g) whether oral evidence of the matter stated can be given and, if not, why it cannot;
> (h) the amount of difficulty involved in challenging the statement;
> (i) the extent to which that difficulty would be likely to prejudice the party facing it

as well as "any others it considers relevant".

The preservation of certain common law categories of admissibility in *clause 102* follows the method and subjects in the Law Commission draft Bill as do the provisions for multiple hearsay. Also followed, in *clause 109*, is the Law Commission clause requiring the judge to stop the trial at any time after the close of the prosecution case if satisfied that the case is based wholly or partly on hearsay evidence which is so unconvincing that a conviction would be unsafe.[41]

The Bill does not, however, contain any express bar to a conviction based wholly on hearsay evidence.

There is a saving in *clause 125*, that no provision in *Part 11* will have effect in relation to criminal proceedings begun before the commencement of that provision. The Law Commission draft provided that the Act was to have effect in relation to criminal proceedings begun on or after an appointed day, and the definition of "criminal proceedings", in both cases is simply "criminal proceedings in relation to which the strict rules of evidence apply". There does not appear to be any guidance, in this Part, as to whether for these purposes a retrial with new evidence under *Part 10* (retrial for serious

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[41] Law Commission clause 17 also applied to trial in magistrates' courts

offences), should be regarded as part of the same proceedings as the original trial. If it is part of the same proceedings, it would seem to follow that the changes to the rules of evidence made by *Part 11* would not apply in a retrial of proceedings begun before *Part 11* came into force.

E. European Convention on Human Rights

Article 6 of the *European Convention on Human Rights* provides:-

> **Article 6 – Right to a fair trial**
> 1 In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.
>
> 2 Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.
>
> 3 Everyone charged with a criminal offence has the following minimum rights:
> a to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;
> b to have adequate time and facilities for the preparation of his defence;
> c to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;
> d to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
> e to have the free assistance of an interpreter if he cannot understand or speak the language used in court.

After considering the Strasbourg caselaw, on Article 6(3)(d) in particular the Law Commission had stated their belief, in their Consultation Paper, that:-

> …the risk of there being a breach of the Convention where a person stands to be convicted on hearsay evidence alone is sufficiently serious to warrant requiring the court to stop the case where hearsay is the only evidence of an element of the offence. … We provisionally propose that unsupported hearsay should not be sufficient proof of any element of an offence.[42]

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[42] para 9.5

Following "cogent and powerful criticisms" on consultation, the Law Commission reconsidered their provisional proposal, and concluded:

> that the Convention does not require direct supporting evidence where it is sought to prove a particular element of the offence by hearsay. Adequate protection for the accused will be provided by the safeguards we propose, and in particular by recommendation 47.[43] We are inclined to agree with the suggestion of Phillips LJ that we ignore that provisional proposal "unless and until the jurisprudence of Strasbourg demonstrates that our hearsay rules are in conflict with the Convention"

F. Comments

The Bar Council commented in their response to the *White Paper* that the hearsay proposals were outlined so briefly that it was difficult to assess their scope. In responding to the *Auld Report*, they had said:

> 30. A better approach, it is suggested, is that of the Law Commission's inclusionary approach to hearsay. The Law Commission recommended retaining the rule but having a more flexible and wider range of exceptions. First hand hearsay, even in oral form, would be admissible where the witness was unavailable. Unavailability would have to be strictly proved.The definition of hearsay could be re-defined so as to restrict it to intentional assertions. The Law Commission proposed an important safety valve. That is governed by a consideration of the interests of justice. This rule might render third party confessions admissible. This course may find a comfortable middle ground between abandoning the hearsay rule in its entirety and maintaining it in its current state. It may well go some way towards preserving the fairness of the principle as it operates in certain circumstances.
>
> 31. In any event, Auld recognises that "the rules of evidence should facilitate rather than obstruct the search for truth and should simplify rather than complicate the trial process". This sensible general principle is subject to the equally important principle that such rules should not create unfairness. Auld also takes no account of the dangers of admitting evidence from legally suspect witnesses: accomplices, informants, witnesses with an axe to grind.
>
> 32. It is also submitted that the proposed rule is too broad and offends against Convention jurisprudence. If hearsay evidence is used then the rights of the accused must be preserved and such incursions into the rights of a defendant "strictly necessary". As Keir Starmer has observed: "This clearly has important ramifications for UK law and practice in the criminal sphere".[44]

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[43] see above, the judge will have power to stop a trial based on unconvincing hearsay evidence.

[44] http://www.lcd.gov.uk/criminal/auldcom/lorg/11.htm

Liberty also favoured the Law Commission approach.

> Liberty prefers the following specific features of the Law Commission's proposals to those set out in the Auld Review.
>
> A new Criminal Evidence Code should retain the general rule against hearsay, subject to specified exceptions drawing primarily on those exceptions to the rule which already exist.
>
> The availability of a 'safety valve' (a discretionary power to admit otherwise inadmissible hearsay) would address the needs of both prosecution and defence to rely on evidence which, whilst technically inadmissible, deserves to be admitted in the interests of justice. In our view, if it were to be introduced, such a rule would only be appropriate if it were defined by clear reference to the principles of ensuring a fair trial as established in the Article 6 caselaw. As far as defendants are concerned, this would reflect an emerging willingness by the appellate courts to quash a conviction as unsafe it a defendant, subjected to the harsh operation of the hearsay rules, is denied a fair trial.

Other respondents to the *Auld Report* also expressed preference for the Law Commission approach.

The Legal Action Group criticised the *Auld Report*:

> L J Auld admits having been heavily influenced by John Spencer, who has a particular view of evidence - especially hearsay evidence. This illustrates LAG's overall concerns about the form of the present review; both Royal Commission and Law Commission processes are structured so as to avoid inappropriate influence by one person. Contrary to the view taken by the Law Commission, L J Auld recommends that hearsay should generally be admissible, and that fact finders should be trusted to assess the weight of the evidence. We have expressed concerns about this approach, above. Spencer and Auld's views on hearsay evidence run counter to the weight of opinion that was presented to, and accepted by, the Law Commission. We do not think that the case has been made out for making changes that fly in the face of the Law Commission's conclusions, especially in the absence of any reference to empirical research on the impact of hearsay evidence. [45]

The Association of Chief Police Officers thought otherwise:

> We consider that the Report has identified the areas of the law of evidence most urgently in need of reform: the injustice of evidence-giving so often being turned unnecessarily into a test of memory; the improper exclusion of relevant evidence because of overly restrictive rules against hearsay and character evidence; and the waste and confusion inherent in the present use of expert witnesses. If the

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[45] http://www.lcd.gov.uk/criminal/auldcom/lorg/lorg4.htm

> recommendations in relation to hearsay and character evidence are general in nature, this is partly reflective of Lord Justice Auld's conception of the remit of his report. He is, however, pointing in the right direction. [46]

The Law Society suggested that there should be wider consultation:

> 23. We are opposed to a general relaxation of the general law on governing the admissibility of hearsay evidence and consider the current statutory exceptions sufficient. The law of evidence has developed organically and the safeguards are present for good reason born of judicial experience in ensuring a fair trial. The adoption of a civil or family court approach is misconceived because the objectives in such cases are completely different from the objectives in a criminal trial. A person accused of a crime should not be denied the opportunity to cross examine the maker of a statement adverse to him or her.
>
> 24. There should be no circumstances in which hearsay evidence should automatically be admitted. If it is suggested that such evidence is to be admitted for 'good reason' a judgement has to be made as to whether such a reason exists, and this must be dealt with judicially.
>
> 25. The law of hearsay is not properly understood, even by practitioners. The law needs to be codified in statutory form and detailed proposals need to be published for widest consultation.[47]

That view was echoed in an article in the *Criminal Law Review*:

> By contrast to these detailed proposals [on double jeopardy] the White Paper's stance on rules of evidence is under-developed. The commitment in last year's Paper to codes of criminal evidence and procedure is repeated, but there is no further discussion of the kind of codes the government has in mind. Unlike the criminal code they will certainly not be based on a principle of restatement of the existing law. The government clearly wants to follow Auld in relaxing the strict rules of admissibility, and so it suggests, for example, that there should be greater use of a witness's reported statements, and of a defendant's convictions. At the same time the government seems not to have finally settled its attitude to the schemes suggested by the Law Commission in relation to hearsay and character evidence, with the result that the changes remain open for further consultation. One reform the paper does rule out – and this will be welcomed by many criminal lawyers – is the routine introduction of the defendant's convictions in all cases. It appears that the risks of prejudice and of Article 6 violations have persuaded the government that this is not an acceptable strategy.[48]

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46 ACPO's response to the Auld Report, http://www.lcd.gov.uk/criminal/auldcom/cja/cja13.htm

47 Law Society's response to the White Paper, http://www.lawsoc.org.uk/dcs/pdf/

48 CLR [2002] 603

Liberty thought that the Law Commission proposals should be followed:

> 4.60 Liberty agrees that there is a clear need for rationalisation and codification of the present rules on hearsay evidence.
>
> We note that the existing rules on hearsay evidence, complex as they may be, have evolved in large part to protect the interest of defendants in obtaining a fair trial. Any future reforms must continue to provide vigilant protection of that interest and in particular ensure that the rules on hearsay do not compromise the defendant's unqualified right to a fair trial.
>
> Liberty accepts that in certain circumstances there may be arguments for admitting cogent and reliable evidence which would presently be excluded as inadmissible hearsay. The present rules sometimes lead to unfairness for defendants as well as the victims of crime, for instance by excluding evidence which shows that someone else has confessed to a crime.
>
> However, we remain convinced that in most cases the best evidence is evidence given in open court, in the presence of the accused and the fact-finders, and subjected to full cross-examination. We therefore believe that an exclusionary general rule, formulated with appropriate and well-defined exceptions, continues to be the best and only acceptable approach to ensuring fairness in criminal trials.
>
> In our view, the most forceful justification for the hearsay rules is that they allow defendants to challenge the facts asserted by a witness through direct cross-examination. Evidence which has been permitted without challenge but is disputed is inevitably less reliable for that reason. In concrete terms, our view is that the prejudice caused by such material inevitably will outweigh its probative value, be it considered by lay magistrates, juries, or professional judges.
>
> The view expressed in the Auld Review of the criminal courts is that jurors may be more competent that we give them credit for in assessing the weight of the evidence. Unfortunately this provides little reassurance to defendants who are convicted substantially on the basis of hearsay evidence. Moreover, as juries give no reasons for their findings no one will ever know whether they have indeed understood the principles by which weight should accorded to different kinds of evidence.
>
> The hearsay rules also ensure that the evidence is given in the presence of the fact-finder, who is thereby able to consider the demeanour of the witness and thereby to form a view of his credibility. We accept that it is not always possible to assess credibility merely by reference to a witness's demeanour, but it is our firm view and experience that in very many cases, fact-finders are substantially assisted in forming a view of a witness's evidence by observing the way in which evidence is given.
>
> Although not referred to in the White Paper we would draw careful attention to Article 6(3)(d) of the European Convention. This provides that everyone charged with a criminal offence has the right 'to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his

behalf under the same conditions as witnesses against him'. So far as it relates to the evidence of witnesses who do not give oral evidence at trial, the basic approach to hearsay in the Convention cases is that 'all the evidence must in principle be produced in the presence of the accused at a public hearing with a view to adversarial argument'.

We do recognise that the right to confront one's accuser under Article 6 is not an absolute requirement but forms an essential part of any assessment of the overall fairness of the proceedings. In determining whether a defendant was afforded a fair trial other relevant considerations will include the reasons for a witness's non-attendance and the importance of the hearsay evidence in the proceedings as a whole. It is, of course, essential, that any codification of the law of evidence takes into account the existing ECHR case law on the use of hearsay.

Hearsay was considered by in detail both by the Law Commission and in the Auld review and Liberty prefers the following specific features of the Law Commission's proposals.

A new Criminal Evidence Code should retain the general rule against hearsay, subject to specified exceptions drawing primarily on those exceptions to the rule which already exist.

The availability of a 'safety valve' (a discretionary power to admit otherwise inadmissible hearsay) would address the needs of both prosecution and defence to rely on evidence which, whilst technically inadmissible, deserves to be admitted in the interests of justice. In our view, if it were to be introduced, such a rule would only be appropriate if it were defined by clear reference to the principles of ensuring a fair trial as established in the Article 6 caselaw. As far as defendants are concerned, this would reflect an emerging willingness by the appellate courts to quash a conviction as unsafe if a defendant, subjected to the harsh operation of the hearsay rules, is denied a fair trial.[49]

Justice had similar reservations:

Hearsay

107. The White Paper describes the law on hearsay as an area 'ripe for change'. It acknowledges that hearsay evidence is generally less satisfactory than first hand evidence but suggests that there are cases where this is not so or where hearsay may be the only evidence available.

108. The approach suggested resembles the position in civil proceedings. The test should be 'if there is good reason for the original maker not to be able to give the evidence personally (for example through illness or death) or where records have been properly compiled by business than the evidence should automatically go

[49] Liberty's Response to the Home Office White Paper "Justice for All".

in'. The proposal is also linked to a recommendation that it should be easier for witnesses to give their evidence by reference to previous and original statements.

109. The present rules on hearsay need rationalising because they can operate unfairly and inconsistently for both prosecution and defendant. However, it is important to understand the purpose of the rule to ensure that the essential protection it provides remains in tact. The rule against hearsay protects the defendant against evidence which is not on oath. The rule is based on the presumption that the truth is best discovered by hearing the unrehearsed evidence, on oath or affirmation, of witnesses who have actually perceived relevant events and who are then subjected to cross examination in the presence of the court. The problem with hearsay evidence is that it involves statements which not are made before the court. This means that the maker of the statement is not cross-examined and his or her demeanour cannot be observed. Demeanour can be a strong indicator of veracity or mendacity and is of great importance to the fact finders at a trial.

110. In international law, a fundamental element of the principle of equality of arms is the right of the accused to call and to question witnesses. This is confirmed by article 14(3)(e) of the ICCPR and article 6(3)(d) of the European Convention. This right is 'designed to guarantee to the accused the same legal powers of compelling the attendance of witnesses and of examining or cross-examining any witnesses as are available to the prosecution'. However, this right is not without limitation. There are exceptions to this principle but they must not infringe the rights of the defence.

111. The wholesale removal of the rules of admissibility would be disastrous in an adversarial system concerned with the fairness and not just the relevance of evidence. This must be borne in mind when considering the compatibility of any reform with article 6(1) and article 6(3)(d) ECHR. The process as a whole must be considered so as to guarantee that it is fair - the principles prohibit the admission of evidence which may place the defendant at an unfair disadvantage, or which deny him or her the opportunity to test prosecution evidence.

112. Reform should ensure that the principle behind the protection remains so that the balance of fairness is maintained. It is also important to note that there are significant differences between the civil and criminal justice systems which mean that the rules from one cannot easily be transported to the other. The standard of proof beyond reasonable doubt applicable in criminal proceedings demands that convictions should be sustained only on the basis of evidence of undoubted reliability, meaning that greater dangers may flow from the admissibility of hearsay evidence in criminal cases.

113. The White Paper's proposals allow automatic admission of evidence which cannot be given in court because of 'good reason'. It also recommends that 'judges should …have discretion to decide what other evidence of this sort can be given'. This leaves open the possibility of wide discretionary powers operating without a detailed framework of well-defined exclusions. More detail on the proposals is clearly required before a final opinion can be given, but we would

suggest that the Law Commission's report on the subject be thoroughly considered.

114. In its report, the Commission recommended that a court should have a very limited discretion to admit statements of absent witnesses where the interests of justice require it. These recommendations would make it easier for an absent witness's statement to be admitted, so the Law Commission stressed that it was vital to create adequate safeguards for the other side. The recommended safeguard was the duty of the judge to direct the jury to acquit, where witnesses had not been cross-examined and where the case rested wholly or partly on their evidence of a witness.

115. Justice supports the Commission's recommendation. We would also draw attention to the dangers in increasing the admissibility of such evidence in the Magistrates' Court given the problems that exist with the decision-making process here.

116. Finally, it is interesting to note that other common law countries have grappled with this problem. In Canada, the rule was, until recently, that out of court statements could only be admitted for the truth of their content if they fit into one of the hearsay rules. The Supreme Court of Canada changed this rule with trilogy of cases: R. v. Khan, R. v. Smith and R. v. K.G.B.. The new rule is that hearsay may be admitted if the statement is necessary and the circumstances in making the statement are reliable enough to offset the traditional hearsay dangers. Even if a statement fits into a traditional hearsay exception, it will not be admitted unless it is necessary and the statement was made in circumstances of reliability.

117. In conclusion, Justice calls for an extensive and comprehensive review of the current state of the law of evidence. We agree that the hearsay law requires reform but we are concerned that the current law will be weakened merely to achieve an increased number of convictions. More rigid safeguards like the admissibility test adopted in Canada require further consideration, as do the recommendations of the Law Commission's review.[50]

IV Evidence of bad character

A. The Law Commission consultation and Report

In their Report on *Evidence of Bad Character in Criminal Proceedings* published in October 2001, the Law Commission outlined the current law as follows:

1.3 Presently, evidence of misconduct of the defendant on an occasion other than that leading to the charge may be introduced by the prosecution as evidence of

[50] "Justice for all? Justice responds to radical proposals for change of the criminal justice system in the White Paper 'Justice for All'"(October 2002)

> "similar fact" or by the prosecution or the co-defendant in the limited circumstances provided for by statute, principally under section 1 of the Criminal Evidence Act 1898. Evidence of a person's bad character may, however, also be introduced by a defendant in respect of witnesses who are not codefendants or in respect of people who are not witnesses. The only limitation to this freedom is the requirement that the evidence be "relevant". [51],

The Law Commission described the problems in the current law in considerable detail in part IV of their Report and provided the following summary:

> **The Principal Defects**
>
> **Evidence adduced as part of the prosecution case in chief**
>
> - ***"similar fact"***
>
> There is still confusion about the law on "similar fact evidence". The test for the admissibility of this kind of evidence does not, in our view, give clear enough guidance on how it is to be applied.
>
> - ***background evidence***
>
> If evidence is admitted as "background" evidence its value does not have to be assessed in the light of its prejudicial effect (as it would if it were "similar fact evidence") and yet it may be very prejudicial. Moreover, it is not clear what counts as "background" evidence.
>
> - ***Theft Act 1968, section 27(3)***
>
> This provision is neither justified nor useful.
>
> **Evidence adduced in the course of cross-examination**
>
> The statutory rules are supposed to have the effect that only bad character evidence which goes to credibility is admitted in cross-examination of a defendant who "loses the shield", but the courts can and do admit evidence which does not relate to credibility.
>
> The rule that bad character evidence on the "tit-for-tat" basis may only be adduced in cross-examination means that witnesses are inadequately protected from irrelevant cross-examination on their character.
>
> The fear of "losing the shield," which should deter a defendant from making gratuitous attacks, does not bite where that defendant does not testify, or has no criminal record to be revealed. This puts a premium on tactical decisions and distorts the process.
>
> Defendants may be inhibited from putting their true defence on the central set of facts for fear of their character going in.
>
> The statute does not preclude evidence of the defendant's bad character being admitted even where its prejudice outweighs its relevance to the defendant's credibility.
>
> There is no power to prevent the record of a defendant being admitted where that defendant has undermined the defence of a co-accused. Unfairness can result.

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[51] Law Com No.273

The options for reform on which they consulted were:-

> Option 1: - adduce the defendant's criminal record at the start of every trial
> Option 1A:- adduce the defendant's criminal record for similar offences at the start of every trial
> Option 2:- adduce the defendant's record of sex offences in sex cases
> Option 3: - allow evidence of the defendant's previous misconduct to be adduced only where it is an ingredient of the offence charged
> Option 4:- a single exclusionary rule with an exception for evidence whose likely prejudicial effect outweighs its probative value
> Option 5:- an exclusionary rule with a single exception for evidence whose probative value outweighs its likely prejudicial effect
> Option 6: - an exclusionary rule with separate exceptions for evidence admissible in chief and for evidence subsequently becoming admissible.

Following a discussion of the options described in the consultation paper and the reaction to them, the Law Commission concluded

> 6.67 Our preference, therefore, is still for a structure along lines similar to option 6 –
> namely, an exclusionary rule with a specified exception or exceptions. Moreover, we now believe that the problems discussed in the consultation paper are best resolved by means of a general approach which extends to evidence of the bad character of witnesses and other non-defendants, rather than defendants alone.
> In the next Part we give an overview of this scheme.
> […]
> 7.1 The overall aim is that all the rules on admissibility of evidence of a person's bad character should be set out in one statute. This entails replacing the existing mélange of rules deriving from statute and common law with a single comprehensive set of rules.
> 7.2 At the heart of our proposals are five fundamental considerations, namely:
> (1) No person who is involved in a criminal trial should be subject to a gratuitous and irrelevant public attack on their character.
> (2) To adduce evidence of a person's bad character in a public forum is, prima facie, such an invasion of their privacy and so prejudicial to them that it should not be adduced where any relevance it may have to the issues the fact-finders have to decide is of no real significance or is only marginal.
> (3) The fact-finders in any criminal trial must have all relevant material placed before them so as to enable them to perform their function, consistent with doing justice to the parties whose accounts they have to judge.
> (4) Wherever it is appropriate for aspects of a person's character to be adduced in evidence it should only be permitted to the extent that it is relevant for the fact-finders to be aware of it for the performance of their task.
> (5) In the case of evidence of the bad character of a defendant, the probative value must be sufficient to outweigh the prejudicial effect of the evidence (except where the evidence is being adduced by one defendant about another).

There were three organising principles of the new structure for the rules on evidence of bad character. The first was that a distinction was to be drawn between the evidence about

the events for which the accused is being prosecuted; the investigation and prosecution for offences arising out of the event, and any evidence of bad character going outside that central set of facts. The second was the purpose of the evidence, so that rules as to admissibility of bad character evidence outside the central set of facts should be organised according to the purpose for which it was admitted, namely whether it is explanatory, incriminatory, goes to credibility or is corrective. The third concerned whether the evidence was to be adduced by the prosecution, the defendant or a co-defendant.

Also, eight key principles were said to be at the heart of the scheme, namely:

> (1) All parties to the trial should feel free to present their case on the central facts in issue free from the fear that this will automatically result in previous misconduct being exposed.
> (2) Insofar as the context permits, defendants and non-defendants should be equally protected from having their bad character revealed for no good reason.
> (3) Evidence of a person's bad character extraneous to the central set of facts should only be presented to the fact-finders if the court gives permission; and if the evidence is within the central set of facts, the court's permission is not needed.
> (4) In considering whether to give permission the court must be satisfied that a test has been met, having regard to identified factors.
> (5) No such evidence may be adduced unless it is of substantial value for determination of the case (the enhanced relevance test).
> (6) A person's character should not be regarded as indivisible. If certain parts of it are sufficiently relevant to be revealed to the fact-finders then so be it but no more should be revealed than is necessary for the interests of justice to be served.
> (7) If it is to be revealed it will be for the fact-finders to make of it what they will, with appropriate guidance on the risks inherent in such evidence.
> (8) If a defendant's character should be revealed to the fact-finders he or she should not be able to avoid it by taking tactical steps such as not givingevidence.

To make the law fairer, the Law Commission proposed:

> (1) All the rules will be in one statute and will therefore be accessible.
> (2) They will give greater protection for non-defendants.
> (3) They will result in the elimination of "tit-for-tat" unfairness thereby giving greater protection for defendants. (Under the current law, a defendant's criminal record can be admitted on a "tit-for-tat" basis where the defendant has attacked the character of a prosecution witness.)
> (4) A co-defendant with a criminal record is less likely to suffer the admission of that record where it is not warranted.
> (5) Judges will have to give and juries seek to comply with fewer nonsensical directions drawing bizarre and unreal distinctions between credibility and propensity.
> (6) The establishment of consistent statutory tests coupled with guidance for courts when ruling on admissibility will result in greater consistency of decisions.
>
> 21. We are unable to say whether, if our scheme were carried into effect, more or less bad character evidence would be presented to fact-finders. We can see

> aspects of the scheme which might lead to less call for such evidence to be admitted on a "tit-for-tat" basis because witnesses are given greater protection from gratuitous attack and, under our scheme, the whole of a defendant's bad character is not automatically admissible if the defence attack a witness's character. On the other hand, we can also see that making a final break from formulae such as those requiring that bad character evidence be "strikingly similar" may mean that more evidence of bad character would become potentially admissible, subject always to the court's judgment on the impact of its potentially prejudicial effect.

They proposed a new scheme which they described in detail in the Report and provided the following summary of it.

> 3. Fundamental to the scheme we recommend is the idea that, in any given trial, there is a central set of facts about which any party should be free to adduce relevant evidence without constraint – even evidence of bad character. Evidence falls within this central set of facts if it has to do with the offence charged, or is evidence of misconduct connected with the investigation or prosecution of that offence. We recommend that evidence of bad character which falls outside this category should only be admissible if the court gives leave for it to be adduced, or all parties agree to its admission, or it is evidence of a defendant's bad character and it is that defendant who wishes to adduce it.
>
> 4. An important feature of our scheme is that this basic rule applies equally whether the evidence is of the bad character of a defendant or of anyone else. Thus witnesses, no less than the defendant, will be protected against allegations of misconduct extraneous to the events which are the subject of the trial, and which have only marginal relevance to the facts of the case. For the purpose of deciding whether the evidence has sufficient relevance for leave to be granted, the same criteria will apply to defendants and non-defendants. Defendants, however, will have additional protection from the prejudicial impact of such evidence, to reflect the fact that it is their liability to criminal sanction which is at stake.
>
> 5. Under our scheme, leave may be given to adduce evidence of the bad character of a non-defendant if
>
> > (1) it has substantial explanatory value, or
> > (2) it has substantial probative value in relation to a matter in issue in the proceedings which is of substantial importance in the context of the case as a whole.
>
> 6. Leave may be given to adduce evidence of the bad character of a defendant in four situations, the first two of which correspond to those in which evidence of the bad character of a non-defendant may be admitted.
>
> 7. First, leave may be given to any party if the evidence has the same degree of explanatory value as would be required in the case of a non-defendant, and, in addition, the interests of justice require it to be admissible, even taking account of its potentially prejudicial effect.

8. Secondly, leave may be given to the prosecution if

(1) the evidence has substantial probative value in relation to a matter in issue which is itself of substantial importance, and

(2) the interests of justice require it to be admissible, even taking account of its potentially prejudicial effect. If it has probative value only in showing that the defendant has a propensity to be untruthful, leave may not be given unless, in addition,

(3) the defendant has suggested that another person has a propensity to be untruthful, and

(4) in support of that suggestion the defendant adduces evidence of that person's bad character which falls outside the central set of facts, and

(5) without the evidence of the defendant's bad character the fact-finders would get a misleading impression of the defendant's propensity to be untruthful in comparison with that of the other person.

9. Thirdly, leave may be given to the prosecution if

(1) the defendant is responsible for an assertion which creates a false or misleading impression about the defendant,

(2) the evidence has substantial probative value in correcting that impression, and

(3) the interests of justice require it to be admissible, even taking account of

its potentially prejudicial effect.

10. Fourthly, leave may be given to a co-defendant (D2) to adduce evidence of the bad character of a defendant (D1) if the evidence has substantial probative value in relation to a matter in issue between D2 and D1 which is itself of substantial importance in the context of the case as a whole. If it has probative value only in showing that D1 has a propensity to be untruthful, leave may not be given unless, in addition, D1's case is such as to undermine that of D2.

11. Where the court is required, for the purpose of any of the above rules, to assess either the probative value of evidence of a person's bad character, or whether the interests of justice require the evidence to be admissible even taking account of the risk of prejudice, it will be required to have regard to factors which are set out in the draft Bill.

12. In assessing the probative value of such evidence the court must assume its truth – unless it appears, on the basis of any material before the court, that no court or jury could reasonably find it to be true.

13. We recommend a number of procedural safeguards, designed to ensure a fair trial:

(1) Where a party is required to seek permission to adduce evidence of the defendant's bad character, rules of court may require notice to be given of their intention to do so, but the court may have a discretion to dispense with that requirement.

(2) In a trial on indictment, where evidence of the defendant's bad character has been admitted with leave and the judge is satisfied that the

> evidence is contaminated such that, considering the importance of the evidence to the case against the defendant, a conviction would be unsafe, the judge would be required to discharge the jury or direct the jury to acquit.
> (3) Where a court gives a ruling on the admissibility of bad character evidence, or on whether the case should be stopped under safeguard (2) above, it must give the reasons for the ruling in open court and those reasons must be recorded.
> (4) Where a defendant is charged with more than one offence, and evidence of the defendant's bad character is admissible on one of the offences charged but not on another, the court should grant any defence application for severance of the charges unless satisfied that the defendant can receive a fair trial.

> 14. We also conclude that the jury may need to be given warnings by the judge in two situations: first, where no evidence has been adduced about the defendant's character and there is a danger of speculation about it, and second, where there is a danger that the jury will give undue weight to bad character evidence which is admitted.

In accordance with their usual practice, the Law Commission's Report included a draft Bill giving effect to their detailed recommendations. As the Law Commission was on the point of publishing its final recommendations when Lord Justice Auld presented his Report, he did not think it appropriate to venture any firm recommendation. He did, however, explain how his own, long held and instinctive resistance to putting a defendant's previous convictions to a jury was tempered by:

> the reality of the present law that it mostly does not conceal from the tribunal of fact that a defendant has some – though not precisely what – criminal record. In the resultant scope for speculation, it is thus capable of engenering as much or more prejudice against him.[52]

B. The White Paper

1. The judge to decide relevance

A different approach was suggested in the White Paper:

> **Previous convictions and other misconduct**
> 4.54 Evidence of a person's previous convictions, or anything else suggesting a criminal tendency, currently cannot generally be referred to in court during a trial and, in the case of defendants with previous convictions, are only revealed at the time of sentencing.

[52] Review of the Criminal Courts of England and Wales, Report by the Right Honourable Lord Justice Auld, October 2001, para.11.114, http://www.criminal-courts-review.org.uk/ccr-00.htm

> Even when it can be referred to, juries are often asked to perform the almost impossible task of taking previous convictions into account for one purpose, such as credibility, but to ignore them when considering whether the defendant actually committed the crime or not.
>
> 4.55 On the face of it, there is an argument for simply having a defendant's previous convictions read out at the beginning of every trial as a matter of routine. But previous convictions, or some of them, may be irrelevant to the issues in the case. Research undertaken for the Law Commission shows that knowledge of previous convictions may prejudice a jury or magistrates unfairly against the defendant. It is essential that any changes do not jeopardise the defendant's right to a fair trial. Juries and judges need to make their decisions on the basis of the evidence of whether or not the defendant committed the crime with which he is charged rather than his previous reputation. That is why we are opposed to the routine introduction of all previous convictions as evidence in a case.
>
> 4.56 Currently the defendant's previous convictions can be introduced where he attacks the character of prosecution witnesses, often by introducing their previous convictions. The threat of introducing his previous convictions will frequently inhibit him from introducing character evidence about the prosecution witness. We favour an approach that entrusts relevant information to those determining the case as far as possible. It should be for the judge to decide whether previous convictions are sufficiently relevant to the case, bearing in mind the prejudicial effect, to be heard by the jury and for the jury to decide what weight should be given to that information in all the circumstances of the case. And this should be the case for witnesses as well as defendants.[53]

C. Comments

The White Paper offered six examples of how the approach would work. Some commentators have queried these illustrations, which were:-

> **Example 1**
> A doctor is charged with indecent assault against a patient. He denies that any indecency took place. Two separate patients in the last five years have made similar complaints resulting in separate trials. On both occasions the doctor has been acquitted.
>
> The matter in issue is whether the complainant is telling the truth when she says that the indecency took place, or the accused when he says it did not. It defies belief that it could only be an unlucky coincidence that this number of patients have made this kind of allegation and therefore the previous allegations are of clear probative value. The judge should therefore be able to rule that the jury

[53] Justice for All", July 2002, Cm 5563, http://www.cjsonline.org.uk/library/pdf/CJS_whitepaper.pdf

should hear of the previous allegations, taking into account the other evidence in the case and the risk that undue weight might be put on them.

Example 2
The defendant is charged with assaulting his wife. He has a history of violence, including a number of convictions for assault occasioning actual bodily harm, and there are witness accounts of him striking his wife in the past. He claims that she received her injuries falling down the stairs. In this case, his previous conduct could be thought relevant to determining whether the allegations of violence, or the defendant's version of events, are true. The judge should therefore be able to rule whether this is admissible, provided that he is satisfied that it can be put in its proper context by the jury.

Example 3
A 19 year old man is stopped at 2am driving a car that has been reported stolen. He tells the arresting officer that the car belongs to a friend of a friend and that he has been given permission to borrow the vehicle. Upon investigation it transpires that he has three recent previous convictions for taking without consent (TWOC). There is a statutory defence to TWOC if the court is satisfied that the accused acted in the belief that he had lawful authority, or that the owner would have consented had he or she known of the circumstances of the taking. In this case the young man's previous convictions are clearly relevant to whether his version of events is true and it would be for the magistrates to determine whether they are likely to have a disproportionate effect, in the context of the other evidence in the case.

Example 4
The defendant has come from abroad to live in England and is later charged with rape. A jury is unable to reach a verdict at a first trial. Shortly before the re-trial the defendant tries to leave the country but is arrested at the terminal. The fact that a defendant has absconded in the course of proceedings is unlikely to be admitted under the current law but our approach would make it more likely that it would be heard by juries.

Example 5
The defendant has a previous conviction for indecent assault. Many years later he is charged with possession of cannabis with intent to supply. He claims that the police have framed him and planted the drugs and the money. Under the current law, this defence opens the way for his own record to be put to him when he gives evidence, and this is likely to include his previous conviction even though it has little bearing on the issues in the case. Alternatively, the fear of his record coming out might prevent the defendant from presenting his full defence to the court. Under our proposals, it is unlikely that evidence of the indecent assault conviction would be considered sufficiently relevant to be admitted.

Example 6
The defendant is suspected of rape, during which the victim is threatened with a knife. He denies being in the area at the time. There is, however, evidence that the next day, the defendant tried to sell items from a handbag stolen from a car

> parked near the scene and broken into shortly before the rape took place. He has previous convictions for violent offences which have involved the use of a knife and for stealing handbags from cars. Here, the evidence of selling the stolen items, coupled with his previous convictions for theft, have a bearing on whether he was in the area at the time and should therefore be capable of being admitted by the judge. The convictions for violent offences would add to the jigsaw of identification evidence and should therefore also be admitted provided that the judge is satisfied that they will not have undue weight in the light of the other evidence.

Dr Brian Block, a magistrate, writing in *The Justice of the Peace* asked: [54]

> Does it really defy belief that three allegations in five years is an unlucky coincidence? Doctors are very vulnerable to this kind of accusation. Female patients are sometimes vindictive (particularly if *their* overtures are spurned as sometimes happens) and sometimes ignorant of the intimate procedures that the doctor has to perform. If, in the course of examining thousands of female patients over a five-year period three complain, he is indeed unlucky, but it does not mean that he is guilty. Yet, according to the wording of the example, if the possibility of coincidence "defies belief", it must logically follow that the previous allegations (of which he was acquitted) are not merely of "clear probative value" but proof of guilt.
>
> in [the second] example the case against the defendant is clearly that he has a propensity for violence, the inference being that if he has done it before he is likely to have done it again. In both the above examples the Judge, in allowing the evidence of previous incidents to be heard, is effectively determining the verdict.
>
> [the third] is a curious example for two reasons. First, the case turns on whether the defendant can offer the statutory defence and call evidence to prove it, and whether he can or cannot the question of previous convictions is not relevant. Secondly, it is surely ingenuous to expect magistrates to hear that he has three previous convictions for the same offence and then decide that they are not relevant and will not be taken into consideration when deciding their verdict. In the Crown Court, the Judge would know of previous convictions and if he decided they were not relevant or too prejudicial the jury would be kept in the dark and not expected to engage in mental gymnastics.
>
> My final example is example 6 . It is immediately apparent that none of the evidence which the drafter of the example believes should be admitted is directly relevant to rape. If the defendant had not said that he was not in the area none of it would be even remotely relevant. Even so, he may have been handling, which wuld be consitent with his not necessarily being in the rape area at the time. However, if one takes the evidence of trying to sell stolen items at its highest, and

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[54] Vol 166 p893

> coupling this with convictions of violence with a knife, there is still nothing to connect him with the rape. In the absence of other, more direct, evidence, he could not be convicted on his criminal history; if other evidence were available – direct identification by the victim, DNA evidence for example – he could be convicted on that evidence alone without calling in aid his criminal past
>
> No doubt it is possible to envision circumstances where evidence of previous convictions is so cogent that a good argument for its admission could be made. But in the examples quoted above previous convictions – and in the case of the doctor, previous acquittals! – would have been far more prejudicial than probative. After all, the reasoning behind their admissibility is that a person with a history of previous similar convictions is more likely to have committed the instant offence than a person with a clean record. That may well be the situation but it is a considerable departure from trying defendants on the facts of the case alone with the prosecution having to prove guilt beyond reasonable doubt on the evidence. Such a departure may well result in convicting more guilty parties but would also run the risk of convicting innocent persons with a record, and would surely encourage the police to "round up the usual suspects" if the very convictions that make them suspects may help to convict them again.
> […]
> This section of the White Paper will rewrite the law so that a criminal record and disposition will in many cases be the determining factor in securing a conviction, which seems incompatible with para.4.70 which claims that the changes to the trial system are intended to maintain justice for defendants based on the presumption of innocence before proof of guilt.

In its response to the White Paper, the Bar Council thought it was sad that the examples chosen failed to take account of the principles to be derived from two important decisions in the House of Lords,[55] and suggested that the examples, save for one, would be likely to be decided in the same way under the present law, the Law Commission's framework and the White Paper proposal.

In its response to the White Paper, Liberty also expressed strong opposition to the proposals:

> 4.51 The proposal to disclose previous convictions ignores the fact that any case relying on previous convictions is likely to be weak; and threatens to create a 'usual suspects' approach. Juries should decide in each case whether there is sufficient evidence to establish the guilt of the accused – that they committed this offence, this time - beyond reasonable doubt. If details of a defendant's previous convictions are introduced, this will almost inevitably lead juries to convict where there is insufficient evidence to meet this standard, on the basis that their previous history makes them 'more likely' to be guilty. There is a danger that any person who has their previous convictions disclosed in circumstances that go beyond the current position would not have a fair trial. It does not establish that they are the

[55] *R v P* [1991] 93 Cr App R 267 and *R v Z* [2000] 2 Cr App R 281

person who committed the offence but that they are the type of person who is more likely to commit such offences. The White Paper states (p.131) that,

"those that find themselves in prison are 13 times as likely to have been in care as a child, 13 times as likely to be unemployed, 10 times as likely to have been a regular truant, two and a half times as likely to have a family member convicted of a criminal offence and six times as likely to have been a young parent."

All these factors suggest a propensity for criminal behaviour and yet would not be suggested as relevant for ascertaining a person's guilt in a particular case. Why therefore should the existence of previous convictions?

If there are aspects of a defendant's character that are demonstrably relevant to the current case, if there are strikingly similar facts to a previous conviction or if a defendant with convictions suggests they are of good character, then the prosecution can already argue that previous convictions should be disclosed. In fact, Liberty believes that many prosecutors (and politicians) are not fully aware of the number of situations where they are already permitted to adduce evidence of previous misconduct. However, the presumption should remain against this happening.

Once someone has been convicted of an offence they will always be more likely to be convicted on future occasions. It will also make it more tempting for weaker cases to be presented to the court by the CPS and the police on the basis that evidence of previous misconduct is likely to secure a conviction. This will create a 'usual suspects' charter.

Disclosure of "other misconduct" and the use of the phrase 'anything suggesting a criminal tendency' could refer to adducing evidence of previous acquittals. If there is no conviction to show a court, the fact that there have been previous charges or even previous arrests, are the obvious ways to imply that someone is not of an entirely wholesome character. As with disclosure of previous convictions it will mean that a defendant will not have a fair trial but is even more difficult to justify. The approach taken is to potentially allow anything, however irrelevant to a particular case, which suggests that a person may be involved with offending to be heard by a court. It implies that a jury or magistrates' bench who acquitted 'got it wrong'.

Liberty has met with Lord Falconer to discuss our views on detailed proposals for the adducing of previous convictions and other misconduct to be put before the court. We have also written a paper relating to this which is available from Liberty and is added as an appendix to this submission. As well as the arguments of principle mentioned above, there are strong practical concerns about the way in which the proposals will impact on the day to day running of the magistrates' and crown courts which can be briefly mentioned here.

One of the main stated aims of the government's criminal justice proposals is to speed up the process so that cases are determined more rapidly. If the presumption over the admissibility of previous convictions changes, so that they are adduced before trial as a matter of course and it is for the defence to establish

that they should not be permitted, it will result in major delays to the court process. The proposals are aimed at crown court proceedings and frequently refer to the 'judge' and 'jury'. However a very high proportion of defendants pleading 'not guilty' have their cases heard in the Magistrates Court. As magistrates are arbiters of both law and fact, any trial in the magistrates' court would, in the vast majority of either way trials where the defendant has previous convictions, result in an application for the case to be heard in the crown court.

This is because if the case were heard by the magistrates they would be put in the position of hearing of the previous convictions before deciding whether disclosure is more prejudicial than probative. If it is, they will then have to forget they are aware of those convictions when considering whether the prosecution has established guilt. This is a wholly artificial situation. As a consequence, defendants with previous convictions in either way offences will be far more likely to elect trial in the crown court as there will at least be a possibility of the jury not being aware of their previous convictions. It could be argued that a similar situation exists under s.76 and s.78 of the Police and Criminal Evidence Act 1984 which deals with the admissibly of confession evidence. However PACE applications are relatively few and would have a minor impact on the running of the magistrates' court. It is worth noting that knowing that an application under PACE was likely to be an issue would be a strong factor in deciding to elect for a case to be heard in the Crown Court.

Further delay will also be caused in both Magistrates' and Crown Courts as defence solicitors and barristers will feel obliged in most cases to object to a prosecution application for previous convictions to be admitted. If they feel there is any chance of success they will be obligated to apply and they may well be expressly instructed by their client to do so. As caselaw develops it is certain there will be often considerable legal argument put forward by both sides over the admissibility of previous convictions which will use up a large amount of court time.

Justice also opposed the proposals:

91. Currently, the grounds on which previous convictions can be admitted are very limited. For example, under s1(f) Criminal Evidence Act 1898 a defendant may be cross examined on his previous convictions, with the leave of the judge, if he casts 'imputations' on prosecution witnesses or puts his character at issue. The rule on 'similar fact evidence' also allows the prosecution to adduce evidence of previous misconduct as part of the prosecution case.

92. Under the 1898 Act, previous convictions go to credibility and not the likelihood that defendant committed the offence: this is referred to as 'forbidden reasoning', although considerable scepticism has been expressed as to whether this can be avoided in practice. The restriction on the use of previous convictions results from the long-established principle that a defendant's guilt should not be decided on the basis of how many crimes s/he has previously committed, but on the evidence relating to the current charge alone. It protects the presumption of innocence and helps ensure a fair trial.

93. Most common law systems retain similar rules. For example, in Canada, previous convictions are not admissible unless the accused places his or her character in issue. Similar rules apply in New Zealand and Australia.

94. The admissibility of previous convictions can erode the presumption of innocence because of a reasoning process which leads juries or magistrates to the conclusion that, if a defendant has already been convicted of similar offences, then s/he is likely to have committed the current offence too. There is considerable evidence which confirms the value of the current system of protection. It also demonstrates that lay reasoning on the issue is more complicated than a simple assumption of a direct causal connection between previous convictions and the offence charged.

95. Research evaluating the impact of evidence of bad character by Dr Sally Lloyd-Bostock concluded that previous convictions had a prejudicial effect on the outcome of jury and magistrate trials. Some convictions, like indecent assault on a child, can be particularly prejudicial, whatever the offence charged. Lloyd-Bostock concluded: 'The results showed clearly that the magistrates' ratings of likely guilt were significantly affected by information about the defendant's prior record.' The research showed that a similar previous conviction, recent or old, had the greatest effect. An old dissimilar conviction also resulted in higher ratings of likely guilt. However, a recent but dissimilar conviction had no significant effect, possibly because similar convictions promote a stereotype of the type of person who commits a particular type of offence.

96. More worryingly, studies have shown that a mere charge, let alone a conviction, for a sexual offence against a child can cause prejudice. In Ontario, this has led to the courts allowing prospective jurors to be asked about their ability to judge sex offence cases fairly. They can be excused if they feel they cannot be fair. In his study, Vidmar concluded that, out of 849 prospective jurors, 36 per cent said they could not be impartial.

97. It is also important to realise that the admission of previous misconduct evidence does not just affect the defendant. In 1973, a study by the LSE considered jury practice and the rules of evidence. It looked at the effect of the rule on previous convictions and noted then as now that it was the 'subject of continuing controversy'. Researchers noted that 'the inclusion of similar convictions against a defendant definitely increases the co-defendant's chance of being found guilty of one or other of charges'. This happens because of 'the operation of guilt by association which leads to the co-defendant being convicted when the defendant's previous convictions are admitted'. There is clear evidence that the prejudicial effect of previous convictions can be traced to the process of decision-making. Research demonstrates that background beliefs, prejudices and life experiences are essential to the way juries create a 'story' about a case.This story model is based on the hypothesis that jurors impose a narrative story organisation on trial information. Different jurors will construct different stories and a central claim of the theory is that the story will determine the decision that the jury reaches. Thus, gaps in evidence are filled by the decision maker and 'a

previous conviction is used as information about the type of crime the defendant is likely to commit and not likely to commit'.

98. It is clear that there are already ample problems with prejudice in current practice, particularly in magistrates' courts, where magistrates will often know local defendants. Here, the exclusionary rule may operate only theoretically. The Auld Review and the Law Commission both recognised these difficulties. However, we must ask whether the answer is to jettison the principle behind the rule because the practice is not working ideally. If the system cannot currently function without prejudice, should it be extended?

99. The White Paper proposes change by allowing the judge to decide if the convictions are relevant while the jury decide weight. The test is that 'where a defendant's previous convictions or other misconduct are relevant to an issue in the case, then unless the court considers that information will have a disproportionate effect, they should be allowed to know about it'. Thus, the previous convictions will no longer be considered solely in relation to credibility but to propensity too. The proposal widens the potential for the admissibility and effect of previous misconduct.

100. The White Paper provides illustrations of the sort of case where such evidence may be admissible. Example 1 tells of a doctor on trial for indecent assault. He had faced two previous allegations of a similar nature in the last five years but was acquitted on both counts. The White Paper says 'it defies belief that it could only be an unlucky coincidence…and therefore the previous allegations are of clear probative value'. In R v Z the House of Lords agreed, finding that evidence of previous conduct for which the defendant had been acquitted were indeed admissible under the principles of similar fact evidence. However, whilst agreeing with this decision, Justice believes that the proposal to allow evidence of any previous convictions, acquittals or misconduct, and the reasoning behind it, could effectively establish a presumption of guilt and abolish the rule of double jeopardy in a totally unacceptable way. We agree with Dr Lloyd-Bostock's assertion that 'if we assume that, amongst defendants with similar previous convictions, some are innocent of the current offence, we have good grounds to infer that routinely revealing previous convictions would increase the risk of convicting an innocent man.' Clearly, given the research detailed above, the admission of evidence of previous misconduct will, prima facie, have a prejudicial effect. The proposal that they should be admitted if relevant and not disproportionate could widen the potential for prejudice significantly. Suppose the unlucky doctor had been the victim of a vexatious and mendacious complainant.

101. The Government has confirmed, in the White Paper, that there is to be consultation on the proper guidelines for admissibility and that this will be informed by the Law Commission's proposals.

102. The Law Commission acknowledged that the present law is inconsistent and unreliable and could actually inhibit defence practice. Its proposals try to achieve a balanced approach by adopting the same test for all witnesses, namely, that

> evidence of bad character may be admissible if it is linked to the central set of facts at issue in the case. Otherwise, leave of the court is required. The Commission also recommended additional protection for defendants, making the court consider the probative value of the evidence and whether its admission into evidence was in the interest of justice, and imposing tighter restrictions if the admission of the evidence was linked only to the question of propensity. It also proposed general procedural safeguards to ensure a fair trial.
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> 103. This approach requires caution in light of research which confirms the existing prejudice caused by the admission of character evidence, but it does, at least, provide a structured framework for admissibility.
>
> 104. Unfortunately, international law standards do not provide much assistance. ECHR jurisprudence is not particularly helpful because of its age and because of the divergence in procedure between inquisitorial and adversarial systems. However, it should be remembered that the ECHR sets minimum standards only and, if current protection is higher, that does not mean it should be easily reduced to the ECHR's basic level of protection.
>
> 105. Clearly, any new admissibility test must focus on the likely prejudice caused to the defendant by the admission of such evidence, bearing in mind the evidence of research which demonstrates how seemingly unconnected convictions may have a devastating effect, not only on the defendant, but on those prosecuted with him/her.
>
> 106. In conclusion, Justice opposes the increased use of previous convictions to establish guilt in light of the prejudice their limited admissibility already creates. The use of previous convictions erodes the presumption of innocence and causes unfairness. Careful consideration should be given to the safeguards outlined in the Law Commission's very well reasoned and balanced report. Indeed, basing reforms on proposals contained in that report would achieve what the White Paper rightly proposes in relation to witnesses by applying a test of relevance where it is sought to introduce evidence of their previous convictions.

However, ACPO agreed that the Law Commission proposal had not been sufficiently radical:

> Despite the need for greater opportunity to introduce relevant previous convictions into evidence, we would not endorse Lord Justice Auld's support for the automatic reading-out of a defendant's previous convictions (this is not found in any recommendation, but see Chapter 11 paras. 119-120), a proposal firmly rejected by the Law Commission. The basis of our argument for greater admissibility is that under the present system juries are routinely denied knowledge of previous convictions highly relevant to their decisions; this is not an argument, however, for the admission of all convictions. We would no more wish to see a defence case prejudiced by irrelevant evidence than to have prosecution witnesses or victims humiliated, or perhaps worse still, discouraged from giving evidence by the prospect of confrontation with irrelevant but embarrassing evidence of their past. If juries are presented with the entire criminal history of a defendant as a matter of course, the principle of equality of

> arms will lead to greater tolerance of the defence gratuitously putting prosecution witnesses' character into evidence. The test of relevance should apply to introducing bad character evidence of any witness, whether prosecution or defence.
> However we share Lord Justice Auld's concern that the Law Commission have taken an insufficiently radical approach to the problem. While their report contains much that is useful, in important respects it preserves the perverse mistrust of juries in this area. Evidence of a defendant's bad character would usually only be admitted where the prosecution show that to do so would be in the interests of justice despite the 'prejudicial effect'. The concept of 'prejudice' is split into two: 'reasoning prejudice' where there is a risk a jury might be overly impressed with the fact of the previous misconduct; and 'moral prejudice' where the nature of the previous misconduct poisons the mind of the jury to the point that they are inclined to convict whether or not sure of guilt.[56]

D. Further consultation

The Bar Council has annexed to its response to the White Paper a copy of a paper entitled "Evidence of Previous Misconduct in Criminal Proceedings: For Consultation" (which was supplied to the Criminal Bar Association by the Home Office on 20 September 2002) and its own response to it[57]. The paper contains proposals said to be closely informed by the Law Commission Report, with much of which the Government agrees. But they did not agree with all that the Law Commission proposed, and believed that reform needed to go further in some respects. They considered that the law needed to send out a clear message that where a defendant's previous misconduct is relevant to the issues in criminal proceedings, it should be admitted unless it is demonstrated that he would be unable to receive a fair trial if the evidence was heard. Views were sought on a number of issues under the headings:

- The definition of bad character, the central set of facts and uncontroverted evidence
- Persons other than the defendant
- The defendant
- Assumption of truth and contaminated evidence
- Severance

The proposal relating to the defendant's bad character was:

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[56] ACPO's response to the Auld Report, http://www.lcd.gov.uk/criminal/auldcom/cja/cja13.htm

[57] online at http://www.barcouncil.org.uk/document.asp

> 12. We wish to see a new approach adopted towards the admission of a defendant's previous misconduct that starts from the position that evidence that is relevant to the case should be admissible. The general exclusionary rule against the admission of previous misconduct and other bad character evidence should therefore be abolished and replaced with provision that puts it beyond doubt that this evidence is admissible when relevant to the issues in the case and sets out clearly when that will be so. We recognise that there are dangers of prejudice with this sort of evidence and any future scheme needs to deal adequately with this. However, we believe that the starting point should be that relevant evidence should be admissible and that it should then only be excluded where the prejudicial effect is demonstrated to be unacceptable in the context of the case.
>
> 13. Our proposal therefore is that evidence, outside the central set of facts, of a defendant's bad character should be admissible without leave where it is explanatory, goes to a matter in issue, corrects a false impression or is adduced by a co-defendant, subject to the defendant being able (where appropriate) to apply for its exclusion on the basis that its prejudicial effect outweighs its probative value. Evidence of bad character should also become admissible if, as a result of the defendant's conduct of his case, he attacks the character of a witness or other non-defendant. These circumstances are all considered in further detail below.

The Bar Council agreed with many of the proposals in the consultation, but disagreed with the suggestion that evidence of a defendant's bad character outside the central facts should be admissible without leave in any circumstances. They explained why:

> How judicial leave is triggered – whether it be a requirement that any such evidence is only admissible with leave (as in the cases of non-defendants), or notice has to be given to the defence of an intention to adduce such evidence so as to give the defence an adequate opportunity of seeking a ruling to exclude it – is a matter of detail. The defence will not inevitably be aware that such evidence is to be adduced, especially if it is adduced in cross-examination of the defendant. Where defence counsel has to object after a question has been asked creates a prejudicial impression on the jury and undermines the defendant's faith in the proceedings. The defence must have adequate opportunity to address the judge on the question whether the evidence of bad character is admissible as well as the issue of proportionality of the prejudicial effect. Until convicted, a defendant should be treated no less favourably than any other witness.
> [..]
> A defendant who misleads the Court for whatever reason should do so at risk of having evidence of previous misconduct placed before the court.
>
> We disagree that such evidence should be admissible without leave [paragraph 26]. Such a provision would enable prosecuting counsel to cross examine a defendant about evidence of previous misconduct without the defence or the judge having an opportunity of considering whether such evidence is admissible, let alone open to objection on grounds of disproportionate prejudice. Were that to happen, then a retrial would have to be ordered or a conviction might be overturned on appeal. This is most undesirable and it is easily avoidable by a requirement for leave.
> […]

> whether evidence of bad character is adduced should depend upon its relevance to an issue in the case, including issues as to credibility as between a witness and a defendant. The suggestion that such evidence could be excluded on an application by the defence misunderstands the dynamics of a criminal case. In particular, a defendant may not know such evidence is about to be adduced say in cross examination of a defendant. That is why such evidence should only be admissible by leave of the judge.

While they agreed with a suggestion that evidence which is relevant to an issue in the case because it has explanatory value should be admissible, they said that this should be subject to the condition that it has substantial value to the case as a whole and is not adduced for example to explain why a defendant was under surveillance.

On the question of evidence going to a matter in issue, the consultation paper put forward the intention -

> …that previous misconduct that has probative value to the issues in the case should be admitted to give juries and magistrates the fullest possible relevant information for their determination. Previous misconduct may well establish a propensity in the defendant to commit the offence (or sort of offence) charged or make it less likely that the defence he is running is untrue. It might identify the defendant as the perpetrator or help to establish his likely state of mind when the offence was committed. These can all be important issues in a case and the prosecution should not be inhibited from adducing evidence that will help the court to assess and determine them unless there is a good reason for doing so. We therefore wish to see previous misconduct being approached on the basis that adducing it should very much be the norm where it is probative of guilt and only being excluded where it is established that prejudicial effect outweighs that
> [-]
> It is our intention that this should create a broad inclusionary approach to admitting relevant evidence of a defendant's previous misconduct. In particular, we believe that it would be valuable to make clear that evidence establishing propensity to commit an offence should be admissible under this head: there should be no "forbidden chain of reasoning". This spells out what is implicit in the Law Commission's proposals. Provided that the evidence satisfies the basic test that its relevance in terms of propensity outweighs any undue influence that might be given to it, then the jury should be allowed to determine how much weight that propensity should carry.probative value.

The Bar Council's response was:

> We disagree that propensity can itself justify admission of evidence of a defendant's bad character. It will lead to miscarriages of justice. The test must be – and must be rigorously applied – one of relevance to an issue in the case. The risk is that the police will not investigate thoroughly a case in which they think they can rely on propensity. The result will be that the investigation will focus on the suspect who had the opportunity and has the propensity. The real culprit – who has not been investigated – will escape. This is an example of a double

> miscarriage of justice. Alternatively, evidence which would demonstrate that the suspect is in fact guilty would be ignored because the police thought – wrongly – they had enough.
>
> We repeat that any imbalance in the test of relevance as between defendants and others to the disadvantage of a defendant [paragraph 18] is not only undesirable, but will inevitably lead to wrongful convictions.
>
> The Law Commission set out the results of research demonstrating the dangers of admitting evidence of propensity. There is no logical basis for admitting such evidence unless sit satisfies a test of relevance under one of the other heads of admissibility which are logically probative. We do not suggest that evidence be limited to the current ambit of similar fact evidence as set out in the cases of P and Z. We suggest that where a defendant has displayed behaviour that indicates an escalating series of offences – whether escalating in gravity or frequency – that evidence should often be admissible. It would be admissible where relevant, e.g. to a defence of self-defence, or accident, or innocent presence. We often see psychiatric reports in cases where diminished responsibility is raised as a defence to murder which catalogue a series of acts of violence of increasing gravity as evidence of a psychopathic personality. If such evidence is clinically probative, there is a case for saying that it will also be forensically probative in some cases. This would be a significant departure for the existing law.
>
> Examples given of why propensity should be relevant, such as the person caught shoplifting who has 15 convictions for shoplifting do not provide an appropriate reason for admitting evidence of propensity. If the defendant says nothing in defence, then adverse inferences will be drawn; if he/she raises a defence of honest forgetfulness, then evidence of previous conduct might well be admissible in any event. It should not be automatically admissible – what if there were medical evidence that the defendant suffered bouts of memory loss? If the evidence is introduced to refute a dispute about identity, it would only be logically probative if it could be established that no-one else in the vicinity had any history of shop-lifting, and even that would be poor substitute for proof of guilt.

E. The *Criminal Justice Bill*: Chapter 1 of Part 11

Apart from presentation, the principal way in which *Chapter 1* differs from the Law Commission's draft Bill is that evidence of the defendant's bad character which meets the specified requirements would be admissible without any leave from the court. There is, however still to be a leave requirement for evidence of the bad character of anyone other than the defendant to be given.

Clause 81(1) would define evidence of a person's "bad character" as –

> evidence which shows or tends to show that
> (a) he has committed an offence, or
> (b) he has behaved, or is disposed to behave, in a way that, in the opinion of the court, might be viewed with disapproval by a reasonable person.

That wide definition follows the Law Commission draft exactly. *Subsection (2)* would exclude from the definition –

> evidence which—
> (a) has to do with the alleged facts of the offence with which the defendant is charged, or
> (b) is evidence of misconduct in connection with the investigation or prosecution of that offence.

Clause 82 would abolish the common law rules. *Clause 83* deals with the admissibility of evidence of the bad character other than the defendant. *Clause 84* deals with the admissibility of evidence of the defendant's bad character. *Subsection (1)* would provide for it to be admissible if, but only if –

> (a) all parties to the proceedings agree to the evidence being admissible,
> (b) the evidence is adduced by the defendant himself or is given in answer to a question asked by him in cross-examination and intended to elicit it,
> (c) it is important explanatory evidence,
> (d) it is evidence of the defendant's conviction for an offence of the same description, or of the same category, as the one with which he is charged,
> (e) it is relevant to an important matter in issue between the defendant and the prosecution,
> (f) it has substantial probative value in relation to an important matter in issue between the defendant and a co-defendant,
> (g) it is evidence to correct a false impression given by the defendant, or
> (h) the defendant has made an attack on another person's character.

As explained above, there is no requirement that the court's leave should be obtained, although under subsection (3) -

> The court must not admit evidence under subsection (1)(d), (e) or (h) if, on an application by the defendant to exclude it, it appears to the court that the admission of the evidence would have such an adverse effect on the fairness of the proceedings that the court ought not to admit it.

The qualification of relevance to an *important* matter in issue, in *paragraph (e)* was not in the draft Bill, nor was the category of admissible evidence under *paragraph (d)* (evidence of a conviction for a similar offence).

Clauses 85 to *90* expand on what is meant by the conditions set out in *clause 84(1)*, closely following the Law Commission draft, and with the interesting inclusion of "appearance or dress" as conduct by which a defendant might be seeking to give the court a false or misleading impression about himself.

Clause 91 gives the court power to stop the case at any time after the close of the prosecution case, where evidence of the defendant's bad character has been admitted

under *clause 84(1)(c)*, (important explanatory evidence), *(d)* (similar offence conviction), *(e)* (relevance to a matter in issue), *(f)* (probative value on a matter in issue between defendants), *(g)* (correcting false impression) or *(h)* (attack on another's character), and the court is satisfied that the evidence is "contaminated" such that a conviction would be unsafe.. Evidence is "contaminated" if :

> (a) as a result of an agreement or understanding between the person and one or more others, or
>
> (b) as a result of the person being aware of anything alleged by one or more others whose evidence may be, or has been, given in the proceedings, the evidence is false or misleading in any respect, or is different from what it would otherwise have been.