RESEARCH PAPER 03/52
5 JUNE 2003

The *Courts Bill* [HL]

Bill 112 of 2002-03

This paper discusses the provisions of the *Courts Bill* which, with the *Criminal Justice Bill*, is part of the Government's programme to modernise the Criminal Justice System. The *Courts Bill* is designed to lay the foundation for a unified courts administration, and to improve court security, fine enforcement and other aspects of the court system.

The Bill is due to be debated on Second Reading on Monday 9 June 2003.

Catherine Fairbairn

Sally Broadbridge

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ISSN 1368-8456

Summary of main points

The *Courts Bill* is part of the Government's long-term strategy to modernise the Criminal Justice System, introducing reforms intended to promote "justice for all" as outlined in a White Paper in July 2002. It implements court-related recommendations made by Sir Robin Auld in his Review of the Criminal Courts, published in October 2001 and brings forward other reforms, mainly but not exclusively focused on criminal justice.

Part 1, described by the Lord Chancellor as the core of the Bill, imposes on him a duty to ensure that there is an efficient and effective system to support the carrying on of the business of all the courts including, for the first time, magistrates' courts. It paves the way for the creation of a new unified courts administration, by abolishing the Magistrates' Courts Committees which are now responsible for the administration of magistrates' courts, and providing for new non-executive, local courts boards to be set up. They are to work in partnership with a new executive agency which, as part of the Lord Chancellor's Department, will not need any statutory base. The new structure is being developed alongside the legislative reforms.

Parts 2 and 3 contain reforms affecting lay justices and magistrates' courts, providing for a new single commission area to which justices will be appointed, and other changes related to their appointment, training and termination of office, as well as changes to the jurisdiction of magistrates' courts. There is also provision to improve fine collection, including fine collection schemes, with the appointment of new fines officers which are to be piloted locally before being extended to the whole of England and Wales with any necessary modification.

Part 4 contains provisions relating to improving court security in the Supreme Court, county courts and magistrates' courts. Part 5 provides for a new inspectorate of court administration, so that there will be inspection of administration of all the courts: at present it is only the magistrates' courts which have an inspectorate. Part 6 is principally concerned with judicial titles. Part 7 contains provisions relating to court practice and procedure, including that criminal procedure rules and family procedure rules will be made respectively by the new Criminal Procedure Rules Committee and Family Procedure Rules Committee.

The miscellaneous part, Part 8, consolidates the Lord Chancellor's existing powers to set court fees, for the first time making their exercise subject to parliamentary scrutiny. It will enable the criminal courts to order payment of costs by a person who was not a party to the proceedings, but whose serious misconduct makes an order against him appropriate, and it will establish a new central register of judgments, which will cover unpaid fines as well as civil judgments. Finally, it will give the civil courts in England, Wales and Northern Ireland. power to order that some damages should take the form of periodical payments, in serious personal injury cases.

Most of the Bill's provisions are to extend to England and Wales only, although some relate specifically to Northern Ireland.

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I Introduction

A. Background

The *Courts Bill* 2002-03 was introduced in the House of Lords on 28 November 2002 and was brought to the House of Commons on 20 May 2003. Its purpose is to improve and modernise the court system. Most of the proposals were outlined in the Government's White Paper, *Justice for All*, published in July 2002. Some of its provisions derive from courts-related recommendations made by Sir Robin Auld in September 2001, in his Review of the Criminal Courts in England and Wales.[1] These pave the way for the creation of a unified courts administration to support all the courts, modify the jurisdiction of magistrates and magistrates' courts, introduce a new criminal procedure rules committee and a new court administration inspectorate and provide for improved security in the courts. Other provisions in the Bill follow from the National Audit Office's report of March 2002 which identified areas of fine collection which needed improvement, and from the Lord Chancellor's Department consultation, also in March 2002, proposing that courts should be given power to order periodical payments in personal injury cases.

1. The Auld Report

The Review of the Criminal Courts was begun in January 2000. The terms of reference were:

> A review into the practices and procedures of, and the rules of evidence applied by, the criminal courts at every level, with a view to ensuring that they deliver justice fairly, by streamlining all their processes, increasing their efficiency and strengthening the effectiveness of their relationships with others across the whole of the criminal justice system, and having regard to the interests of all parties including victims and witnesses, thereby promoting public confidence in the rule of law. [2]

The report ("the Auld Report") was published in October 2001. In it Sir Robin (Lord Justice) Auld made 313 recommendations. Comments were invited in a consultation period which ended on 31 January 2001. There were 500 comments which (except for those where contributors requested confidentiality) were posted on the Lord Chancellor's Department website.[3]

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

2 "Lord Chancellor launches Review of the Criminal Courts", 14 December 1999, LCD Press Notice 386/99

3 http://www.lcd.gov.uk/criminal/auldcom/index.htm.

2. The Way Ahead

On 19 February 2001, between the commissioning of the Auld review and publication of the report, the Government published its strategy *Criminal Justice: The Way Ahead* which contemplated, among other things, more streamlined and effective court organisation and procedures, including links with the other criminal justice agencies.[4]

3. Damages for future loss

In March 2002, the Lord Chancellor issued a Consultation Paper *Damages For Future Loss: Giving the Courts the Power to Order Periodical Payments for Future Loss and Care Costs in Personal Injury Cases*, recommending that the courts should have a new power, to order periodical payments, which at present they can only order with the consent of the parties.

4. Collection of fines and other financial penalties in the Criminal Justice System

A National Audit Office Report, published in March 2002, identified areas where fine improvement should be improved. This was followed up by the Public Accounts Committee, which made a number of specific recommendations in November 2002.

5. The White Paper: *Justice for All*

The Government responded to the Auld recommendations, and made further proposals, in a relatively short White Paper, *Justice for All*, which was published in July 2002. A list of the recommendations, showing which had been accepted, was published separately. Many of the accepted recommendations which required primary legislation were included in the *Criminal Justice Bill*, which was introduced in the House of Commons on 21 November 2002.[5] The Government has made a number of additions to the *Criminal Justice Bill* during its passage so far, most notably detailed new provisions for minimum terms in cases of murder. That Bill now awaits Second Reading in the House of Lords.

The Government did not fully accept Sir Robin Auld's recommendation that a unified criminal court should be established, and rejected his suggestion that there should be three levels of jurisdiction, instead of the present two.[6] The Government did agree that criminal cases should be dealt with at an appropriate level and location, and this should be done in

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4 Cm 5074

5 Bill 8 of 2002-2003, for background and explanation of the subjects covered, see the series of Library Research Papers at http://www.parliament.uk/commons/lib/research/rp2002/rp02-072.pdf, http://www.parliament.uk/commons/lib/research/rp2002/rp02-073.pdf, http://www.parliament.uk/commons/lib/research/rp2002/rp02-074.pdf, http://www.parliament.uk/commons/lib/research/rp2002/rp02-075.pdf, http://www.parliament.uk/commons/lib/research/rp2002/rp02-076.pdf

6 recommendation 83 et seq

a more co-ordinated way, but considered that the benefits identified from establishing a unified criminal court could be realised through a closer alignment of the magistrates' courts and the Crown Court, without a complete reordering of the court system:

> We will therefore legislate to bring the magistrates' courts and the Crown Court closer together and collectively these courts will be known as 'the criminal courts' when exercising criminal jurisdiction.

But the Government did accept Sir Robin's recommendation that a single, centrally funded executive agency should be responsible for the administration of all courts, civil, criminal and family (save for the Appellate Committee of the House of Lords) replacing the Court Service and Magistrates' Courts Committees.

The White Paper also indicated the Government's acceptance of Sir Robin's recommendation about improving court security and other court-related recommendations, and outlined steps to be taken to improve fine enforcement.

6. The *Courts Bill*

Part 1 of the Bill would abolish Magistrates' Courts Committees and establish local courts boards. The Court Service and the new executive agency, being part of the Lord Chancellor's Department, do not depend on legislation. Part 2 would make provision for local justice areas, instead of the commission areas and petty sessions areas. These are probably the most controversial elements in the Bill. There has been particular concern that the absence of any "blueprint" or other mention of the new central agency, coupled with the limited role apparently to be played by the new local courts boards, may indicate centralisation rather than localisation of decision making.

Part 2 also contains other provisions for justices of the peace and other matters relating to magistrates' courts, including a new scheme intended to improve fine enforcement, addressing a need emphasised in a National Audit Office report in 2002.

Part 3 deals with jurisdiction and procedures for civil and family, as well as criminal proceedings in magistrates' courts, seeking to provide for more effective and flexible working, while Part 4 proposes a new, uniform court security regime, to replace the present unsatisfactory mix which Sir Robin Auld described as giving a "disturbing" overall picture. Part 5 reflects an Auld recommendation that the Magistrates' Courts Service Inspectorate should be superseded by an independent inspectorate for a unified Criminal Court. Part 6 provides for greater flexibility in the deployment of judicial resources and the naming of judicial offices. Part 7 would give the title "criminal court" collectively to the criminal division of the Court of Appeal, and the Crown Court and magistrates' court when dealing with any criminal cause or matter, and introduce provision for rules of court, and procedure committees, for criminal and family business.

The miscellaneous provisions in Part 8 cover a wide range of subjects, of considerable interest and importance. They include a new power for criminal courts to make orders for costs against people who are not parties to the criminal proceedings, a new register of judgments to include fines as well as civil judgment debts, and a potentially far-reaching change of the law of damages for personal injuries. It introduces a new power for the court to order periodical payments in personal injury cases, without the parties' consent, following consultations by the Lord Chancellor's Department.

In a press notice announcing the introduction of the Bill, the Lord Chancellor said:

> The Courts Bill will be crucial in delivering modern, efficient courts that have fewer delays, are in touch with the communities they serve and meet the needs of the people that use them. This legislation, along with the Criminal Justice Bill and a future Victims Bill, is part of our long-term strategy to modernise the Criminal Justice System, introducing reforms that will ensure there is justice for all,"
>
> A central theme of these reforms is the need for a more joined-up Criminal Justice System. Following Sir Robin Auld's recommendations, we will unify the administration of the courts, ending the current division between the 42 Magistrates' Courts Committees and the Court Service.
>
> Unification will allow many improvements to the way the courts work. For example, a unified courts estate will allow the heavy workload of one courthouse, whether civil, family or criminal, to be shared with another under-used courthouse, potentially saving one from closure while reducing delays at the other.[7]

This paper draws attention to concerns which have been expressed about particular aspects of the Bill by select committees and during debates in the House of Lords, and briefly outlines the principal changes which have been made since the Bill was introduced. It goes on to discuss the main provisions of the Bill and the reactions to them.

7. Division of England and Wales into different areas for different purposes

It may be helpful at this stage, before discussing any detail of the organisational changes proposed in the Bill, to explain that England and Wales are, and will continue to be, divided (and subdivided) into different areas for different purposes connected with the criminal justice system. These areas are prescribed under different powers, and are not necessarily co-terminous, although there is in practice some correspondence.

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[7] "Courts Bill ushers in wide-ranging reforms" , 29 Nov 2002, LCD Press notice 426/02

The present division into *commission areas*, and subdivision into *petty sessions areas*, relates to the appointment of justices and the jurisdiction of magistrates' courts and of individual justices. It is proposed that there will be no separate commission areas, but there will be *local justice areas*, initially the same as the petty sessions areas, to which the Lord Chancellor will assign individual justices.

The present division into areas covered by Magistrates' Courts Committees relates to the administration of the magistrates' courts, and corresponds with the existing *criminal justice areas* into which the police, probation service and Crown Prosecution Service are also organised. These are also the areas for which new local criminal justice boards have been set up, without need for legislative authority, pursuant to Auld recommendations. They have operated in shadow form since last year, and were officially launched on 1 April 2003.[8]

The Crown Court is administered by the Lord Chancellor, through the agency of the Court Service, within the system of *circuits*, which cover much larger areas.

Administration of all the criminal (and other) courts is to be the responsibility of the Lord Chancellor, who will set up a new agency which (like the present Court Service) will not need to be defined or regulated by legislation. But it will work with 'courts boards' (originally to have been known as 'courts administration councils') whose areas and functions will be governed by the provisions of Part 1 of the Bill.

B. Consideration by Committees

The Bill, or particular aspects of it, have been considered by –

- the House of Lords Delegated Powers and Regulatory Reform Select Committee
- the House of Lords Constitutional Select Committee
- the Joint Committee on Human Rights.

Also, during March 2003, the newly formed House of Commons Select Committee on the Lord Chancellor's Department took evidence on the Bill, to identify the main issues which should be considered when the Bill reaches the Commons. The Committee has already published uncorrected transcripts of the sessions, and expects to publish a report on Friday 6 June.

The following abstracts of the committees' publications refer to the clauses as numbered in the Bill as brought from the Lords.[9]

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8 Local criminal justice boards, http://www.cjsonline.org/access/working/lcjb.html

9 *Courts Bill*, Bill 112 of 2002-03

1. Delegated Powers

In its Second Report, the Delegated Powers and Regulatory Reform Committee considered a number of delegated powers including Henry VIII powers: these were explained in the Department's memorandum which was annexed to the Report.[10] The Committee's view was that the powers were appropriately delegated and subject to an appropriate level of Parliamentary control, subject to reservations that:

The negative procedure was *probably* adequate for the Lord Chancellor's powers, in **clauses 71, 78** and **84**, to amend the composition of Rules Committees, although the powers could be used in a way which changed the balance of a Rule Committee;

The Committee was not satisfied that negative procedure was justified for the Henry VIII powers, under **clauses 73** and **80** (to enable the Lord Chancellor to amend enactments to facilitate the making of criminal and family procedure rules) and under **clause 107** (to enable him to give full effect to the provisions of the Act);

The Committee considered that the new general power in **clause 92** to prescribe fees should be subject to parliamentary procedure, even though the current powers were not, as some of the fees might have an impact on rights of access to the courts;

The Committee thought that the Lord Chancellor's power to designate 'criminal justice areas', under **clause 8(2)** should be subject to parliamentary procedure, including on the first exercise, even though it was intended that the first order should simply rename the existing petty sessions areas without changing any boundaries.

Government amendments were accordingly brought forward to address those reservations, so that the power under **clause 8(2)** is subject to negative procedure, and the powers under **clauses 73, 80** and **107** are now subject to affirmative procedure. The Lord Chancellor has said that there will be a government amendment to deal with the renaming of the petty sessions areas, as a transitional provision.

2. Constitutional issues

In its Third Report, the Lords Select Committee on Constitution reported on its correspondence with the Lord Chancellor about a number of questions of principle affecting principal parts of the constitution. The Committee had asked for further information on

> (a) the number of Court Administration Councils [now to be known as "Courts Boards"] that are envisaged;

[10] http://pubs1.tso.parliament.uk/pa/ld200203/ldselect/lddelreg/20/2004.htm

> (b) the procedural requirements for "guidance" which would be given by the Lord Chancellor under clause 4 to [Courts Boards]. As the bill stands, it is not clear whether such guidance is to be binding on the [boards],whether it is to be publicly available, and whether it may contain specific as well as general directions;
>
> (c) what is envisaged by the Lord Chancellor's power to remove lay justices from their offices under clause 11(6)(b) ("declining or neglecting to take a proper part in the exercise of his functions"); and
>
> (d) the justification for the Lord Chancellor's proposed power to alter (as well as allow and disallow) rules made by the Criminal Procedure Rule Committee (and the equivalent power in respect of the Family Procedure Rule Committee and the Civil Procedure Rule Committee).
>
> In addition, the Committee note the centralising tendency of this bill, illustrated particularly by the complete transfer of responsibility for administering magistrates' courts from Magistrates' Courts Committees to the Lord Chancellor. While the Committee do not consider that the centralising proposals in this bill merit public comment at this stage, members did wish to register their concern that this bill is an example of a more widespread trend. The Committee intend to keep the constitutional implications of incremental, centralising actions throughout the Government's legislative programme under review.[11]

The Committee noted that, while some of its concerns were addressed in the Lord Chancellor's reply of 23 December 2002, its question about the proposed number of Court Administration Councils remains unanswered. The question has been further explored during debates in the House of Lords. Although the number is not fixed, the Lord Chancellor must (by virtue of an opposition amendment) have regard to the desirability of ensuring that they are co-terminous with the 42 criminal justice areas.

3. Human rights issues

In its First Report of 2002/03, the Joint Committee on Human Rights concluded that most of the Bill had no human rights implications, but that -

- several provisions which did engage human rights were justified in so far as they interfered with those rights and
- there were a few provisions which could potentially lead to an unjustified interference with human rights.[12]

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[11] http://pubs1.tso.parliament.uk/pa/ld200203/ldselect/ldconst/38/3801.htm

[12] Joint Committee on Human Rights: First Report 2002/03, 16 Dec 2002., http://www.publications.parliament.uk/pa/jt200203/jtselect/jtrights/24/2402.htm

The Committee wrote to the Lord Chancellor expressing its concerns on six points. In a further report, in February 2003, it reported that the government response (including agreement to amend one clause) adequately answered four of them.[13] These were:

a. Dismissal of Justices of the Peace (clause 11)

Clause 11 limits the Lord Chancellor's previous unlimited power to remove JPs, so that they may only be removed for incapacity, misbehaviour, neglect of duty or persistent failure to meet prescribed competences. The Committee's concern had been that if JPs could be removed by a member of the executive, this might detract from their institutional independence.

b. Immunity of Justices of the Peace and Justices' Clerks (clauses 31 and 32)

These clauses give immunity from legal liability for acts and omissions in the exercise of duty. The Committee's concern had been that this enactment might override the right to compensation under the *Human Rights Act 1998* for Article 5 violations.

c. Disqualification of lay justices who are member of local authorities (clause 41)

Clause 41 provides that magistrates who are members of local authorities are disqualified from acting in cases involving the relevant local authority. The Committee had been concerned about **subsection (5)**, which prevented an act from being invalidated "merely because of the disqualification". Although the Committee was satisfied by the Department's explanation that the subsection would not prevent adjudications from being quashed when the sitting of the disqualified JP was incompatible with a rule of law, the subsection was taken out at Third Reading in the House of Lords.

d. Setting of fees (clause 92)

Clause 92 as introduced would have given the Lord Chancellor a new, general power to set court fees for all tiers of court, after consultation but without parliamentary scrutiny. The powers which it is to replace are not subject to scrutiny. The Lord Chancellor agreed to amend the Bill so that the power would be subject to negative resolution, thus increasing parliamentary scrutiny over matters where hitherto it did not exist. The amendment has been made, to **clause 106**, which governs the order-making powers.

The two issues on which the Committee continued to have concerns were:

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[13] Joint Committee on Human Rights: Fourth Report 2002/03, 3 Feb 2003, http://www.publications.parliament.uk/pa/jt200203/jtselect/jtrights/50/5002.htm

e. Validation of acts of invalidly appointed JPs (clause 42)

Clause 42 validates the appointments and acts of JPs who were born abroad and whose appointments had been inadvertently in breach of the *Act of Settlement 1700*. The Committee was concerned that this might leave people affected by orders of an invalidly appointed JP without any remedy for acts or omissions which were unlawful at the time of their occurrence.

f. Time limits for criminal appeals to the House of Lords (clause 88)

Clause 83 (of the Bill as introduced) extended the time for the prosecution to apply for leave to appeal to 28 days, but left the defendant's time at 14 days.[14] The Lord Chancellor had explained that there was already a discretion to extend the defendant's (though not the prosecution's) time, but the Committee drew attention to the fact that the effect of **clause 83** would be to give the prosecution a right to apply in the period between 14 and 28 days, while the defendant would have to show grounds for allowing an extension. The clause (now **clause 88**) was amended by Government amendment at Lords Report stage, so that the 28 day period would apply to both prosecution and defence, to meet the continuing concerns of the Committee and of peers who spoke at Committee stage.

The Committee also commented that the Explanatory Notes published with the Bill as introduced were not helpful in relation to the Bill's human rights implications. Those Notes referred only to the Lord Chancellor having made a statement about compatibility, under s19 of the *Human Rights Act 1998*. The Explanatory Notes published with Bill brought from the Lords have been expanded, to contain short explanations of why the Department considers that the above provisions are compatible with Convention rights, and also drawing attention to other Convention issues. The current Notes suggest that Article 6 rights (right to a fair trial) are engaged by **clauses 27-29** (Justices' clerks and assistant clerks will be able to do things authorised to be done by a single JP, but there is a statutory guarantee of their independence), and **clause 36** (fines officers making determinations, from which there will be a right of appeal). Powers given to court security officers, under **clauses 52,53** and **55** are said to engage Article 8 rights (rights to respect for private and family life) and to be justified by the need to prevent disorder and crime and protect the rights of others. Rights under Article 1 of the First Protocol (protection of property, for natural and legal persons) are engaged by **clause 54**, which gives court security officers power to seize articles, and **clause 6** and **Schedule 2** under which local authorities will be deprived of their property, i.e. the magistrates' courts. Both measures are said to be proportionate.

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[14] HL Bill 12

4. Commons Committee on the Lord Chancellor's Department

The Select Committee has held a number of evidence sessions on the *Courts Bill*, with a view to highlighting the main areas of interest before the Bill reaches the House of Commons. All the evidence sessions took place during the interval between the sixth and the last days of the Lords Committee Stage.

a. Lawyers' representatives

On 11 March 2002, the Committee took evidence from representatives of the Law Society and the Bar Council. The representatives expressed concerns about:

- The Government's policy of full cost recovery – which was considered inconsistent with the aim of access to justice
- Resources – funding for the justice system was still small compared with e.g. health service funding
- Potential problems with the welcome new power for the court to order periodical payments (instead of lump sum damages), particularly the effect on offers to settle, and the effect of the power to review orders:[15] there had to be a balance between the needs for certainty and for flexibility to deal with changes which could not have been foreseen
- Court security – where the powers appeared at first blush to be new but "which in reality only put the existing powers of the security agencies on a statutory footing": there were concerns about the quality of the personnel.

They considered that some rationalization of the criminal courts was necessary, and hoped that the new courts boards would not be talking shops regularly ignored by the centralized administration. There had been concerns about the powers of the new "fines officers", but the Lord Chancellor's comments at Second Reading had been reassuring. There was no objection in principle to the idea of binding pre-trial rulings in magistrates' courts, but there should be a right of appeal in appropriate cases.

b. Magistrates', justices' clerks' and justices' chief executives' representatives

Evidence was also given by representatives of magistrates and justices' clerks. Unification of the criminal courts was welcomed, but there were major concerns about the (unclear) role of the new Courts Boards, whether the two strands of consultation and management should be separate, the size of the areas they should cover, and the possible effect of the Bill on the relationship, of confidence and trust, between justices' clerks and magistrates. Court closures did not necessarily save money because there were additional costs when people had to travel further: unified administration could provide an overview

[15] A misunderstanding, that the Lord Chancellor would have power to review individual orders was clarified: his power would be to make regulations which would enable courts to do so

illustrating this. There had been worries about the powers of fines officers, now clarified: there was still some concern about their powers to vary the rate of payment of fines.

c. Academic lawyers

On 18 March the Committee took evidence from Professor Lee Bridges, and Nicola Padfield. Professor Bridges thought that clause 1 (the Lord Chancellor's general duty) should be redrafted so that it imposed a duty to maintain an efficient effective and accessible system of courts, rather than one limited to maintaining an efficient and effective system of support for the courts. Mrs Padfield said that in many ways, from the academic point of view, the most interesting thing about the Bill was that it put up front a lot of the constitutional concerns about the role of the Lord Chancellor. Both academics saw advantage in unified administration but commented on the lack of clarity about what the Courts Boards were and what their function was: the Bill was not clear about how it was going to work locally. The new fines officers were also discussed, and Mrs Padfield commended to the Committee's attention a report on enforcement recently published by the Home Office..[16] Professor Bridges was concerned about the membership of procedure committees, and the Lord Chancellor's powers to change the membership.

d. LCD officials

On 27 March the Committee took evidence from officials of the Lord Chancellor's Department. Most of the questions focused on the unified criminal court administration, whether the family courts service should have been unified, the courts' IT systems, fines officers, court security and court fees, the apparent centralizing aspects of the Bill, the (lack of definition of) functions of the new Courts Boards, why there had been a change from the original intention (in the White Paper) of having local management boards. Ms Debora Matthews explained:

> In the White Paper we described the involvement of local community court users, magistrates and judges as a local management board, including a chief officer. That is how we saw the organisation developing at the time. As we consulted with some of our major stakeholders, it became apparent to us, as it did to ministers, that what we really needed to do was to give the non-professional, the non-court manager people on that board some kind of independent status, which is how the concept of the Courts Administration Council, with backing in primary legislation and with its own independent access and right to be heard by ministers was developed, so that they actually had teeth and power of their own, acting independently of the chief officer. It was almost splitting the concept of a local management board into two, giving the external members of the local management board independent teeth, and actually expecting that in normal circumstances the type of partnership working that we hope to establish between Courts Administration Councils and the local chief officers will effectively be

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[16] On-line report 09/03, "Clearing the debts: the enforcement of financial penalties Magistrates' Courts", Alan Mackie, http://www.homeoffice.gov.uk/rds/pdfs2/rdsolr

> that local management board that we envisaged in the White Paper. There was a recognition that we needed to give the external members teeth, and that is how the concept arose.

C. Changes to the Bill in the House of Lords

The Bill was amended at Third Reading as well as in Committee and at Report Stage in the House of Lords.[17] It has expanded from a 101 clause Bill with 7 schedules to a 110 clause Bill with 8 schedules. As most of the new clauses are in Part 2 of the Bill, the clause numbering is now significantly different from that of the Bill as introduced in the House of Lords. In this paper, unless otherwise stated all references to individual clauses use the numbering of the Bill as introduced in the House of Commons.

The following table illustrates the progress of the Bill, and gives references to the relevant Committee reports published since its introduction.

COURTS BILL (HL) 2002/03		
Date	Reference	
28 Nov 2002	641 c956	Lords presentation and first reading. (HL Bill 12 of 2002/03).
28 Nov 2002	HL Bill 12 2002/03	(Explanatory Notes HL Bill 12-EN published).
9 Dec 2002	642 c13-28,42-84	Lords second reading debate.
11 Dec 2002	HL 20 2002/03	Delegated Powers and Regulatory Reform Select Committee (HL) Second Report
20 Dec 2002	HL 24 HC 191	Joint Committee on Human Rights First Report
15 Jan 2003	HL 36 2002/03	Delegated Powers and Regulatory Reform Select Committee (HL) Seventh

[17] The Bill as introduced was HL Bill 12 of 2002/03, http://www.parliament.the-stationery-office.co.uk/pa/ld200203/ldbills/012/2003012.htm, as amended in Committee it was HL Bill 51 of 2002/03, http://www.parliament.the-stationery-office.co.uk/pa/ld200203/ldbills/051/2003051.htm , as amended on Report it was HL Bill 63 of 2002/03, http://www.parliament.the-stationery-office.co.uk/pa/ld200203/ldbills/063/2003063.htm , and as introduced into the House of Commons, it is Bill 112 of 2002/03

		Report
16 Jan 2003	HL 38 2002/03	Constitutional Select Committee (HL) Third Report
20 Jan 2003	643 c500-16,532-50	Lords committee stage first day. Clause 1 agreed to.
28 Jan 2003	643 c1044-74,1088-118	Lords Committee stage second day. Clauses 2, 3 and 4 agreed to. Clause 3 as amended.
4 Feb 2003	644 c140-94	Lords Committee stage third day. Clauses 5-13 agreed to. Schedule 1 agreed to.
10 Feb 2003	644 c466-538	Lords Committee stage fourth day. Clauses 14-40 agreed to. Schedules 2 and 3 agreed to. New clauses considered.
10 Feb 2003	HL 50 HC 397	Joint Committee on Human Rights Fourth Report
11 Feb 2003	644 c578-628,637-62	Lords Committee stage fifth day. Clauses 41-78 agreed to. Schedule 4 agreed to.
18 Feb 2003	644 c1097-1126	Lords Committee stage sixth day. Clauses 79-86 agreed to. Clause 87 under consideration.
11 Mar 2003	HC 526-i 2002/03	Committee on the Lord Chancellor's Department Minutes of evidence.
18 Mar 2003	HC 526-ii 2002/03	Committee on the Lord Chancellor's Department Minutes of evidence 18 March 2003. (Vote).
19 Mar 2003	HL 76 2002/03	Delegated Powers and Regulatory Reform Select Committee (HL) Fourteenth Report
27 Mar 2003	HC 526-iii 2002/03	Committee on the Lord Chancellor's Department Minutes of evidence 27 March 2003.
27 Mar 2003	646 c913-47,996-1033	Lords committee stage seventh day. Clauses 87,92,93,100 as amended agreed to. Clauses 88-91, 94, 96-99 agreed to. Schedules 5-7 agreed to, Schedule 7 as

		amended. Bill reported with amendments. (HL Bill 51 2002/03).
27 Mar 2003	HL Bill 51 2002/03	As amended in Committee (HL).
7 May 2003	HL 102 2002/03	Delegated Powers and Regulatory Reform Select Committee (HL) Eighteenth Report
8 May 2003	647 c1187-226,1237-95	Lords report stage first day.
12 May 2003	648 c12-30,46-108	Lords report stage second day.
12 May 2003	HL Bill 63 2002/03	As amended on Report (HL).
19 May 2003	648 c498-48	Lords third reading and debate on amendments.. Passed and sent to Commons.
20 May 2003	Votes and Proceedings	First reading. 16 May.
20 May 2003	Bill 112 2002/03	Brought from the Lords. (Explanatory Notes Bill 112-EN also published).

1. Government amendments

Many of the amendments made were Government amendments tabled to meet concerns expressed by committees and/or during the Lords stages of the Bill. The principal ones included:

Part 1 (Maintaining the court system) – a number of government amendments were made at Report, introducing the name "courts board", clarifying the procedure for setting their areas and providing for more detail about them to be set out in secondary legislation.

Clause 11(1)(b) (resignation and removal of lay justices) addition of failure to meet competence standards added at Report.

Clause 12 (The supplemental list) – reinstated at Report.

Clause 19 (Training, development and appraisal of lay justices) – added at Report.

Clause 21 (Duty to consult lay justices on matters affecting them) - added at Report.

Clause 27 (4) (Duty to consult the bench before changing the assignment of a justices' clerk) – added at Report.

Clause 106 (Rules, regulations and orders) – increasing levels of parliamentary scrutiny of rule making powers, added at Report.

There was some disquiet at the group of 72 amendments to **Schedules 7** and **8** (Minor and consequential amendments, and repeals) being moved for the Government as late as Report stage

2. Other amendments

A number of opposition amendments were successfully pressed. These included:

Clause 3 (Provision of accommodation) – substitution that the Lord Chancellor *shall*, instead of *may*, provide and equip court-houses etc.[18]

Clause 4 (Establishment of courts boards) – addition of a subsection requiring the Lord Chancellor to have regard, when specifying the areas to be covered by courts boards, to the desirability of ensuring that they are coterminous with the existing 42 criminal justice areas.[19]

Clause 5 (Functions of Courts Boards) – addition of a requirement for the Lord Chancellor to give written reasons if he rejects a recommendation made by a courts board about a final business plan.[20]

Clause 25 (Places, dates and times of sittings) –addition of a requirement for the Lord Chancellor to have regard, when exercising his powers to direct when and where magistrates courts should sit, to the need to ensure that court-houses are locally accessible by persons resident in each local justice area.[21]

Clause 41 (Disqualification of lay justices who are members of local authorities) – removal of subsection (5) which provided that no act would be invalidated merely because of a person's disqualification under the section.[22]

Clause 92 (Fees) – addition of restriction that the Lord Chancellor may not, in prescribing court fees, seek to recover judicial salaries, and a requirement that he should have regard to the need to facilitate access to justice.[23]

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18 HL Deb 28 Jan 2003 c1062, the House divided 100/92
19 HL Deb 19 May 2003 c504, the House divided 136/115
20 HL Deb 8 May 2003 c 1210, the House divided 98/83
21 HL Deb 8 May 2003 c1252, the House divided 90/89
22 HL Deb 19 May 2003 c522, the House divided 141/122

Schedule 1 (added at Report) (Constitution and Procedure of Courts Boards) - requiring that each Courts Board should have at least two members who are lay justices, instead of one.[24]

There has been no indication that the Government will seek to reverse these amendments which the Bill goes through its Commons stages.

II Part 1: Maintaining the court system

A. The present arrangements

All criminal prosecutions begin in the magistrates courts, where 95% of them are fully dealt with, while the remaining, more serious cases are sent to the Crown Court for trial or sentence.

In the magistrates' courts, 91% of summary criminal cases are dealt with by lay Justices of the Peace, who sit in benches of three with the assistance of a legal adviser. The remaining cases are dealt with by professional District Judges (Magistrates' Courts) formerly known as stipendiary magistrates. Magistrates are responsible for the administrative management of their own courts, through local magistrates' courts committees, ("MCCs") described by Auld as "in effect local management boards". Over the years (and with a sharp drop since 1997), these have been reduced in number to 42, corresponding with the 42 criminal justice areas into which the police, Crown Prosecution Service and probation service are organised. These areas are to be distinguished from the Commission Areas, to which individual magistrates are now appointed, and outside which they have no jurisdiction. Each MCC appoints a chief executive, who has administrative functions, and justices' clerks, who are responsible for providing legal advice to the magistrates. Each MCC has one or more "benches" of magistrates in its area. Local authorities provide the court accommodation and 20% of the revenue funding, while the remaining 80% is provided by the Lord Chancellor's Department.

The Crown Court (which is part of the Supreme Court) sits at Crown Court centres which are spread among six judicial circuits each of which has a Presiding Judge with general responsibility for the circuit and a particular responsibility for all matters affecting the judiciary serving there. Professional judges sit in the Crown Court, alone, with a jury, or with lay magistrates, according to the nature of the proceedings. Administration and management of the courts has since 1995 been the responsibility of the Court Service, which is an executive agency of the Lord Chancellor's Department, headed by a Chief Executive. The other responsibilities of the Court Service include the administration of the county courts and Supreme Court (including the Civil and Criminal Divisions of the

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23 HL Deb 27 March 2003, c918, the House divided 90/87

24 HL Deb 8 May 2003 c1213, the House divided 95/85

Court of Appeal but not the Appellate Committee of the House of Lords), which deal with most civil and family business, and with appeals.

The Court Service has no autonomous existence. Its framework document says that it exists to carry out the administrative and support tasks necessary to enable -

- Criminal cases to be heard
- Civil disputes to be adjudicated
- Family proceedings to be decided
- Judgments to be enforced

Its objectives are to serve the public by:

- providing a prompt and accurate service
- increasing the efficiency and improving the economy with which resources are used to deliver that service.[25]

B. Proposals for change

a. The Auld Report

Chapter 3 of the Auld Report provides a summary of the criminal justice system in England and Wales, describing the two levels of criminal court, the magistrates' courts and the Crown Court, explaining their different jurisdictions, histories, functions, organisational and management structures, and funding. It goes on to discuss some of the present problems in each system, in separate commentaries. The chapter ends with the question "One system or two?"

> 65 Thus, the system of administration of the Crown Court is very different from that of magistrates' courts. It is centralised and, some say, too monolithic and inflexible to meet local needs and the different jurisdictions it has to administer. The MCCs, despite increasing oversight by the Lord Chancellor's Department, are a fragmented and diverse system of local bodies hobbled by difficult financial and managerial mechanisms and with inconsistent practices and procedures. Not only are there great differences between the two systems, there is poor co-operation between them. Those who are likely to have the closest experience of this are the members of the Justices' Clerks' Society who, in their submission in the Review, wrote:
>
> "There is little, if any, day to day co-operation between the administration of the Crown Court ... and the Magistrates' Courts.... The Society would suggest that the enquiry examine whether the time has come to establish a single, integrated courts service with common rules and practices (possibly with a separate, specialist arm for youth justice)".

[25] http://www.courtservice.gov.uk/docs/about_us/framework_document.pdf

> 66 However, both systems are striving to overcome their considerable structural problems; and both, in their present forms, are relatively new and in a state of transition. The question for decision is whether to continue them as separate administrative structures, leaving them to develop their own improvements, with or without structural change, or to consider a single administrative body and, possibly, a unified court, accommodating both levels of jurisdiction.

He provided an answer to the question, in Chapter 7:

> 50 Much of the debate about the management structure of the courts has had as its premise the continuance of the present system of two separate criminal court structures, the Crown Court and the magistrates' courts. As I have described in Chapter 3, their respective forms of management through the Court Service and the Magistrates' Courts Committees are unsatisfactory in themselves and also in the divide between them. There are strong arguments for unifying the two systems whether or not the court structures they serve are unified. They become overwhelming if unification of the two court structures is contemplated, especially if [as recommended in Chapter 7] it includes the introduction of an intermediate tier of jurisdiction.

He went on to review the history, including the effectiveness of all the recent changes and the recommendations which had been made in 1969 and again, in 1989, that there should be a centrally-funded and centrally run service, ending with the recommendations that:

- a single centrally funded executive agency, as part of the Lord Chancellor's Department, should be responsible for the administration of all courts, civil, criminal and family (save for the Appellate Committee of the House of Lords), replacing the Court Service and Magistrates' Courts Committees;

- the agency should be headed by a national board and chief executive;

- within each circuit the criminal courts should, if consistent with the efficient and effective operation of civil and family courts, be organized managerially on the basis of the 42 criminal justice areas; and

- implementation of national policy and management at local level for all three jurisdictions should be the responsibility of local managers working in close liaison with local judges and magistrates, much as the Circuit Administrators and Presiding Judges, Chancery Supervising and Family Liaison Judges do at circuit level.

b. The White Paper, Justice for All

In the White Paper, *Justice for All*, the Government accepted those recommendations, saying:

9.17 Much has been done to improve joined up working but only so much can be achieved within the current fragmented administrative framework. That is why we intend to legislate to integrate the management of the courts within a single courts agency to replace existing Magistrates' Courts' Committees and the Court Service. This will build on the best attributes of both organisations to work to deliver decentralised management and local accountability within a national framework. The aim of the new agency will be to enable management decisions to be taken locally by community focused local management boards, but within a strong national framework of standards and strategy direction. It will be accountable to Parliament through the Lord Chancellor's Department.

9.18 We do not seek to set out a blueprint for the new agency – we want that to be developed by those closest to the business in order to suit the needs of the business: people from the magistrates' courts and the Court Service, working together. But there are some clear guiding principles, which we require: integration of management and local flexibility and accountability within a framework of national standards.

9.19 Currently there is no integrated management of the courts at local level. If we are to have a justice system which is flexible and responsive to local needs that must change. Take, for example, the court estate. Magistrates' Courts' Committees often face tough decisions to close court buildings – in many cases because there is simply not enough magistrates' courts business to justify keeping them open. The Court Service can be in the same position in the same town, or another Magistrates' Courts' Committee can face the same issues a few miles away across the area border.

9.20 In an integrated system, local managers will have much greater freedom to balance workloads across the civil, criminal and family jurisdictions, making it easier to sustain court services in local areas. This will support our aim to provide the widest possible network of viable local venues, keeping delivery of justice local. Unification will also make it simpler to transfer cases from magistrates' courts to the Crown Court and easier for the courts to engage directly with other criminal justice agencies.

9.21 Local justice is very important. Magistrates and juries are drawn from the local community. It is a great strength of the justice system that members of the community in which the defendants and victims live are engaged in its delivery.

9.22 The management of the courts also needs to reflect local considerations and have the flexibility to respond to local problems, work with other local partners and be innovative in the way that it works. The new structure will need to ensure sufficient local flexibility and devolved decision making about management issues of importance to the local area.

9.23 There also needs to be greater accountability to the local community. Many issues dealt with by the courts administration – such as the location of services, or court facilities are of great concern to court users and the community as a whole. At the moment engagement with the local community is voluntary for both the

> magistrates' courts and the Court Service. Magistrates' Courts' Committees are largely comprised of magistrates appointed by magistrates. There is no requirement for court users, the local community, or Local Authorities to be consulted about many key management decisions.
>
> 9.24 Therefore we expect managers of courts to be accountable to new local management boards which will include representatives drawn for example from the judiciary, the magistracy, local court user groups, victims support groups, Local Authorities and the local community. Precise membership will be decided as the organisational blueprint is developed. We expect the decision making to be decentralised to the local management boards, so that resources can be managed flexibly to meet local requirements. Similarly support arrangements must meet the needs of local managers.
>
> 9.25 But local flexibility cannot be used to excuse wide variations in performance. Local services will need to satisfy clear national standards in performance, financial reporting, and meeting national policy aims. Areas which perform well will earn greater flexibility and autonomy.

Before publication of the Auld Report, there had been surmise that the lay magistracy might face abolition. But Sir Robin's confidence that they should continue to exercise their established jurisdiction was recently echoed by the Lord Chancellor:

> The Lord Chancellor today reiterated the Government's support for Lay Magistrates and paid tribute to the quality of legal advice they received.
>
> Speaking at the Justices' Clerks Society Annual Conference Lord Irvine said:
>
> "The unique system of lay justice in this country is a cornerstone of our Criminal Justice System. A system of lay justice cannot work without the support of skilled and experienced legal advisers. So the role of Justices' Clerks is absolutely vital: not just your legal advisory role, but the essential case management functions that free the Magistracy to concentrate on core issues of guilt and sentence".[26]

C. The *Courts Bill*

At Second Reading in the House of Lords, the Lord Chancellor described Part 1 as the core of the Bill. It would give the Lord Chancellor responsibility for the administration of the courts. **Clause 1** would place him under a duty to ensure that there is an efficient and effective system to *support* the carrying on of the business of the Supreme Court, county courts and magistrates courts, and to produce annual reports as to the way in which he has discharged that duty. **Clause 2** would provide the power for the Lord Chancellor to

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[26] "Lord Chancellor defends Courts Bill and gives vote of confidence to the magistrates' courts" 9 May 2003, LCD Press notice 204/03

employ civil servants as court staff and, subject to certain restrictions, to contract work out. **Clause 3** would impose a duty on him to provide court accommodation. The Lord Chancellor already has responsibility for the Crown Court and civil courts, with corresponding powers, but what is new about Part 1 is that it will be a statutory duty, and will extend for the first time to the magistrates' courts. Hitherto, it has been the magistrates themselves who have been responsible for the management of the magistrates' courts, through Magistrates Courts Committees, which will be abolished by **clause 6**. **Clause 4** provides for the establishment of "courts boards", one for each of the geographical areas into which England and Wales are to be divided. These were to have been known as "court administration councils" but the name was changed in response to comments that the name was not appropriate to describe what the bodies would do, and that the acronym "CAC" could have unfortunate associations. **Clause 5** sets out their functions and **Schedule 1** is to govern their constitution and procedure. **Schedule 2** is to provide for the transfers of staff and property, consequential on the abolition of Magistrates' Courts Committees. What the Bill does not contain is any reference to the "new executive agency, of the Lord Chancellor's Department" to which day to day responsibility for the administration of the courts is to be delegated.[27] It is probably this aspect of the core of the Bill, with questions about the scope for local decision-making, which has caused the most concern, particularly among lay magistrates. Consultation has continued during the Bill's passage through the House of Lords, and there have been substantial additions to Part 1, intended to address those concerns.

1. The new agency and courts boards

In answer to a written question by Baroness Nicol, before Second Reading, the Lord Chancellor said:

> The Courts Bill, which was introduced in this House last Thursday, includes provisions to enable the Government to fulfil the commitment made in the White Paper Justice for All to establish an executive agency with responsibility for the administration of all the courts in England and Wales, except the House of Lords.
>
> I have today placed in the Libraries of both Houses a statement about the principles which will form the basis of the agency's Framework Document.[28]

The statement also describes the then intended role of courts administration councils:[29]

> 13. Court Administration Councils will work in partnership with local chief officers. They will make a non executive contribution to the development of local strategy for delivering high performance and securing value for money within the national policy and performance framework.

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27 Explanatory Notes, para 14

28 HL Deb 4 Dec 2003 c110WA

29 http://www.parliament.the-stationery-office.co.uk/pa/ld200203/ldlwa/21204wa1.pdf

14. On issues of particular importance, chief officers will be required to seek the agreement of the local Council. At the beginning of the year, Councils will approve the area's strategic plan - this will include the area's estate strategy (including any proposals to open or close court houses); its staffing structures and recruitment and retention strategy; and spending priorities for the year, including any major local projects. Throughout the year, Councils will receive regular performance reports and will propose remedial action, where necessary. At the year end, Councils will contribute to their area's annual report.

15. The relationship between the local Council and the chief officer will be crucial to an area's success. Councils will be involved in the selection of the local chief officer . The chief officer's performance will be assessed against the requirement to work in partnership with the local Council. Councils will be asked for their view about this aspect of the chief officer's performance. In addition, Councils will have a right of access to the national Chief Executive about any issue, including managerial performance.

16. The Lord Chancellor will appoint members to the Court Administration Councils. The Courts Bill leaves the membership open, to ensure that appointments can reflect the needs of the local area. Members will be appointed for the skills, knowledge and experience which they can contribute. The appointments process will be in line with the Commissioner for Public Appointments' code of practice which requires procedures based on merit, independent scrutiny, equal opportunities and diversity, probity, openness and transparency.

17. We recognise that this will be a challenging role and we will consider what support needs to be provided to ensure that Councils can perform their role effectively. (This may include remuneration, induction, training, or the establishment of a body to provide continuing guidance). In considering this, we will learn from the experience of the magistrates' courts community.

Monitoring arrangements

18. Under the Courts Bill, the Lord Chancellor will have a statutory duty to give due consideration to the recommendations of the Councils. He will be accountable to Parliament for ensuring that the Councils are properly involved in the work of the agency. He will, therefore, ensure that arrangements are in place to secure proper co-operation in practice.

19. The Councils will be highly influential and the role of the Chief Executive will be crucial in ensuring that the partnership works. Working successfully with the Councils will, therefore, be an important objective for the Chief Executive.

20. Mechanisms for monitoring the performance of the agency as a whole will take into account the success of the agency in working with Councils to respond to local needs. This includes:

- ministerial monitoring arrangements

- the agency's annual report, which is to be laid before Parliament
- the Inspectorate, which will include taking soundings from the Council in its assessment of an area.

Dispute resolution

21. In normal circumstances, chief officers and Councils will work in partnership. Nonetheless, provision needs to be made for the situation where there is a difference of opinion between the local chief officer and the Council on key issues. In these exceptional circumstances, the issue will be referred to the Chief Executive for resolution. Important issues that cannot be resolved, in this way will be a matter for the Lord Chancellor who must give due consideration to the recommendations of the Councils.

Opposition peers considered that those proposals departed from the decentralisation of decision-making to local management boards, which had been anticipated in the White Paper, and that they did not provide genuine local management and accountability of local justice. Concerns, shared by representative bodies of magistrates and justices' clerks, were debated at length at Second Reading and in Committee. As Baroness Anelay of St Johns later commented:

> The sheer number of pages reflects the level of concern of Members of the Committee.[30]

At Report Stage, the Government brought forward a package of amendments, which Baroness Scotland of Asthal described as follows:

> These amendments rename the court administration councils as courts boards. I know that the noble Baroness and others have found that old name lacking in felicity. But the change to courts boards is not a mere change of name; it is a much more robust statutory definition of their function. The amendments make clear that the boards will have an ongoing role in relation to the courts in their area—scrutinising local plans and reviewing their implementation, and contributing their own ideas. The amendments guarantee that boards will have that role.
>
> The amendments make provision for much more detail to be provided in secondary legislation, through regulations. Our intention is that those regulations will be subject to the affirmative resolution procedure, so that Parliament has the opportunity to examine the detail of the new organisation.
>
> I turn to Amendment No. 18—the proposed new Clause 4. The new clause clarifies the procedure for setting and altering the courts boards' areas; requires that each courts board will be known by a name specified in an order; and provides that a new schedule, setting out the constitution and procedure of courts

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[30] HL Deb 8 May 2003 c1189

boards, is to have effect. Provisions about the membership of the boards which are currently found in Clause 4 are set out in this schedule.

The amendment deals with a concern raised by the noble and learned Lord, Lord Fraser, that boards should have a say in what their boundaries are to be. Before making any order altering the boards' areas, the Lord Chancellor must consult those affected; and the original order which establishes the areas will be subject to affirmative resolution, so that Parliament is able to ensure that the area structure is appropriate.

(…)

New Clause 5, proposed in government Amendment No. 20, sets out a more robust statutory definition of the role of the courts boards—to,

“scrutinise, review and make recommendations",

about the way in which the Lord Chancellor is discharging his duty, and in particular to scrutinise draft and final business plans. This puts into statute what we had set out in a published statement; namely, that the boards will contribute to the development of local strategy and keep the delivery of that strategy under review. So I am happy to confirm to the noble Lord, Lord Phillips, that his analysis of that point is correct.

The amendment makes clearer how guidance issued to the boards will be used: to explain how they should carry out their functions, in particular their role in relation to local business plans. That aspect of the role is fundamental. It enables the boards to influence priorities and the way in which resources—staff, estates and financial resources—are used to deliver services in their area.

The new clause does not include the limitation of courts boards' remit to which the noble and learned Lord, Lord Fraser, objected in Committee. This clarifies our intention that courts boards will have a local focus, but that they should be able to influence the national framework within which they work.

(…)

I turn to government Amendment No. 24, which contains a new schedule. The amendment creates a power to make regulations about the appointment of members of courts boards; the selection of chairmen; terms of office and provisions about resignation, suspension or removal from office; the procedure of boards; and the validation of proceedings in the event of a vacancy or defect in appointment. I hope that the House will be content that the opportunity for scrutiny of such regulations means that the Lord Chancellor will not have unbridled power to appoint and remove members from the boards on a whim.

The amendment contains a redraft of the categories of membership. It makes it absolutely clear that the numbers set out in the Bill are minima not maxima. It provides that lay justice members must be assigned to a local justice area that is at least partly in the board's area. That point was drawn from an amendment tabled in Committee by the noble Lord, Lord Dixon-Smith, who is in his place. It provides that all board members must be selected from one of the Bill's four categories. The Lord Chancellor would not therefore have discretion to appoint members who do not qualify under those categories.

> I turn to Amendment No. 25. The noble Lord, Lord Phillips, proposes a further amendment which would require a minimum of two magistrates. I make no apology for repeating what I said many times in Committee; that is, that the Bill sets out a framework so that there can be variation between local areas. The discussion groups that we have held so far have been unanimous in their agreement that one size does not fit all. It is likely that many of the courts boards will have more than one magistrate among their membership, but we do not believe that that should be prescribed as the minimum.
> The courts boards are not intended as a replacement for proper channels of communication and consultation between magistrates and the administration of their courts. That is why we have tabled an amendment to Part 2, which guarantees that those channels will be established. Magistrate members of the courts boards are not intended as "representatives" of local Benches. A minimum of one, along with a minimum of one judge, is therefore appropriate. [31]

The Government amendments went a long way to meeting the opposition objections. Baroness Anelay said:

> the Government have been left in no doubt about the unpopularity of their original proposals among magistrates. Letters have flooded into the LCD from chairs of Benches in every quarter of the United Kingdom. I know because they were kind enough to copy those letters to me. The one point of agreement for the Government from the chairs of Benches and noble Lords is that the organisation of the courts should move forward to a unified courts administration.
>
> Before the Easter recess, the noble Lord, Lord Goodhart, and I had a meeting with the noble Baroness, Lady Scotland. I thank her and her officials for the time they spent with us and the productive results of that meeting. The noble Viscount, Lord Tenby, was unfortunately unable to attend but has been kept in the loop throughout the process.
>
> Over the recess, the Government then tabled a vast number of amendments covering the whole Bill. Those have generally improved the Bill—indeed, I am tempted to say out of all recognition. But there is still progress to be made. The amendments to Clauses 4 and 5 go some way to meeting our objections, but four significant objections remain. If they are addressed, then, and only then, can we accept the Government's new clauses.
>
> Our objections to new clauses 4 and 5 are represented by the opposition amendments to government amendments today. [32]

The four amendments related to:

- Co-terminosity of the courts boards with the existing criminal justice areas

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[31] HL Deb 8 May 2003 c 1203
[32] HL Deb 8 May 2003 c 1190

- Requiring courts boards to scrutinise draft and final strategy and business plans
- Requiring the Lord Chancellor to give written reasons for rejecting a courts board's recommendations on a final business plan
- Having a minimum of two magistrates on each courts board.

Each was pressed and carried.

Writing in *The Guardian* on the previous day, Lord Phillips of Sudbury said:

> When the history of modern times comes to be written, one of the most damaging judgments will relate to the extent to which all governments professed to want to return powers the citizen and the community while doing the reverse. The latest, little-noticed example of this is the courts bill, now grinding its way through the House of Lords. This promises the creation of a unified courts administration answerable to the Lord Chancellor run by a new executive agency (not even referred to in its more than 100 clauses and seven schedules.) All this is done in the name of "efficiency and effectiveness", which has become the mantra of this government no less than its Tory predecessors, regardless of the likely impact on the independence and morale of the magistracy, and the quality of local justice.
>
> I say regardless, because not only is the consultation too little and too late - the 10 consultations still continue - but also because it is a classic of modern legislative disdain. That is not to say that the ministers and civil servants are heartless or deaf. But it is to assert that this profound piece of civic engineering has been devised by bright civil servants with little or no hands-on experience of that which they are revolutionising, and advocated by ministers in the same predicament (even Baroness Scotland, a distinguished QC, has little such experience). Meanwhile, many of the 30,000 or so lay justices of the peace (JPs), on whose unpaid backs the burden of our criminal justice system overwhelmingly rests, are getting restive. Unused and disinclined to getting involved in politics, their leaders, the chairs of the local court benches, are up in arms. A fortnight ago at a packed meeting in London they decided to establish their own forum, unhappy with the performance of the Magistrates' Association, where, some suspect, the government promise of increased sentencing powers for JPs may have compromised resistance on issues such as this. [33]
> (…)
> Worse, instead of running their own courts and employing their own staff the latter will be appointed and employed by government, and the new courts boards will have no decisive role at all but only an advisory one, plus the statutory requirement for "the lord chancellor to give due consideration to recommendations provided by the boards" (small comfort). Government protestations of good policy intentions vis-a-vis such fundamental constitutional matters rightly cuts little ice with the critics. Ministers come and go; governments change; financial priorities alter.
> (…)

[33] This was angrily denied by the Magistrates' Association

> Of course, some JPs are indifferent, simply wanting to go to their local courts (still reducing in number) and do their job. They should been warned. A Whitehall circular last November from the so-called criminal courts business redesign manager anticipated that the unified system will "allow bulk processing of cases and allow specialist courts within an area to hear certain types of cases". A better way to destroy job satisfaction it would be hard to find, but then the whole culture of the bill is managerialist. There are those within the magistracy itself for whom those values predominate over the deeper civic ones of local autonomy and accountability, independence and local identification.[34]

2. Continuing consultation

Meanwhile the Central Council of Magistrates' Courts Committees and the Magistrates' Association, among others, continued to be active, and the Lord Chancellor's Department held a number of discussion groups around the country between January and April 2003, culminating with a conference for bench and branch chairs on 4 June. A final report is to be produced later in June, but an interim report on the feedback is available.[35] The discussion groups centred on two key areas, the geographical split of the new agency, and the role and remit of the courts boards. Participants included local representatives of the judiciary and the magistracy, justices' chief executives, Court Service managers, the police, Crown Prosecution and Probation Services, Victim and Witness Support, the Bar, the Law Society, the Children and Family Court Advisory and Support Service, the Civil Court Users Association, Citizens' Advice and local authorities. There had been consensus that:

- Customer service is paramount.
- One size will not fit all in structuring local areas and Courts Boards.
- There must be sufficient flexibility to move resources, work and so on in order to respond to fluctuations in demand. Decisions as to structure must not put up barriers to this.
- There is some merit in support services being provided on a larger area basis in order to derive the benefits of economies of scale.
- The requirements of the professional and lay judiciary are very different
- The requirements for Civil, Family and Criminal business streams are very different.
- The Chief Officer in each area must have sufficient clout, empowerment and ability to commit resources in order to be effective.
- A requirement for quick response both up and down the management chain is essential.

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[34] "Magistrates on the march: The courts bill strips away the autonomy of those who shoulder the burden of work in the justice system" , 8 May 2003, *The Guardian*

[35] *Interim report on the feedback from regional discussion groups on the proposed unified courts administration*, May 2003, Lord Chancellor's Department

The areas of concern had fallen under the following headings:

- How local is local?
- Would value be added [by courts boards]?
- Would members be representative?
- Judicial involvement
- How to ensure all jurisdictions are represented
- Links with the Chief Officer
- Links with criminal justice boards
- Transitional arrangements.

The Conference held on 4 June was attended by about 300 bench chairmen and other bench representatives. Yvette Cooper (the LCD Minister who will be responsible for the Bill in the Commons) explained how the Department's thinking on unified administration had developed. The starting point was that neither of the existing models (the centralised Court Service and the local MCCs with all their individual differences) was an appropriate model to follow. There was no perfect model. It was not easy to devise a hybrid which would be accountable both to local communities and to Parliament. The Health Service model, with local management but national standards set in legislation was not a feasible option for a Department which could not get an annual Bill to make the necessary modifications. The new administration would need commitment from everyone to make it work. In answer to the suggestion that the new courts boards did not have enough "bite", she said that this would depend on the quality of the individuals serving on the boards, just as the MCCs already did. The government amendment to put the duty to consult lay magistrates on matters affecting them (**clause 21**) reflected the difference between the professional judiciary and the lay magistrates who did not spend all their time at the courts.

It was emphasized that the structure of the new agency, planned to start in April 2005 (after shadow running in 2004) had *not* already been decided. It was still being developed, taking on board the feedback from consultation. Many LCD officials were working on it. She said that what had come out overwhelmingly in consultation was the perceived importance of the 42 areas as building blocks: whether there should be an intermediate tier was not decided. There would be if it seemed necessary, but it was important not to weaken the sensitive link between local areas and the centre.

In a question and answer session, many magistrates expressed the view that bench chairmen should automatically be members of the courts boards, so that magistrates should know what was going on. There was also discussion of the usefulness of local bench fora, which had sprung up, independently of MCCs, in different forms in different places. There were widely divergent views on whether the magistrate members of courts boards ought to be paid, and if so on what basis.

Yvette Cooper said that the Government did not anticipate any major changes to these provisions in the Commons, but it was anticipated that there would be some amendments relating to the enforcement of fines

The Magistrates Association have published a number of briefings and progress reports on their website at http://www.magistrates-association.org.uk/ . In May, they reported:

> 7. The government, as a result of this pressure from the Magistrates' Association, from CCMCC and from opposition peers, has now set out details of the role and functions of the new proposed courts boards. A statement of principles has been published and several government amendments have been laid in response to our continuing efforts and requests. The government has always stated that its goal is decentralised management and local accountability; we have now achieved significant clarification and change in that much greater detail has been published and amendments are to be made to the statute.
>
> 8. It remains the case that the courts boards will not have executive powers as it is the government's position that it is not possible for executive power to exist both at the centre and at a local level.
>
> 9. However the courts boards will have the following roles and responsibilities:
>
> - a duty to scrutinise, review and make recommendations to the Lord Chancellor about his general duty in relation to the courts in the area
> - involvement in the selection of the chief officer
> - the chief officer will be required to seek the agreement of the board in issues of particular importance
> - the chief officer will be accountable to the board as well as to the national agency for any failure to deliver agreed plans
> - the board will consider both draft and final business plans for the area
> - the board will approve the strategic plan for the year including:-
> - plans for the estate (including opening or closing of courthouses)
> - staffing structures and recruitment and retention strategy
> - spending priorities for the year including any major local projects
> - the board will get regular performance reports and propose remedial action when necessary
> - the chief officer will be required to work in partnership with the board; performance against this requirement will be built into his/her performance contract
> - the board will have a right of access to the chief executive on any issue including managerial performance
> - in the event of failure to reach agreement between board and chief officer, matters will eventually go to the Lord Chancellor for resolution
>
> 10. The Magistrates' Association has consistently pressed for these boards to be effective and empowered. Whilst still believing that the best model

is for local management boards with decision-making powers — the new courts boards, despite their non-executive status, do appear to have an effective role and the ability to make genuine decisions.

Local Consultation

11. Magistrates on MCCs are not bench representatives. Local people including magistrate members will serve on these new bodies but again they will not be bench representatives. For the vast majority of magistrates, knowledge of court management can only be through consultation and information, not executive power. As magistrates' courts committees have grown larger, links between the management and benches have become much more remote, an area of concern for many magistrates. With unified administration there is a real opportunity to make sure that this feeling of isolation can be rectified by ensuring that magistrates are properly informed about the way the courts are run and for magistrates' views to be known and taken into account. In order to achieve this the Magistrates' Association has been pressing for an amendment that will ensure that every single bench has a formal statutory link, for both consultation and information, with the new agency.

Since the CJS committee meeting on Monday 28 April our efforts have met with further success.

Consultation

A government amendment has now been tabled for Report (attached) that will ensure that magistrates in a local justice area will be kept informed and consulted on matters affecting them in the performance of their duties, by statute. This will mean that at bench level, bench chairmen and magistrates will have, by right, knowledge and direct engagement with the administration in the running of their courts, thus providing links which are stronger than at present. This key amendment was inspired by the Magistrates' Association, goes to the heart of confidence in the system and has been one of our principal goals.

Justices' Clerks

A further government amendment has been tabled for Report (attached) which is also most reassuring for magistrates. Justices' Clerks will now have to be assigned to one or more local justice areas thus providing the geographical link that has been keenly sought. In addition, bench chairmen or a deputy must be consulted before there is a change.

There are a few more amendments to be tabled by opposition peers which will further meet our concerns.[36]

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[36] 6 May 2003

III Part 2: Justices of the Peace

Part 2 contains a range of provisions which have the common theme that they relate to lay justices. Many of them are to replace, re-model or make necessary modification to provisions now contained in the *Justices of the Peace Act 1997*, which is to be repealed. The following commentary covers those provisions which are novel.

1. The commission of the peace

Under s.1 of the *Justices of the Peace Act 1997*, England and Wales are divided into commission areas. The commission area is the unit on which the appointment of lay magistrates, their individual jurisdiction and the jurisdiction of the magistrates' courts to hear summary cases is based. There are now 6 commission areas in Greater London. Outside Greater London, there are 39 commission areas in England and 4 in Wales: most coincide with the areas of Magistrates' Courts Committees, but a few are subdivisions of those areas.[37] Under s.4, England and Wales are also divided into petty sessions areas which must consist of either:

(a) the whole of a commission area; or

(b) an area wholly included within a commission area.

There are currently 26 in Wales and over 260 in England.[38] The Lord Chancellor assigns magistrates to particular petty sessions areas, which are the "benches" each of which has its own chairman.

Sir Robin Auld described the present working patterns of lay justices and District Judges in magistrates' courts as follows:

> 15 District Judges were given national jurisdiction when the Stipendiary Bench was unified by the Access to Justice Act 1999, in order to enable them to deal more flexibly with the work wherever and whenever it arises. The official policy of the Lord Chancellor's Department for them is that they should normally sit in the area to which they have been assigned and should deal with the same range of cases as magistrates. But the Senior District Judge, acting on behalf of the Lord Chancellor, may also direct their deployment anywhere in the country to deal with fluctuations in workload or particularly complex cases.
>
> 16 Magistrates, on the other hand, are appointed to and sit only in a particular commission area, though in each area their numbers provide the necessary

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37 The *Justices of the Peace (Commission Areas) Order 1999*, SI 1999/3010 as amended.

38 The *Petty Sessions Areas Order 1999,* SI 1999/3009 as amended

> flexibility. However, whilst I do not advocate that magistrates should normally sit outside or far outside the area to which they have been appointed, I have considered two candidates for improvement in their territorial jurisdiction. First, there should be a ready means of transfer from one bench to another. Until recently this was cumbersome, resulting sometimes in magistrates of great experience being lost to, or excluded for some time, from the system. However, there is now developing a simple procedure of 'active transfer', that is, without a break in service, between commission areas. Such procedure, which preserves magistrates' continuity of experience, is becoming the norm for those seeking transfer providing they have the support of the chairman of their transferor bench and acceptable MNTI reports, and there is a suitable vacancy. Second, in the event of there being a new unified Criminal Court, although I would expect magistrates to sit mainly in their local courthouses, there is no reason why their jurisdiction should be restricted to one particular locality when they could be usefully deployed from time to time in adjoining areas, especially for longer cases and if they live in the boundary area spanning them.

His recommendation was that:

> whilst magistrates should continue to be appointed to one commission area, there should be a ready mechanism for enabling them, when required, to sit in adjoining areas.

In its response, the Government accepted that there should be a mechanism to allow magistrates to be deployed more flexibly and said that options to enable this were being considered.[39]

The Bill would repeal the whole of the *Justices of the Peace Act 1997*. **Clause 7** would provide for there to be a commission of the peace for England and Wales,

> (a) issued under the Great Seal, and
> (b) addressed generally and not by name, to all such persons as may from time to time hold office as justices of the peace for England and Wales.

Clause 8 would provide for England and Wales to be divided into areas, specified by the Lord Chancellor, to be known as “local justice areas”. The Lord Chancellor would have power to alter the areas, after consulting the justices of the peace assigned to the area and the courts boards and local authorities within whose area the local justice area falls. **Clause 10** would make provision for the appointment of lay justice, placing the Lord Chancellor under a statutory duty to assign each lay justice to one or more local justice areas. There would be power to change those assignments. Every justice is by virtue of his office capable of acting as such in any justice area but

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[39] Justice for All: Responses to the Auld and Halliday Reports

> may do so only in accordance with arrangements made by or on behalf of the Lord Chancellor (clause 10(3)).

The Explanatory Notes comment:

> 42 … The name 'local justice area' is considered to be a more modern and more appropriate title for these areas. An initial order setting up local justice areas will simply be laid in Parliament and will not be subject to the negative resolution procedure, on the basis that it will simply be renaming petty sessions areas as local justice areas and will not change any boundaries. Subsequent orders altering areas will be subject to negative resolution.[40]
> (…)
> However, the clause also provides that if a justice is to act outside his normal place of sitting he is to do so in accordance with arrangements. It is envisaged that these would be informal in nature. In practice it would be unrealistic that a justice would sit in an unaccustomed area save by prior arrangement between courts and with his agreement.
>
> 48. As magistrates will no longer have a jurisdiction limited to a commission area, there will no longer be the statutory residence qualifications for assignment (section 6 of the JPA 1997). It is envisaged, however, that Advisory Committees (who advise the Lord Chancellor on appointments of magistrates) will continue, under guidance from the Lord Chancellor, to recommend that magistrates be assigned to the local justice area in which they reside unless there is good reason to do otherwise (for example, should an applicant find it easier to sit where he or she works rather than where he or she lives).

Some peers were disappointed that the existing responsibility of the Chancellor of the Duchy of Lancaster, to appoint magistrates in that area, would go, although the response to a recent local consultation had been against change, but Baroness Scotland assured them that the Duchy had been consulted.[41]

2. Training of lay justices

Clause 19 introduces a rule making power in connection with the training, development and appraisal of lay justices. It was added at Report stage and is intended to give statutory backing to the role of Bench Training and Development Committees (which were established by rules under the 1997 Act).

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[40] para 42
[41] HL Deb 4 Feb 2003 c182

3. Places, dates and times of sittings

There are now statutory restrictions on where a magistrates' court may sit, and on the powers it may exercise, according to what kind of courthouse it is sitting in. The Explanatory Notes explain the changes being made, to introduce greater flexibility.

> 82. Clause 30 empowers the Lord Chancellor to direct where and when magistrates' courts are to sit. This would allow magistrates' courts' business to be conducted at any place in England and Wales. In making such directions he will be under a duty to have regard to the need to make court-houses accessible by persons resident in each local justice area. The places at which magistrates' courts sit and the days and times at which they sit would be determined in accordance with directions made by the Lord Chancellor. This would bring magistrates' courts into line with the Crown Court, High Court, Court of Appeal and county courts. The power to determine when magistrates' courts sit is likely to be used as an emergency measure only.

In Committee, Lord Bassam of Brighton for the Government, commented that:

> Under a unified administration it should be easier to share buildings and to timetable particular cases in courts with the right facilities. There will be increased access … to specialist facilities that will enable and benefit all court users.[42]

Subsection (2), which requires the Lord Chancellor to have regard to the need to ensure that court-houses are accessible to persons resident in each local justice area, was the result of an opposition amendment on which the House divided and passed the amendment by 90 to 89. In moving the amendment, Baroness Anelay of St Johns said:

> [clause 30] makes it possible for the Lord Chancellor to control sittings of magistrates' courts within the unified courts administration set up by the Bill. It gives him considerable flexibility in deciding where magistrates' courts shall sit or whether they should sit at all. I am not against such flexibility, certainly when it is used constructively and not merely as a cost-cutting measure. I can see that in some circumstances it could lead to a magistrates' court being given the chance to sit in an area where one had previously been closed down, perhaps by being directed to sit in another court building that has survived court closures—a Crown or county court. So there could be advantages to that procedure.
>
> The problem is that such flexibility in the hands of a centralised bureaucracy, as set up under the Bill, could tempt a future cost-cutter—forbid that we should consider the current incumbent of that office as such—to close down even more magistrates' courts on the basis that one could hold the court in a Crown Court building further away and people could travel that little further without too much difficulty or cost to the individual.

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[42] HL Deb 10 Feb 2003 c 506

> We must ensure that flexibility is used to make courthouses at least as accessible as they are now, and if possible more accessible.
> (…)
> This clause could open up the way for further reductions in magistrates' courts venues unless we make it clear on the face of the Bill that the Lord Chancellor should consider access for residents in local justice areas. I am not proposing anything that is mandatory or prescriptive; he has only to consider the matters. I hope to impose that clarity on the face of the Bill.[43]

In support, Lord Goodhart said:

> Few matters have caused more concern in respect of court administration over recent years than the closure of magistrates' courts, particularly in rural areas where the alternative is often to travel some 20 or 30 miles to the nearest town. We believe it is of the highest importance that justice, particularly in magistrates' courts, should be local. That is in the interests of all concerned. It is in the interests of the defendants and more importantly in the interests of the victims and other witnesses. It is in everyone's interest that they should have access to a court reasonably close to where they live and should not be compelled to travel what are in some cases substantial distances to the nearest magistrates' court. Given the large number of cases that are dealt with by magistrates' courts, we believe that the Lord Chancellor should be required to bear that in mind.[44]

4. Resignation and removal of lay justices

At present, the Lord Chancellor can remove a lay justice from office at will. **Clause 11** would replace that unfettered power with a power to remove a lay justice from his office only on specified grounds namely–

> (a) on the ground of incapacity or misbehaviour,
> (b) on the ground of a persistent failure to meet such standards of competence as are prescribed by a direction given by the Lord Chancellor, or
> (c) if he is satisfied that the lay justice is declining or neglecting to take a proper part in the exercise of his functions as a justice of the peace.

Ground (b) was added by Government amendment at Report, with the support of the Magistrates' Association. Because the Joint Committee on Human Rights had expressed some concern about the power being exercisable by a member of the executive, Lord Goodhart tabled an amendment, that the power should be exercisable by the Lord Chief Justice, in order to raise that concern. Lord Donaldson of Lymington, the former Master of the Rolls, pointed out that circuit judges were also subject to removal by the Lord

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[43] HL Deb 8 May 2003, c 1250
[44] HL Deb 8 May 2003, c 1251

Chancellor, on similar grounds. Baroness Scotland of Asthal, for the Government, drew attention to safeguards which already existed, so that removal of a justice could not be effected without judicial acquiescence and never could be effected improperly or arbitrarily. Lord Goodhart thought that the power to dismiss members of the judiciary should be removed from the Lord Chancellor, but accepted that the proposed amendment would be a change that would have important constitutional consequences He thought that it was probably inappropriate to raise the issue on a side wind on a Bill that was mainly devoted to other purposes.[45]

5. The supplemental list

Sections 7 to 9 of the *Justices of the Peace Act 1997* contain provisions, formerly in the *Justices of the Peace Act 1979* and earlier legislation, requiring the Clerk of the Crown in Chancery (the Permanent Secretary of the Lord Chancellor's Department) to maintain "the supplemental list" of justices of the peace for England and Wales. The name of a justice is entered in the list:

- if the justice has attained the age of 70 years and neither holds nor has held high judicial office;
- if the justice holds or has held high judicial office and has attained the age of 75 years;
- by the direction of the Lord Chancellor if he is satisfied either that by reason of the justice's age or infirmity or other like cause it is expedient that the justice should cease to exercise judicial functions as a justice for that area, or that the justice declines or neglects to take a proper part in the exercise of those functions;
- by the direction of the Lord Chancellor if the justice is appointed a justice for an area on ceasing to be a justice for some other area;
- if a justice applies for his name to be entered in the list and the Lord Chancellor approves the application.

A justice whose name is on the supplemental list may:

- Sign any document for the purpose of authenticating another person's signature.
- Take and authenticate by his/her signature any written declaration not made on oath.
- Give a certificate of facts within his/her knowledge or of his/her opinion as to any matter.
- In special circumstances and on a personal basis, be authorised by the Lord Chancellor to sit in the Crown Court for a specified period.

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[45] HL Deb 4 Feb 2003, c193

Otherwise they cease to be qualified as justices to do any act or to be members of any committee or other body

The Bill as introduced would simply have repealed those provisions, and would thus have abolished the supplemental list entirely. The reason was given in the *Explanatory Notes* as follows:

> 55. Both the need for these functions to be carried out by justices, and the way of meeting that need, have been largely superceded. Most of these powers have since been extended more generally to members of the public. The Supplemental List originated in the potential need for reserve justices in times of war, when sufficient men of fighting age might be unavailable. It is intended that retired justices should not be able to exercise any special functions. The Supplemental List therefore has no function in practice.

The proposed abolition drew protest from the Magistrates Association, who said:

> In many of our branches the knowledge and experience of supplemental justices is highly valued and they contribute a great deal to the Magistrates in the Community Project, the Mock Trial Competition and recruitment drives. Appointment to the supplemental list is the fitting recognition of and thanks for public service for retiring magistrates and should therefore be retained.

The Conservative spokesman, Baroness Seccombe described it as:

> a mean spirited attack on people who have given at least 15 years of their life to the Bench and the community. This is an issue which we shall oppose unreservedly. Those on the supplemental list often, for example, sign passports and witness signatures which save many people the chore of finding an appropriate person. It costs no money to retain a list and gives pleasure to a magistrate on retirement to be included on what might be called a "roll of honour".

At Report stage she put down an amendment essentially asking for a new clause to reinstate the Supplemental List. For the Government, Baroness Scotland of Asthal responded with an alternative amendment, which was welcomed and agreed. She said:

> Your Lordships will know that the Supplemental List would have been abolished under the original provisions of the Bill. However, the Government have listened very carefully to the appeals of a number of your Lordships at Second Reading who set out the magistracy's view on the matter. We are restoring the Supplemental List through this package of government amendments. Many magistrates have stated that they regard being added to the list as recognition of good service for retired magistrates. The Government recognised the need to reward justices' valued service to the community and so are bringing forward these amendments to restore the Supplemental List to statute.
> (…)

> We have correspondingly amended Clause 11, which sets out the position on ceasing to hold office as a justice of the peace, and we have allowed for the possibility that a serving Bench chairman, or a justice whose case goes part-heard, could remain an active JP until after the age of 70.
>
> The amendments also retain provision for magistrates who retire before 70 after many years of service to be included on the list. There are some small changes to the current position. As with the amendment of the noble Baronesses, there is no statutory reference to continuing powers to perform certain acts as the majority of these do not require statutory authority to be carried out and can be done by most people and not justices alone.
>
> The use of the Supplemental List as a disciplinary mechanism has been removed. This reflects the way in which the Supplemental List has evolved since its introduction in 1941. At that time it was used to introduce a retirement age for justices of the peace who refused to resign despite being unable to carry out their functions, as we discussed on a previous occasion. Today the list is seen more as a "roll of honour" for retired justices and as a form of gratitude for the valuable service magistrates have provided society. [46]

6. Disqualification of lay justices

Both **clauses 41** and **42** deal with situations where particular lay justices ought not to sit, or to have sat, on the bench because they were disqualified, and both clauses gave rise to concerns in the House of Lords.

a. Lay justices who are members of local authorities

Clause 41(1) provides that:

> A lay justice who is a member of a local authority may not act as a member of the Crown Court or a magistrates' court in proceedings brought by or against, or by way of an appeal from a decision of . . . that local authority . . . a committee or officer of that local authority

At Committee Stage in the House of Lords, Lord Goodhart commented:

> It seems to me that there can be no doubt in the mind of a justice of the peace who is a councillor as to whether he is disqualified or not. It must be perfectly obvious whether there is a party to whose case he should not listen.
>
> It seems to me that if a justice of the peace who is disqualified sits, the tribunal effectively cannot be impartial for the purposes of Article 6 of the Human Rights Convention. If this House took a decision in the Pinochet case to set aside a

[46] HL Deb 8 May 2003, c1238

> decision because a member of the Appellate Committee sat when he had failed to disclose an interest, the same principle should apply to the magistrates' court and someone who plainly has an interest should be disqualified from sitting.[47]

However, the provision which caused concern in the House of Lords (although the Human Rights Committee had been satisfied that its same concern had been unfounded) was a provision preventing an act from being invalidated because of a disqualification under the section.

The wording of the clause follows that of s66 of the *Justices of the Peace Act 1997*, subsection (6) of which provides:

> (6) No act shall be invalidated by reason only of the disqualification under this section of the person acting.

Clause 36(5) of the Bill, as introduced, similarly provided:

> (5) No act is invalidated merely because of the disqualification under this section of the person by whom it is done.

Lord Goodhart made the point that the fact that **clause 36(5)** repeated a provision in existing legislation was not an adequate reason to retain it if it was wrongly conceived. He was not persuaded by Baroness Scotland's argument that the use of the word 'merely' was crucial, and the subsection would not prevent a person who was affected from challenging the adjudication on the ground of bias under the common law rule or Article 6.1: he thought that it would be wrong to put the onus on the person complaining. It would be complicated, expensive and difficult. It was difficult to see how a tribunal containing a JP disqualified under the section would be impartial. His amendment was supported by Lord Donaldson of Lymington (the former Master of the Rolls), Baroness Annelay of St Johns, and Lord Renton, who added that it would be a contradiction to enact the non-invalidation provision alongside the disqualification provision. Their Lordships were not persuaded that there was a true parallel with the position, where there had been a technical defect in the appointment of a JP, addressed in the following clause.

The amendment was not pressed at Committee or Report, but was put to a division and carried at Third Reading.[48]

b. Lay justices whose appointments were invalid

Clause 42 is also concerned with potential invalidity arising from the participation of a particular JP, not specifically because of real or apparent bias, but because of a technical defect in the individual's appointment. It had not been appreciated, until 2002, that a

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[47] HL Deb, 10 Feb 2003, c526

[48] HL Deb 19 May 2003, c520: the House divided 141/122

person born outside the UK and dominions could not validly be appointed to be a JP, because of an overlooked provision in the *Act of Settlement 1700*. **Clause 42** would simply prevent that provision, retrospectively, from invalidating:

> (a) any appointment before 31st January 2002 of a justice of the peace, or
> (b) any act done by virtue of such an appointment.

This clause has raised two quite different concerns, one relating to its retrospectivity, and one about its not having prospective effect.

In its First Report, the Joint Committee on Human Rights expressed concern that the validation might leave people affected by orders of an invalidly appointed JP without any remedy for acts or omissions which were unlawful at the time of their occurrence, and invited the Lord Chancellor to explain why the Government is satisfied that the clause would be compatible with Convention rights. For complex technical reasons, reproduced below, the Committee's concern continued, notwithstanding the Lord Chancellor's explanation that the clause was only declaratory of the common law doctrine of de facto authority, and the Committee drew the risk of incompatibility to the attention of the House.

> 29. Before 31 January 2002, some people born outside the United Kingdom and its dominions were appointed to be JPs, in breach of the prohibition on such appointments by section 3 of the Act of Settlement 1700. Clause 37 of the Bill would retrospectively validate those appointments and any act done by virtue of such an appointment. We were concerned that this might have the effect of leaving people affected by orders of an invalidly appointed JP without any remedy for acts or omissions which were unlawful at the time of their occurrence. We asked the Lord Chancellor why the Government was satisfied that the provision would be compatible with Convention rights. We were particularly concerned with the possibility that acts or omissions might have involved the determination of a civil right or obligation or of a criminal charge. In that case, retrospective validation might, we thought—
> deprive parties of a remedy for violation of the right to a fair hearing by an independent and impartial tribunal established by law, under ECHR Artcle 6.1, because the tribunal would not have been established by law;
> thereby violate the right of access to a court under Article 6.1, and/or
> violate the right to an effective remedy for violations of Convention rights under ECHR Article 13 (which is not a Convention right within the meaning of the Human Rights Act 1998, but binds the United Kingdom in international law).
>
> If the acts or omissions led to a person being deprived of his or her liberty otherwise than in accordance with a procedure prescribed by law, contrary to ECHR Article 5.1, clause 37 of the Bill could also lead to a violation of the right to compensation under ECHR Article 5.5.
>
> 30. The Lord Chancellor replied that the clause would not change the common law, under which adjudications by foreign nationals were valid, by virtue of the doctrine of de facto authority, until it became apparent that their appointments

were defective. The effect of the doctrine is that the acts of a judge "may be held to be valid in law even though his own appointment is invalid and in truth he has no legal power at all. The logic of annulling all his acts has to yield to the desirability of upholding them where he has acted in the office under a general supposition of his competence to do so". The doctrine applies only where the person has some "colourable authority" for acting, and there is no reason to suppose that the appointment is invalid.

31. The history and scope of the doctrine were discussed by the Court of Appeal in a recent decision concerning a circuit judge who had sat as a judge of the Queen's Bench Division of the High Court. She was authorised to sit as a judge of the Family Division of the High Court and the Technology and Construction Court, but had not been "ticketed" to sit as a judge of Queen's Bench Division in other cases. The Court of Appeal unanimously held that, on the facts, the judge had had de jure authority to sit. Nevertheless, the judges went on to consider whether the judge would have had de facto authority had she not been held to have de jure authority. Hale L.J. thought that the de facto doctrine applied to the judge, because—

> Judge Davies is indeed a judge, validly appointed as such. All those involved in arranging for her to hear this case believed that the case had been validly assigned to her. She herself believed the same. She sat as such and was treated as such by everyone involved....It could not be said that her want of authority was notorious.
>
> It is not necessary to express a view upon whether the doctrine would apply had the circumstances been different ... .

Hale L.J. went on to express the view that the de facto doctrine was compatible with the right to a hearing by a tribunal established by law under ECHR Article 6.1, because the doctrine is a rule of law and is sufficiently accessible and foreseeable. Her Ladyship concluded that the doctrine "is not there, in modern times, to protect usurpers. Rather it protects the individual citizen, who had good reason to think that he was appearing before a properly constituted court, acted accordingly and should not without more be deprived of the rights he has established as a result".

32. In that case, Ward L.J. was clear that the de facto doctrine would apply, while reserving his opinion on questions about the limits of the doctrine. Sedley L.J. was rather more doubtful about the effect and applicability of the de facto doctrine to the facts of the particular case. On the more general issue his Lordship said, "In such a highly problematical area, different objectives of legal and public policy can pull in different directions and legal doctrine begins to verge on the metaphysical. But a point must come at which the undesirability of undoing ostensibly valid judgments has to yield to the greater undesirability of letting unqualified people adjudicate on people's legal rights and obligations. It is clear that the last word has not been said about this ..."

33. This is clearly a difficult area of law and legal policy. We have no authority to resolve the issues, and would in any event be unlikely to be able to reach a

> satisfactory formulation of the principles involved. Nevertheless, we regard certain matters as being clear. First, the general scope of the de facto doctrine is uncertain. Secondly, its effect on the rights of people affected by the acts of someone purporting to be a JP is not entirely clear, since "it is a mistake to suppose that the consequences of invalidity should be worked out with rigid logic and without regard to facts". We note that the Government considers it to be desirable to declare (without changing) the position at common law, a step that would arguably be unnecessary were the effect of the common law clear. Thirdly, there are good reasons for upholding the finality of decisions in proceedings between private parties, or affecting the rights and interests of the public at large, for example licensing decisions, where people rely on knowing the outcome in order to act on it. Fourthly, in some (if not all) criminal proceedings, the person most closely affected by the decision is the defendant; there will often be no interests of third parties favouring the upholding of a conviction where the tribunal was not validly appointed. We bear in mind the view of Hale L.J. that the purpose of the doctrine today is to protect individual citizens. Fifthly, there are good legal and practical reasons for not allowing unqualified people to determine criminal charges and civil rights or obligations.
>
> 34. In the light of these considerations, we are not convinced that the doctrine of de facto authority would always or necessarily suffice to provide a party appearing before an invalidly appointed person, purporting to act as a JP, with a hearing by a tribunal established by law as required by ECHR Article 6.1 in the determination of civil rights and obligations or criminal charges. Although the practical effect may be negligible in this particular case, the doctrine of de facto authority gives rise to potentially very wide issues under Article 6, and affects the principle of legal certainty in a complex way. We therefore consider that there is a risk of incompatibility with rights under Article 6 which we feel should be drawn to the attention of each House.[49]

In the House of Lords, Lord Goodhart explained that the Liberal Democrats had not tabled an amendment to **clause 42** because they recognised that there would be no or few cases where the disqualification would render the tribunal other than independent and impartial.[50] According to a report in *The Independent*, LCD was aware of 22 cases, but it was thought likely that up to 150 people were affected, most of them born in North American or European countries.[51] In October 2002, according to *The Times*, no more than 24 people were affected, and some of them had accepted a Home Office offer of fast track, free, naturalisation, to overcome the problem.[52]

What did concern some peers who spoke in the House of Lords debates was that the opportunity had not been taken to allow for future appointments of people born abroad to be validly made. Baroness Anelay of St Johns pointed out that such people had a valuable

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49 Joint Committee on Human Rights, Fourth Report 2002-03, 10 Jan 2003,

50 HL Deb 10 Feb 2003 c532

51 "Magistrates born abroad furious at being banned under 1701 Act", 20 Apr 2002, *The Independent*

52 "Back on the bench again", 29 Oct 2002, *The Times*

part to play in dispensing justice. [53] Baroness Scotland has explained that the Government plans to introduce a *Crown Employment (Nationality) Bill*, which would regularise the position both for lay justices and the professional judiciary. At Report, she said:

> … we have every sympathy with the intention of the amendment. However, we need to consider carefully whether it would be appropriate to include provisions in this Bill because of the planned Crown Employment (Nationality) Bill, which will initiate changes designed to alter nationality requirements for certain holders of offices under the Crown. Both the professional judiciary and the lay magistracy are included in the ambit of that Bill. However, we are actively discussing whether it might be possible to bring forward an amendment to the Courts Bill at a later stage.[54]

7. Improvement in fines collection

In March 2002, the Comptroller and Auditor General published a report on *Collection of fines and other financial penalties in the Criminal Justice System*.[55] The examination was based on interviews with LCD staff and visits to magistrates' courts areas. It also drew on work which had been done by the Magistrates' Courts Service and the LCD Internal Assurance Division. The fieldwork suggested that there was an urgent need to improve the efficiency and effectiveness of collection. The penalties collected in 2000-01 had accounted for 63% of total impositions of £385 million. The report outlined steps which had already been taken to improve performance, including the setting of a target to increase the payment rate to 68%, and it identified further areas for improvement, which involved:

- strengthening arrangements to obtain and verify details of offenders' means prior to sentence and for keeping track of offenders' addresses;
- examining the scope for incentives to encourage prompt payment of financial penalties;
- reviewing the scope to permit further delegation to administrative staff of responsibility for taking enforcement action, to help expedite enforcement;
- improving the completeness and accuracy of management information and introducing relevant and challenging indicators so that the performance of magistrates' courts in collecting financial penalties can be measured and compared;
- expanding the range of specialist training provided to staff employed on enforcement activities;

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53 HL Deb 8 May 2003 c1276

54 HL Deb 19 May 2003 c525

55 National Audit Office, Report by the Comptroller and Auditor General, HC 672 Session 2001-2002: 15 March 2002: http://www.nao.gov.uk/publications/nao_reports/01-02/0102672.pdf

- examining, with the Home Office, whether the current range of sentencing options is wide enough to minimise the imposition of uncollectable fines; and
- exploring the possibility, in the medium term, of creating "centres of excellence" at local, regional or national level to take responsibility for enforcement.[56]

On the basis of the NAO Report, the Public Accounts Committee took evidence from the Department, including oral evidence on 20 June 2002. In the following month, before the Committee published its own Report, the Government announced what further steps would be taken, in the White Paper, *Justice for All*:

> a performance management framework will be incorporated into the new integrated courts organisation, which will provide support for all areas to improve performance but intervention where there is persistent failure.
>
> We plan to ensure that those who need help to organise their payments or who are genuinely struggling with multiple debts can get support. But those who are fined or ordered to pay compensation and can pay will not be able to escape payment. Initially
> defendants will be obliged to disclose their income and expenditure to the court before appearing in court. This is so that the court can match the fine to the offender's ability to pay and people are not fined inappropriately. If they fail to provide the necessary information the court will be entitled to assume that they have plenty of money and fine accordingly.
>
> Fines officers from the new integrated court service will be appointed in every area. Their job will be to make sure that fines and compensation orders get paid.
>
> Prompt payment or payment in line with agreed terms will attract a discount, and the fine will increase if the defendant fails to pay on time. For those who need time to pay, the fines officers will adjust payment terms according to ability to pay and with the assistance of the Community Legal Service we will promote fines clinics and support and advice for those who have run up multiple debts, which create real problems for them in making payments.
>
> But to deal with those who can afford to pay but try to avoid payment we will, following pioneering reforms in New Zealand and Australia, give fines officers a range of powers, including: registering the fine with the registry of judgements (which prevents defaulters obtaining credit); ordering the clamping of a vehicle, which could be sold if the fine was not paid; authorising bailiffs to seize defaulters' goods; or ordering deductions to be made from defaulters' pay or benefits. There will be a right of appeal against fines officers' discretionary

[56] ibid p9

> decisions and appropriate safeguards for those who are genuinely unable to pay but ultimately, failure to pay could result in imprisonment by a court.[57]

The Public Accounts Committee reported in November 2002, shortly before the introduction of the Courts Bill in the House of Lords. They were critical of the low priority which had been given to tackling the problem.

> Fines account for some 70% of all sentences imposed by courts, and yet only some 60% of fines are paid. Payment of fines appears to be almost voluntary over much of the country, undermining the effectiveness of the criminal justice system.
>
> There is a lack of clarity and accountability in the responsibilities for managing the collection and enforcement of financial penalties. The Department has no direct control over magistrates' courts' committees in respect of their collection activities. Supporting management information systems are inadequate, being unable for example to provide basic data to match cash collected against fines imposed for a particular financial year. And magistrates may have insufficient information on existing outstanding fines when sentencing an offender.
>
> Since 1989 successive official reports have highlighted weaknesses in the systems for collecting financial penalties but the Department has not given them sufficient priority. The Department should now explore options to improve performance significantly by: looking at the scope to centralise some collection procedures regionally or nationally; implementing management information systems which facilitate proper debt management, and assist magistrates when sentencing; establishing centres of excellence to promote good practice; delegating more enforcement responsibilities to administrative staff where appropriate; reviewing the scope to bring together the separate arrangements for enforcing criminal and civil penalties; reviewing the scope for incentives or penalties to encourage the prompt payment of fines; and widening the sentencing options available to courts when dealing with defaulters, for example sequestrating assets such as cars, or limiting a defaulters' ability to obtain credit by registering unpaid fines with the registry of judgement.[58]

The Committee made a number of recommendations:

> **On the Department's oversight of the performance of magistrates' courts committees:**
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> (i) The Department should investigate the reasons for poor collection performance by individual magistrates' court committees, and review the

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[57] *Justice for All*, CM 5563, Home Office, July 2002, p98
http://www.cjsonline.org.uk/library/pdf/CJS_whitepaper.pdf

[58] Public Accounts Committee, 68th Report 2001-02, 27 Nov 2002, HC 999 ISBN 0 21 500645 3

committees' plans to remedy any shortcomings. Good practice identified from committees performing well should be disseminated more widely.

(ii) The Department should review the current range of performance measures for magistrates' courts committees collection activities, for example to include data on the speed with which fines are paid. Current measures, which include payment, cancellation and write off rates should be underpinned by a clear and consistent approach to their calculation across committees, for example accounting separately for criminal penalties and civil impositions.

(iii) Information technology systems currently used by magistrates' courts committee are not capable of fully supporting the enforcement process, and the introduction of a new national system has been delayed. We plan to examine separately the circumstances surrounding the development and delivery of the new national system on the basis of a further report from the Comptroller and Auditor General.

On encouraging the prompt payment of financial penalties:

(iv) Magistrates' courts committees should provide regular feedback to magistrates on the impact of their sentencing and enforcement decisions.

(v) The Department should assist judges and magistrates in keeping up-to-date on the latest best practice in imposing and enforcing financial penalties by providing regular guidance and training.

(vi) The Department and magistrates' courts committees should review the current arrangements for obtaining information on an offender's means to improve the quality and reliability of information available to the courts before sentence is passed.

On pursuing unpaid penalties:

(vii) The Department should disseminate the results of the study commissioned by the Home Office into the effectiveness of different enforcement techniques to all magistrates and magistrates' court staff.

(viii) The Department appeared to have little information on the characteristics of defaulters, leaving it poorly placed to develop effective policies on enforcement. It should therefore give high priority to reviewing the outcome of its recently commissioned study of defaulters, and the implications for financial penalties as an effective punishment.

(ix) To assist in tracing defaulters quickly, the Department should reach agreement with other government agencies, including the Inland Revenue, and the Driver and Vehicle Licensing Agency, to allow courts to request information such as defaulters' addresses.

> (x) Magistrates' courts committees should be encouraged, where appropriate, to use all sources of potential information on the whereabouts of defaulters, including knowledge from within local communities.

In January 2003, after the Lords Second Reading of the Bill, but before Committee began, the Home Office published *Clearing the Debts: The Enforcement of Financial Penalties in Magistrates' Courts*, an online report of independent research, which concluded with an agenda of immediate priorities derived from the research

> … that seem especially worthwhile for all courts to consider, and which would require relatively little in the way of additional investment or ongoing resource commitments. Ten such priorities are identified as follows (each relevant to every magistrates' court, albeit to differing degrees):
> 1. More training to be given to magistrates (and more regular dialogue with court clerks and enforcement staff) about effective practices in the imposition of financial penalties (in other words the issues involved, information required and techniques to follow in ensuring the effective imposition of financial penalties).
> 2. Reviews to be made of all documentary materials concerning the imposition of financial penalties, for example notices of financial penalties, means forms, and how to pay' leaflets (and of their distribution) to ensure that they are as effective as possible in communicating the important messages to their recipients.
> 3. Routine monitoring to be undertaken of performance in money collection, of the patterns of usage of different methods of payment and of the scope for extending/modifying payment facilities to enable greater access.
> 4. Advance cross-checks to be made and actions taken to ensure that opportunities are not missed to address the arrears of any defaulters appearing at court on new matters (for example interviews with a member of staff or before a panel of magistrates).
> 5. Reviews to be undertaken of the court's enforcement protocols (in other words what is done, when, and by whom?) with an emphasis on adopting effective approaches to secure prompt settlement of arrears.
> 6. Specialist training to be provided for enforcement staff on the skills of interviewing defaulters and on how best to induce settlement of debts.
> 7. Priority to be given to the piloting on a systematic basis of telechasing and to establishing more widely fines clinics (on a 'one-to-one' interview basis) run by suitably trained staff. Such clinics might usefully be supported by 'at-court' money advice services (provided by CAB or another locally-based welfare rights organisation).
> 8. Magistrates' involvement in enforcement to be mainly reserved for more serious/persistent default, when the efforts of the staff have proved unsuccessful and other options require consideration. Each court to have a specialist (and trained) panel for this purpose.
> 9. More training to be provided for magistrates (and court clerks) in dealing with persistent defaulters – particularly concerning the skills of questioning, on

> making effective use of the available options and on ensuring decisive progress at each hearing. [59]

The *Courts Bill* seeks to improve fine collection in two ways. **Clause 96** would provide for a new register of judgments to be kept, including judgments entered in the High Court and county courts and

> (e) sums which are, for the purposes of the [Magistrates' Courts Act 1980] sums adjudged to be paid by a conviction or order of a magistrates' court.

By virtue of s.140 of the *Powers of Criminal Courts (Sentencing) Act 2000*, fines imposed by the Crown Court are treated, for the purposes of collection, enforcement and remission, as having been imposed on conviction by a magistrates' court.[60]

Clauses 37 and **38**, and **Schedule 3** deal specifically with collection of fines. These take the form of provisions enabling the Lord Chancellor to pilot a "fines collection scheme", the main components of which are set out in the Schedule, and then to extend the scheme to all local justice areas. Paragraphs 88 – 110 of the Explanatory Notes summarise the provisions. The aspects of them which have attracted most comment are:

- The appointment of "fines officers" who would have powers now reserved to magistrates' courts, as well as some new powers (**clause 36**)
- A specific power to clamp and sell defaulters' vehicles (**Schedule 3 para 13**)
- Henry VIII powers for the Lord Chancellor to modify **Schedule 3** or any enactment, first in connection with the pilot and then in the light of its operation (**clause 36(5) *and* (8)**)
- A discount for prompt payment (Schedule 3 para 6)
- Increase in fine on default (Schedule 3 para 9)
- The time limit for a defaulter to appeal against fines officers' decisions (Schedule 3 para.8)

a. Fines officers

The House of Lords debated amendments which would have required publication of guidance for the training of fines officers. Commitment to training was confirmed at Third Reading by Baroness Scotland of Asthal, who said:

> I can assure your Lordships that fines officers will be suitably trained for their role. It is in the interests of the fines collection scheme that they are well trained, so that we can actually evaluate the different schemes properly. However, if the Government were to accept Amendment No. 15, it is likely that commencement

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59 http://www.homeoffice.gov.uk/rds/pdfs2/rdsolr0903.pdf

60 There is further information about clause 96 below, in Part VIII of this paper.

> of the pilots would be delayed and that the opportunity to test the quality of the guidance would have to be deferred. I am sure that that is not what the noble Baroness intends. I therefore invite the noble Baroness to withdraw her amendment, assured that when the matter comes back after the final scheme has been tested she will have a proper opportunity to make whatever comments she and those opposite think right in relation to the scheme overall.[61]

She had previously explained that while it was in the interest of the scheme that fines officers should be well trained, it was not the usual practice to make statutory provisions for the training of court staff.[62]

b. Powers to clamp vehicles

Some peers had concerns about the new vehicle-clamping powers (described by Lord Goodhart as the most controversial element in the role of the fines officer), particularly because a person's livelihood might depend on the clamped vehicle, and because of the fact that orders would be made against the registered keeper, who might not be the same person as the owner, so that it could be unduly harsh on the owner to find his car clamped because of someone else's default.

Baroness Scotland acknowledged that there were drawbacks but said that checking vehicle registration with the Driver and Vehicle Licensing authority was the only means of independently establishing a link between the owner and the vehicle. When Lord Donaldson of Lymington suggested that the defaulter's driving licence should be suspended, pending payment: she said that it was certainly something which should be thought about.[63]

There will be new summary offences, of meddling with vehicle clamps, and of giving false information to a fines officer, both punishable by fines.

c. Powers to modify the scheme

When Baroness Seccombe sought assurance that the Lord Chancellor would not increase or vary the powers of fines officers, Baroness Scotland explained:

> I can explain why the provision in Clause [36(5)], which allows modifications of Schedule [3], is necessary if we are to get full value from the pilots. It will allow different elements of the scheme to be piloted in different areas, so that their effectiveness in improving the payment rate can be evaluated. For example, a discount for prompt payment and/or an increase for default may be piloted in one area; and wheel-clamping or registration of the debt as sanctions for defaulters

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61 HL Deb 19 May 2003, c517
62 HL Deb 10 Feb 2003, c 508
63 HL Deb 10 Feb 2003, c 534

> may be piloted in another. That flexibility would be lost if the Government were to accept Amendment No. 59.
> The enforcement measures, as a number of noble Lords have made plain, are a significant departure from existing practice. The Government believe that they should be thoroughly tested before implementation. There would be little merit in piloting the measures unless it were possible to change, or even abandon, elements of the package that did not work as intended. Pilots will be carried out immediately following Royal Assent during late 2003 or early 2004 with an aim to introducing the fines collection scheme as soon as possible following that evaluation.[64]

d. Sticks and carrots: discounts for prompt payment and penalties for delayed payment

Discount for prompt payment attracted general support in the House of Lords, but there were reservations about having a sharp, once-for-all uplift on default, rather than the payment of interest on default. In moving an amendment providing that the unpaid fine should bear interest instead, Lord Goodhart said:

> I suggest that that is the wrong approach. A substantial increase on the default, over and above the loss of the discount, may create hardship. Furthermore, a one-off increase presents no further incentive for the defaulter to pay thereafter. I believe that it would be better to impose a more gentle increase, but one that would keep on running until the date of payment. Such an increase would be interest. I suggest that the appropriate rate of interest would be the rate of interest due by statute on judgment debts. It would be simple interest, of course, and I do not believe that it would be a problem for the fines officer to calculate the amount of interest and then to tell the defaulter what is due.[65]

Baroness Seccombe supported the amendment:

> We believe that it would be helpful to have such a form of—…incentive so that fine defaulters will know where they stand. Their fines will be put in the same position as any other form of debt.

The amendment was resisted on the basis of administrative complexity and enormous scope for confusion and for appeals arising from disputed calculations. The amendment was rejected on a division, by 89 to 75.[66] As to the amounts of discounts and uplifts, Baroness Scotland explained that:

> Finally, the 50 per cent set in the legislation for increase and discount are maximums designed to limit the Lord Chancellor's power. There is no

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[64] HL Deb 10 Feb 2003, c 511
[65] HL Deb 8 May 2003 c1261
[66] HL Deb 8 May 2003 c 1266

> presumption that the actual figures used will be 50 per cent or that the percentage discount will necessarily be the same as the percentage increase. We hope that the pilots will enable us to determine the optimum percentage.

e. Time limits for appeal

At Report Stage Lord Goodhart moved an amendment to give magistrates' courts power to extend the time for appealing against the decision of a fines officer. In moving the amendment he said:

> My amendment is defective, in that other 10-day limits should have been included. For example, an appeal made under paragraph 8 from a decision by the fines officer under paragraph 7 is subject to the 10-day limit, as is an appeal under paragraph 11 from a decision made under that paragraph. However, the amendment is sufficient to raise the issue.
>
> The time limits are strict, and well established legal authority exists that states that if there is a time limit in a Bill and the Bill says nothing about a power to extend that time, the time cannot be extended however unfortunate the circumstances. Of course, it is right that an appeal should be brought within 10 working days if there is no good reason for failing to do so. However, undoubtedly there are problems in that regard.
>
> First, the period of 10 working days is measured from the date of the decision, not from the receipt of notice of the decision. The actual time for the appeal may be as little as seven working days. Although first-class post is in theory delivered within one day—and I assume that regulations will require that the notice is to be delivered by first-class post—it is well known that first-class post, especially if it is posted at the end of the working day, as much office post is, does not necessarily arrive on the morning of the next working day.
>
> Furthermore, there is the possibility, which in many cases will be fact, that a defaulter will have left his or her home for work before the delivery of the post and will not get the notice until the evening. If one assumes that the post is not delivered until the second morning, and is not opened until that evening, that reduces the time available to seven days. At the very least, the Government should be prepared to reconsider that point. Will they consider whether the limit should be 10 working days from the receipt of the notice rather than from the date of the decision?
>
> Secondly, and even more importantly, there may easily be entirely legitimate reasons for the notice of the decision not being brought to the attention of the defaulter in time for an appeal. A defaulter may be working away from home or on holiday—even defaulters are entitled to take holidays. There may be a family illness, which requires the defaulter to be in a different part of the country. There are perfectly good reasons why a 10-day time limit may be broken.

> When tight time limits are imposed and no power is given to extend those time limits for any reason whatever, an injustice is bound to occur. The Minister said in her letter that that could be sorted out by the pilot scheme. However, such a scheme has to operate within the boundaries of Schedule 2 as it now stands, and it cannot be part of a pilot scheme to give leave to extend the time. I would go further and say that absence of a power to extend the time is so plainly unreasonable that I see no need to await the results of the pilot. The Government should accept the amendment without waiting for the results of the pilot.[67]

Responding for the Government, Baroness Scotland said:

> we intend to pilot the Schedule [3] fine enforcement measures prior to implementation in order to evaluate their effectiveness. The Bill provides that for the purpose of the pilot schemes any aspect of Schedule [3] may be modified. Consequently, we already have the power to pilot the appeals measures with a longer time period, allowing us to test whether the 10-day period is sufficient. If experience of the pilots shows that the 10-day period is insufficient, then my noble and learned friend the Lord Chancellor has the power under Clause [36(8)] to amend this provision in Schedule [3]. The final scheme will then be put before Parliament for approval under the affirmative resolution procedure.
>
> We have used the date of the decision because the date of receipt of the decision can vary and is arguable. We think that that may be the clearest way of dealing with the matter. It may be that, following the pilots, an amendment using the Clause 31(8) procedure along the lines of Amendment No. 69 could prove the best way forward. However, we do not know whether that is the case now.

Lord Goodhart indicated that he might return to the issue at Third Reading, but did not do so.

IV Part 3: Magistrates' Courts

This part contains proposals for changes to the jurisdiction and procedures of the magistrates' courts in relation to criminal and civil matters and in relation to family and youth courts.

A. Criminal jurisdiction

1. Current law

At present, by virtue of the *Magistrates' Court Act 1980*, sections 1 and 2, magistrates have jurisdiction to issue summonses and warrants only in respect of offences committed in their commission area and offences committed by people who live in their commission area. Similarly, they have jurisdiction to try offences committed in their commission

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[67] HL Deb 8 May 2003, c 1269

area. There is a provision, not yet in force, to allow either the prosecution or defence (but not the court of its own volition) to apply to have a summary case[68] transferred to a different magistrates' court.[69]

2. Proposals for change

It is now proposed that there will be a more flexible deployment of magistrates and that lay magistrates will have national jurisdiction. In the White Paper, *Justice for All*, this flexible approach is discussed as follows:

> 4.7 Taken together, these changes will allow judges and magistrates to be deployed more flexibly, for example a Circuit Judge sitting in the Crown Court would be able to hear a summary offence that became attached, without the case having to go back to a magistrates' court. These changes will also allow the straightforward and speedy transfer of cases from one magistrates' court to another, which will assist in conducting trials at the most convenient local site, and they will deliver greater consistency in procedures between the magistrates' courts and the Crown Court.[70]

3. The *Courts Bill*

Clauses 43 and **44** would enable magistrates to issue summonses and warrants in respect of any offence and any offender, and to try any summary offence

Clause 46 would enable magistrates to transfer criminal cases to other magistrates' courts, whether on the application of a party, or of their own motion. The power to transfer would have to be exercised in accordance with any directions given by the Lord Chancellor as to the distribution and transfer of the general business of magistrates' courts under Clause 30(3) above. For example, this would mean that when deciding whether to transfer a case, the magistrates' court would have to take into account the needs of witnesses.

4. House of Lords debate

In the second reading debate in the House of Lords, the Lord Chancellor said:

> The Bill will bring the magistrates' courts and the Crown Court closer together. Closer integration will remove unnecessary geographical boundaries, allowing cases to be heard at the most convenient location, taking account of the needs of victims, witnesses and defendants, and helping to reduce delay. It will bring about greater consistency in practice and procedure between the criminal courts; and it

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68 A criminal offence which is triable only by a magistrates' court

69 *Magistrates Court Act 1980* section 3B, although this provision is not yet in force

70 http://www.cjsonline.org/library/pdf/CJS_whitepaper.pdf p70

> will remove statutory restrictions, allowing for more flexible use of the court estate and more effective deployment of judges and magistrates.[71]

The Liberal Democrat, Lord Phillips of Sudbury, however, was concerned about the effect on JPs:

> Court service circular 199, emanating from the Lord Chancellor's Department, issued on 29th of last month, said:
>
> "the national jurisdiction means that a summary offence can be treated in the same way as an indictable offence and will allow proceedings to be brought anywhere in England and Wales, rather than in the local justice area where the offence was committed. This will have the effect of reducing delay by allowing bulk processing of cases"—
>
> that is the key phrase—
>
> "and will allow specialist courts within an area to hear certain types of cases".
>
> JPs, who are after all volunteers, will swiftly tire of a diet of, as the circular puts it, "bulk processing of cases". Many have told me so and it is pretty obvious. Unless good justices of the peace have a good cross-section of cases, including some of the most difficult in terms of law, fact and judgment, they will simply walk away, as many of them have already done because of workload, court closures and the like. Apart from that, centralising a certain type of case in a certain court inevitably means even greater distances for all those involved to travel, with all the other consequences already touched on[72]

B. Rulings at pre-trial hearings

1. Current law

Paragraph 123 of the Explanatory Notes sets out the current position as follows:

> The magistrates' courts have a number of their own pre-trial hearings under the current "Narey" arrangements. Where a guilty plea is anticipated, an 'Early First Hearing' (EFH) is scheduled. 'Early Administrative Hearings' (EAH) handle non-guilty pleas. In cases where the defendant is charged with an offence triable either way, magistrates hearing the case under 'initial procedure' will take a plea before determining venue. Following a not-guilty indication, magistrates may then determine mode of trial (s.17A MCA 1980). Where a case is to be tried summarily, a date for a pre-trial review is set, wherever it is deemed necessary. Pre-trial reviews are intended to assist the court in assessing the parties' readiness for trial. However, practices do differ across the country. Magistrates sitting at

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71 HL Deb 9 Dec 2002 c14
72 HL Deb 9 Dec 2002 c50

> pre-trial hearings may make directions or recommendations as to appropriate preparation or conduct of the case. Such a direction may be noted on the court log, but would not bind any future magistrates hearing the case, although the next bench might take the direction into account in making any decision.

2. The Auld report

Sir Robin Auld highlighted the need for good case preparation as part of a just and efficient criminal process. He found that pre-trial hearings could be of great help if needed and held at the right time in the preparation for trial, but that they should be reserved for only such matters as the parties cannot resolve informally themselves. His view was that, apart from special cases, oral pre-hearings should become the exception rather than the rule and that:

> If an oral pre-trial hearing becomes necessary, it should enable the judge to give binding rulings on substantive law, and procedure and evidence before the trial which may speed and simplify or otherwise shape it, subject to variation or discharge at trial as justice might require.[73]

3. The *Courts Bill*

Clause 45, and **Schedule 4** would give judges and magistrates a new power to make binding rulings and directions at pre-trial hearings that are to be tried summarily in the magistrates' courts. This power would be similar to the existing power available in relation to cases heard in the Crown Courts.

At the committee stage in the House of Lords, Lord Bassam of Brighton, for the Government, indicated that the intention of the schedule was to allow for issues of law and evidence to be identified at an early stage and resolved in advance of the trial and that the power to make binding rulings would be a useful aid to pre-trial preparation and progression.[74] There was some debate about whether there should be a right of appeal against a ruling made by magistrates at a pre-trial hearing, and if so whether this should be to the Crown Court or the Divisional Court.[75] There was also some debate about the theoretical possibility of the same magistrates deciding on the question of admissibility and then also on the merits of the case. However, the Government's position was that the common law rule of natural justice would require individual magistrates, acting as the tribunal of both fact and law, who have heard evidence which they subsequently ruled inadmissible, to disqualify themselves from hearing the trial, and that there should be no appeal until the case is ended.[76]

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[73] *Review of the Criminal Courts of England and Wales* p489
[74] HL Deb 10 February 2003 c536
[75] HL Deb 10 February 2003 c534-8
[76] HL Deb 10 February 2003 c537

Reporting restrictions extend only to England and Wales. Although the Conservative peer, Baroness Anelay of St Johns, raised the possibility of publication in Scotland being accessible in England and Wales, Baroness Scotland of Asthal, for the Government said that it was not thought that this would be a major problem because the provision would generally be applicable to cases unlikely to attract widespread press interest.

C. Civil jurisdiction and procedure

Under section 52 of the *Magistrates Court Act 1980*, magistrates only have jurisdiction to deal with civil matters arising in their commission area. There are no current provisions to allow the transfer of civil proceedings (other than family proceedings) from one magistrates' court to another. **Clauses 47** and **48** would give magistrates similar national jurisdiction and power to transfer in relation to civil proceedings as is proposed for criminal proceedings.

D. Family proceedings courts and youth courts

Family proceedings and criminal cases with youth defendants are heard by magistrates who have been specifically authorized for the purpose. The White Paper, *Justice for All*, contains the following proposal:

> 4.40 We will reform the system by which lay magistrates are authorised to hear youth and family cases. We propose that the system of 'panels' will be replaced by a system of personal authorisation, so that a magistrate selected and trained for specialist work need no longer wait months to be elected to their new local panel. The system will continue to operate locally, with input from local magistrates, but the authorisation process will be more transparent and consistent, and based on competencies.[77]

Clauses 49 and **50** would set out the framework by which lay magistrates and district judges would be authorised to hear family proceedings and youth cases. The higher judiciary would also have jurisdiction to hear such cases as a consequence of **Clause 66.**

In the Committee debate in the House of Lords, Conservative Home Affairs Spokesperson, Baroness Anelay of St Johns said:

> I was puzzled as to why the Government wish to hand over the work to the higher judiciary. Perhaps they plan to phase out the lay magistracy in family proceedings courts and youth courts. I am sure that that is not the case. But one could interpret the Bill as giving that power to subsequent Lord Chancellors.[78]

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77 http://www.cjsonline.org/library/pdf/CJS_whitepaper.pdf p76

78 HL Deb 11 February 2003 c581

However, according to the Explanatory Notes[79] and to assurances given by Baroness Scotland of Asthal, for the Government,[80] it is not anticipated that extensive use would be made of this facility.

In the House of Lords debate in committee, Baroness Scotland, explained the proposed changes as follows:

> Magistrates are currently selected for youth and family work by being voted by their fellow magistrates onto local panels. This system applies outside inner London. Within inner London, special arrangements apply. This selection system can sometimes be a little inconsistent across the jurisdiction as it need not be based on any particular selection criteria and may not reflect the particular qualities of the magistrates concerned. It will in any case cease to be workable or appropriate when magistrates have a national rather than purely local jurisdiction, including in family matters.
>
> We will therefore establish a system by which suitable magistrates will be selected and trained under a more transparent procedure.[81]

V Part 4: Court security

1. Current law

The Explanatory Notes set out the current position as follows:

> 147. Currently court security is provided in the magistrates' courts, the Crown Court, and some county courts, the High Court, Court of Appeal and amongst some tribunals, although the administration of court security is regulated differently..
>
> 148. Only in the magistrates' courts is there statutory provision for court security where there is a mix of in house officers employed by the MCCs, and contract officers who are procured through service contracts with private agencies. The Criminal Justice Act 1991, Part IV (CJA 1991) sets out the statutory provision dealing with court security in the magistrates' courts in relation to the provision of these officers, their functions and powers (sections 76 - 78).
>
> 149. There are currently no legislative provisions for security in the remaining courts. One of the key policy intentions behind the legislation is to ensure that guards employed in all courts enjoy the same powers and responsibilities.

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79 Paragraph 136
80 HL Deb 11 February 2003 c583
81 HL Deb 11 February 2003 c585

Recent publicised incidents have illustrated the potential dangers faced by those who are involved with the courts in any capacity.

In August 2000, two prisoners escaped in an armed raid on Slough Magistrates' Court.[82]

On 8 January 2001, Her Honour Judge Goddard QC, was treated at hospital for minor head injuries and shock after being attacked at the Old Bailey by a man accused of murdering his partner with a sword. The man apparently vaulted out of the dock and ran straight to the judge, even though on that occasion there were three male security officers with him. At the time of the incident, Malcolm Fowler, chairman of the Law Society's criminal law committee, criticised the shifting of responsibility for guarding prisoners in court from the police and prison service to private contractors. [83] The Lord Chancellor subsequently announced the commissioning of a departmental security inquiry.[84]

On 10 May 2001, Judge Hopkin was attacked by a prisoner who jumped over the dock. The prisoner had just been sentenced to three years imprisonment for robbery and affray. In another incident in 2001, a dock officer was injured during an escape attempt.[85]

2. The Auld report

Sir Robin Auld noted the gradual withdrawal of uniformed police officers from court duty and drew attention to the threat to the administration of justice caused by violence or threats of violence in the court building, and by the intimidation of witnesses outside court and before they are due to give evidence. He referred to the current position as follows:

> The present security position is, therefore, an unsatisfactory mix in the Crown Court of police and contracted security guards, the latter statutorily, contractually and in terms of training, limited in the effectiveness of security that they can provide. Whether even that level of security is available in magistrates' courts depends on individual Magistrates' Courts Committees; in many cases it is not, and they are also less likely to be equipped with electronic searching devices and CCTV cameras. The over-all picture is disturbing. But, most of all, the lack of a police presence and the reassurance and sense of order that it brings, have been the subject of many expressions of concern by the judiciary and magistracy in recent years.[86]

Sir Robin Auld's specific recommendations in this area were as follows:

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82 http://news.bbc.co.uk/1/hi/uk/865110.stm
83 http://news.bbc.co.uk/1/hi/uk/1106620.stm
84 HL Deb 17 January 2001 c1122
85 "Courtroom attack on judge prompts fresh safety fears", *The Independent*, 11 May 2001
86 *Review of the Criminal Courts of England and Wales* p311

> 115. The Lord Chancellor should, as a matter of urgency, take direct responsibility for and control of security of courts of all levels and jurisdictions.
> 116. Those invested with a duty of providing security should have the same powers in all criminal courts.
> 117. Consideration should be given to requiring the police to resume provision of security in all criminal courts, or to the establishment of a uniformed Sheriff Officer Service which would be fully trained, have police powers and would operate under the general oversight of the local judiciary.
> 118. There should be a review of the necessary provision, in terms of accommodation, technology and otherwise, to protect vulnerable witnesses and others at court, and to enable the former where appropriate and necessary to give their evidence by video-link away from the court.
> 119. In the event of my recommendations in Chapter 8 being adopted, the extent of and financial responsibility for security provided in the Criminal Court should become a joint criminal justice responsibility exercised by the Criminal Justice Board on behalf of Ministers.[87]

3. Responses to the *Auld report*

The Magistrates' Association endorsed the Auld recommendations relating to security:

> With recent heightened awareness of security issues, there are obviously concerns about the security of magistrates and court staff. Equally, with the withdrawal of a police presence in the courts, there is a much greater risk of intimidation of witnesses outside the courtroom.
> As we pointed out in our recent response to the Inspectorate's Thematic Review of court security, we believe that there must be a national security policy for magistrates' courts and that overall responsibility for safety and security should rest with the Lord Chancellor. There must be greater consistency in a minimum standard of security in all magistrates' courts and adequate funding to meet such a standard. Security should be given very high priority as regards funding.[88]

The Central Council of Magistrates' Courts Committees were opposed to giving responsibility to the Lord Chancellor's Department:

> We disagree strongly with Recommendation 115, that the Lord Chancellor should, as a matter of urgency, take direct responsibility for and control of security of courts of all levels and jurisdictions. We believe that such responsibility is best discharged for magistrates' courts at local level and they should be properly resourced to do so.

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87 *ibid* p44-5

88 http://www.magistrates-association.org.uk/documents/magistracy/final_response_to_auld_January_02.doc

> We agree with Recommendation 116, that court security officers should have the same powers in all criminal courts.
>
> We disagree with Recommendation 117 that the police should resume provision of security in all criminal courts and we disagree with the suggestion that a uniformed Sheriff Officer Service be established to operate under the oversight of the local judiciary.[89]

4. The White Paper, *Justice for All*

The Government accepted in principle Sir Robin Auld's recommendation 115 with the following comment in the White Paper:

> 2.27 We are concerned about increasingly violent and threatening behaviour in and around courtrooms. This includes the intimidation of witnesses in criminal trials, attempted escapes by defendants, and attacks on judges, lawyers and other staff in the course of criminal, civil and family cases. We are considering providing security officers in our courts who have the powers to restrain, detain and arrest, and will continue to increase the provision of technical, electronic and other preventive security measures.[90]

The Law Society was disappointed at the lack of proposals for a designated court security service in their response to *Justice for All* in October 2002:

> 10. Another lost opportunity is in the area of court security. LJ Auld recommended a designated court security service. This is not touched on by the White Paper. Civil and criminal courts are effectively unpoliced. Those security staff present are not employed to intervene in violent incidents between witnesses, members of the public, or incidents involving court staff, judiciary or advocates. The administration of justice must take place in a safe and respected environment, and it must be seen to be safe and respected. - CCTVs that can assist investigations after the event are not a solution.[91]

The Law Society also made separate representations as follows:

> where any civilian exercises powers usually only exercised by the police, it is important to ensure that these powers are properly regulated and that those exercising them are accountable.[92]

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89 http://www.ccmcc.co.uk/cc/auldresponse.htm
90 http://www.cjsonline.org/library/pdf/CJS_whitepaper.pdf p44
91 http://www.lawsociety.org.uk/dcs/pdf/ResponseToWhitePaperJusticeForAll.pdf
92 HL Deb 11 February 2003 c588

5. The *Courts Bill*

Part 4 of the Bill contains provisions relating to improving court security in the Supreme Court, county courts and magistrates courts. The Explanatory Notes include the following comment:

> 150. In developing the proposals into the clauses contained in Part 4, the Department has noted the various debates in Parliament on the Police Reform Act 2002. Particular comments and concerns were raised about empowering civilian forces with 'police' powers of fine and detention and the provisions of existing legislation and common law (particularly regarding the power of arrest). The final proposals are designed to provide clear, additional powers to combat the level of disorder faced in court buildings, and thereby help increase public safety while on court premises and public confidence in the justice system. No new or statutory powers of arrest are conferred on court security officers.
>
> 151. Court security officers will, like all citizens, have power to make an arrest under section 24 of the Police and Criminal Evidence Act 1984 and the common law. Section 24 provides that "any person" may arrest without a warrant anyone who is committing or who he has reasonable grounds to suspect is committing an arrestable offence. Criminal Law Act 1967, section 3 confers a power on a person to use such force as is reasonable in the circumstances in the prevention of crime or in effecting or assisting in the lawful arrest of offenders or suspected offenders.

Clause 51 would define a court security officer and give the Lord Chancellor power to make regulations as to training and conditions to be met before a person may be designated as a court security officer. It would also establish that a court security officer must be clearly identifiable as such.

Clause 52 would enable a court security officer to search any person entering or in a court building, and any article in the possession of such a person. The officer may require the person being searched to remove outer clothing: coat, jacket, headgear, or footwear.

Clause 53 would enable a court security officer to exclude, remove or restrain persons from a court building, subject to the limitations set out in the section.

Clause 54 would enable a court security officer to request the surrender of an article which (s)he reasonably believes may jeopardise the maintenance of order in the court building; may put the safety of any person in the court building at risk; or may be evidence of or in relation to an offence. If the person refuses to surrender the article, the officer would have power to seize it.

Clause 55 would provide for the period during which articles surrendered or seized might be retained and **Clause 56** would empower the Lord Chancellor to make regulations about the retention of articles.

Clause 57 would make it an offence for any person to assault or wilfully obstruct a court security officer acting in the execution of his duty.

6. House of Lords Debate

There was general support for the proposal to strengthen court security. Some of the committee debate centred on the question of whether the Lord Chancellor should be under a duty, rather than just having a power, to make regulations as to training and conditions to be met by security officers. The Government's position was that a power afforded greater flexibility and an amendment tabled by the Conservative peer, Lord Hunt of Wirral, which would have imposed a duty, was defeated.[93]

There was also some debate at committee stage on the necessary extent of the court security officers' power of search. Lord Bassam of Brighton, for the Government, pointed out the need for proportionality in order to comply with the *European Convention of Human Rights.*

At Report Stage, the Conservative peer, Lord Swinfen, moved an amendment to give the Lord Chancellor power to make regulations relating to the procedure to be followed by court security staff in the discharge of their functions. For the Government, Lord Bassam of Brighton said that procedural matters might have to be changed quickly in response to particular situations and also that publishing procedure could compromise security. The amendment was defeated.[94]

On the subject of funding for court security, Lord Hunt of Wirral said:

> It would be helpful if the Minister could assure the Committee that the extra security measures suggested in his comments would not be a burden on the court fees, and that extra resources will be made available to cover the important duty on the Government to ensure that we have safety in our courts.[95]

Lord Bassam of Brighton replied:

> I make plain that the Lord Chancellor is committed to securing appropriate funding for security improvements without passing the costs on to litigants.[96]

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93 HL Deb 11 February 2003 c587-597
94 HL Deb 8 May 2003 c1284-9
95 HL Deb 11 February 2003 c606
96 HL Deb 11 February 2003 c608

VI Parts 5 & 6: Inspectors and Judges

These two parts have not been controversial, but are nevertheless of practical importance.

A. Inspectors of court administration

HM Magistrates Courts Service Inspectorate began operations in 1994. Its remit is to inspect and report to the Lord Chancellor on the organisation and administration of magistrates' courts in England and Wales and on the performance of the Children and Family Courts Advisory and Support Service (CAFCASS). It aims both to provide the Lord Chancellor with information about the performance of MCC areas and of CAFCASS and to support them by endorsing good practice and making recommendations about possible improvements. These recommendations are, in the main, addressed to the organisations concerned but may also, where appropriate, be directed to other bodies, which impact upon their performance. MCSI also provides the home for the Joint Inspectorates' Secretariat, which supports HM Chief Inspectors of the criminal justice system in England and Wales.

There is no equivalent inspectorate for the Crown Court.

In his Report, Sir Robin Auld said that:

> If a unified Criminal Court with a single administration for courts of all jurisdiction and levels is established in accordance with my recommendation, it would be sensible to extend the system of inspection to the administration of all the courts.

In the White Paper, *Justice for All*, the Government's view was:

> 9.43 The role of Inspectorates is crucial to raising CJS performance and supporting transparency and accountability. The more the CJS comes to be managed as one overall system, with consistent measures of performance, the more important it will be that future inspections are conducted and delivered in a cohesive and consistent manner.
>
> 9.44 Sir Robin Auld recognised the potential of joint inspection across the CJS and recommended that joint inspections be placed on a more formal and established footing. We support the recommendation to formalise the role of joint inspection. A new approach on CJS inspections will be developed, with the emphasis on tough joint inspections across CJS agencies, to be done on a thematic or regional basis. This will help to identify and address inefficiencies in the way the CJS works, particularly at the interfaces between agencies, and will support better case management and preparation.
>
> 9.45 The Criminal Justice Chief Inspectors of the CJS (HM Chief Inspectors of Constabulary, the CPS, magistrates' courts, Prisons and Probation) have already

> established a joint Inspectorates' secretariat to support their activities. The secretariat provides:
>
> - a channel of communication between Inspectorates that will enable improved and joined up practices as well as better mutual awareness and understanding;
> - development of coordinated joint inspection projects; and
> - support and advice on specific projects that have cross-boundary involvement.
>
> 9.46 We will set up a new independent Inspectorate to look at improving the administrative performance of the magistrates' courts, the Children and Family Court Advisory Support Service and, for the first time, the administration of the Crown Court and county courts. This new body will help to maintain and enhance performance of the courts once their management is unified.

The new HM Inspectorate for Court Administration would be established by clause **58**, and **clauses 59** to **61** set out the functions and powers of the Chief Inspector and other inspectors.

B. Judges

Clause 62 establishes the positions of Head of Civil Justice and Deputy Head of Civil Justice (which already exist), as statutory titles, requiring the Lord Chancellor to appoint a Head, and giving him power to appoint a Deputy.

Clause 63 removes the anomaly arising from s.2(3) of the *Supreme Court Act 1981*, which has the effect of requiring an ordinary judge of the Court of Appeal, even if female, to be styled "Lord". **Clause 64** gives the Lord Chancellor a general power to amend any of the judicial titles in the Supreme Court and county courts (but not the Judicial Committee of the House of Lords). The Explanatory Notes say that the clause is to prevent similar problems arising in the future, and comment that:

> Some titles may need modernisation, to make them more easily understandable to court users. The acceptance commanded by titles containing a presumption of the male gender might also change.[97]

The Master of the Rolls is among the members of the senior judiciary whom the Lord Chancellor must consult before changing judicial titles.

Clause 65 is designed to give flexibility in the deployment of judicial resources. With **Schedule 5**, it would give District Judges (Magistrates' Courts) specific functions and make them judges of the Crown Court, while **clause 66** would allow High Court judges, Circuit judges (and deputies) and Recorders to sit as magistrates.

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[97] para 178

VII Part 7: Procedure rules and practice directions

This part of the Bill contains provisions relating to court practice and procedure.

1. Current law

At present, there is no comprehensive code either of substantive criminal law or of the rules of criminal procedure. The current law is contained in a combination of numerous statutes, common law rules, judicial practice directions and statutory and non-statutory codes of practice.[98] The Explanatory Notes set out the present position relating to practice directions:

> 188. The Heads of Division (the Lord Chief Justice, Master of the Rolls, President of the Family Division and Vice-Chancellor) have power under the High Court's inherent jurisdiction to make directions as to practice and procedure. Section 74A of the County Courts Act (CCA 1984) gives the Lord Chancellor overall control over practice directions to be followed in county courts. He, and any person authorised by him, may make directions as to the practice and procedure of county courts. But there is no statutory provision on practice directions for magistrates' courts.

In his article, *The Case for a Code of Criminal Procedure*,[99] Professor J. R. Spencer argued that the case for codifying criminal procedure is stronger than that for codifying the substantive law because it is criminal procedure which consumes the larger share of the time of the courts and of public attention. He said:

> A quick look at any volume of the *Criminal Law Review* or of the *Criminal Appeal Reports* shows at once that far more appeals are brought on points of criminal procedure than are brought on points of substantive criminal law. An equally cursory glance at the newspapers reveals that most of the *causes celebres* that attract serious public attention turn on points of criminal procedure and evidence, not on substantive law.[100]

He argued that a codification of the rules might help develop an understanding of what the system is and how it works.

At present there are two rule committees: the Magistrates' Courts' Rule Committee, under section 144 of the *Magistrates Court Act 1980*, and the Crown Court Rule

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98 According to Lord Justice Auld, the Law Commission, in a survey for the Review in early 2000, found 271 different sources of law, procedure and evidence, not including case law or guidance from the Lord Chief Justice or the Attorney General. (p508)

99 [2000] Crim.L.R. 519

100 *ibid* p520

Committee under sections 84 and 86 of the *Supreme Court Act 1981* but neither has over-arching responsibility for ensuring consistency across the courts.

A reform of the civil justice system, based on recommendations made by the Rt Hon Lord Woolf in his reports on Access to Justice, has already been implemented.[101] This included the introduction of a unified code of procedural rules, written in plainer English, to replace the existing separate sets of High Court and county court rules.

2. The Auld Report

Sir Robin Auld advocated the establishment of a code of criminal procedure:

> Fairness, efficiency and effectiveness of the criminal justice system demand that its procedures should be simple, accessible and, so far as practicable, the same for every level and type of criminal jurisdiction. There are many features of criminal procedure that are common to summary proceedings and those on indictment, yet at present they are separately provided for in each jurisdiction and in a multiplicity of instruments and, often, in quite different language.[102]

His specific recommendations were as follows:

> 228. The law of criminal procedure should be codified, but in two stages:
>
> > 228.1 first, the Law Commission should be requested to draft legislation consolidating existing primary and secondary legislation coupled, possibly, with some codification of the more important and uncontroversial common law rules; and
> > 228.2 second, a statutory Criminal Procedure Rules Committee should be established to draft a single procedural code for a unified Criminal Court, restating and reforming as necessary statute and common law, custom, judicial practice directions and other guidance.
>
> 229. The code, which should be expressed concisely and in simple English and Welsh, should provide, so far as practicable, a common set of rules for all levels of jurisdiction, and different rules only to the extent that they are necessary for different forensic processes.
>
> 230. The draft code should be enacted in primary and subsidiary legislation, and the Committee should, thereafter maintain it, proposing amendments where necessary for the Lord Chancellor's approval and initiation of amendment by secondary legislation subject to negative or positive resolution as may be appropriate.[103]

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[101] 26 April 1999
[102] *Review of the Criminal Courts of England and Wales* p508
[103] *ibid* p57-8

3. Response to the *Auld Report*

The General Council of the Bar and the Criminal Bar Association welcomed the proposal to have a code of criminal procedure and a Criminal Procedure Rules Committee:

> 96. Almost everyone involved in the CJS is an enthusiastic supporter of codification. The CBA has called for it for very many years. We are in profound agreement with Auld that fairness and efficiency demand simple accessible procedures. We also agree that, so far as practical, procedures should be common to summary proceedings and to those on indictment. This is a reform which is long overdue.
>
> 97. We also agree that what is needed is emphatically not a mere consolidation of all relevant provisions, but a concise and simply expressed statement of the current statutory and common law procedural rules, which is readily amendable without a change in its 'geography'. It should be a cogent and living instrument.
>
> 98. We support the establishment of a Criminal Procedure Rules Committee along the lines proposed by Auld in paragraph 279 of his report, and we warmly commend his recommendations at paragraph 280.[104]

The Legal Action Group expressed doubts about the establishment of a Criminal Procedure Rules Committee, preferring an extended role for the Law Commission:

> However, LAG has doubts about L J Auld's approach to the task of creating a code of criminal procedure, which would involve setting up a Criminal Procedure Rules Committee under the supervision of his proposed Criminal Justice Council. Procedural rules are rarely just a matter of bureaucracy for participants in the system - they are also central to the notion of a fair trial. We are aware that the Law Commission has revived its project to produce a criminal law code, which would also incorporate appropriate law reform. It is unclear why the Commission should not see all aspects of codification through to completion, including criminal procedure and evidence. We suggest that the Commission be given additional resources to allow it to complete the work as soon as possible, and that parliamentary time be allocated to ensure that a code or codes can actually come into force, as a matter of priority.[105]

The Law Society agreed with the proposals and stressed the need for proper funding:

> Reform of the criminal justice system is long overdue and a much needed parallel to the Woolf reforms of civil justice. We hope it will replace the series of disparate, piecemeal initiatives and rushed legislation that has passed for criminal justice policy in successive governments. The success of the Woolf reforms has

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[104] http://www.lcd.gov.uk/criminal/auldcom/lorg/10.htm
[105] http://www.lcd.gov.uk/criminal/auldcom/lorg/lorg4.htm

> been largely as a result of careful consultation and a broad consensus. However, there have been problems as a result of underfunding. The lesson Government needs to learn is that any new system needs to be well resourced from the outset if those reforms are not to be undermined by underfunding.[106]

4. The White Paper, *Justice for All*

The Government rejected the recommendation to have a three tier jurisdiction but accepted in part Lord Justice Auld's recommendation that a unified Criminal Court should be established:

> 4.6 When a criminal case goes to trial, it should be dealt with at an appropriate level and location. We want this to be done in a more coordinated way. Sir Robin Auld recommended the establishment of a unified criminal court. Our view is that the benefits he identified from unification can be realised through a closer alignment of the magistrates' courts and the Crown Court, without a complete reordering of the court system and without adversely affecting the civil and family jurisdictions. We will therefore legislate to bring the magistrates' courts and the Crown Court closer together and collectively these courts will be known as 'the criminal courts' when exercising their criminal jurisdiction…[107]

The Government accepted in principle Lord Justice Auld's recommendation that the law of criminal procedure should be codified:

> 4.51 We want a criminal evidence code and a criminal procedure code. These would simplify cases and be a means of determining how crime should be tried. We believe that other significant changes in evidence and procedure are required as well as those set out in this White Paper. Any further changes would require widespread consultation. As part of this consultation process we would welcome the formation of a Criminal Procedure Rules Committee, chaired by a member of the higher judiciary, which we propose to place on a statutory basis.[108]

There is also consideration in the White Paper of the impact of a more unified court management on civil and family cases dealt with in the magistrates' courts:

> 9.27 In addition to criminal work, magistrates' courts deal with a lot of civil and family business. The improvements in the CJS present a good opportunity to make some improvements in processes to link family work in the magistrates' courts more closely with that in the county courts and the High Court. In particular, we will:
> • establish a single Family Procedure Rules Committee, to develop rules of court at all levels;

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106 http://www.lawsoc.org.uk/dcs/pdf/crimcourtreview.pdf
107 http://www.cjsonline.org/library/pdf/CJS_whitepaper.pdf p70
108 *ibid* p79

• enable Practice Directions issued by the President of the Family Division to cover family work in all courts; and
• introduce a single fee structure for family work in all courts.[109]

5. The *Courts Bill*

Clause 68 would give the title "criminal court" collectively to the criminal division of the Court of Appeal, and the Crown Court and magistrates' court when dealing with any criminal cause or matter.

Clause 69 would provide for criminal procedure rules to be made by a Criminal Procedure Rule Committee. The rules would govern the practice and procedure to be followed in all the criminal courts and the aim would be to secure that the criminal justice system is accessible fair and efficient, and that the rules are both simple and simply expressed.

Clause 70 would set out the composition of the Criminal Procedure Rule Committee and **Clause 71** would enable the Lord Chancellor, after consulting the Lord Chief Justice, to amend the composition of the Committee.

Clause 72 would set out the process for making criminal procedure rules. The Lord Chancellor, with the concurrence of the Secretary of State, would have power to allow, disallow or alter the rules. Rules would be contained in a statutory instrument to which the negative procedure would apply, unless the rules have been altered by the Lord Chancellor, in which case the affirmative procedure would apply.

Clause 73 would enable the Lord Chancellor, again with the concurrence of the Home Secretary, to amend, repeal or revoke any legislation in order to facilitate the making of the Rules (a "Henry VIII power"). In the committee debate in the House of Lords, Baroness Scotland of Ashal, after questioning on the subject by the Conservative peer, Lord Hunt of Wirral, confirmed that the Government intend to apply the affirmative procedure when the Henry VIII powers are used to amend or repeal any enactment.[110]

Clause 74 would give power to the Lord Chief Justice, with the concurrence of the Lord Chancellor to issue directions as to the practice and procedure of the criminal courts. The Lord Chief Justice would also be able to give directions containing guidance on law or making judicial decisions without the concurrence of the Lord Chancellor.

Clauses 75 to **81** would establish the Family Procedure Rule Committee and would contain provisions in relation to family procedure rules similar to those set out above in relation to criminal procedure rules (save that the concurrence of the Home Secretary,

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[109] *ibid* p150
[110] HL Deb 11 February 2003 c658

who has responsibility for criminal policy, would not be required). The President of the Family Division, with the concurrence of the Lord Chancellor, would have power to give directions as to the practice and procedure of county courts and magistrates' courts in family proceedings.

Clauses 82 to **85** would amend the *Civil Procedure Act 1997* in relation to the civil procedure rules and the Civil Procedure Rule Committee largely to bring it in line with the changes proposed in relation to the criminal and family jurisdictions. This would include a power to alter rules drafted by the Civil Procedure Rule Committee.

6. House of Lords debate

Concern was raised about proposed new powers for the Lord Chancellor to alter rules made by the civil procedure, family procedure and criminal procedure rules committees on the basis that a power to alter rules can, in effect, be a power to make them (even though the Lord Chancellor cannot initiate a rule change). This proposal would extend the Lord Chancellor's existing power to allow or disallow rules proposed by the Civil Procedure Rules Committee. The Explanatory Notes contain the following comment:

> 196. The Lord Chancellor is to have the power to alter the rules made by the Committee after consultation with the Committee. The power to alter rules is not a new power, but is a power that is being restored. Prior to the creation of the Civil PRC the Supreme Court Rule Committee made rules for the Supreme Court and these required the agreement of the Lord Chancellor. The Lord Chancellor had the power to allow, disallow or alter rules made by the County Courts Rule Committee. This power dates back to at least section 164 of the County Courts Act 1888. Altered rules will be subject to the affirmative resolution procedure in Parliament

Nevertheless, in debate it was pointed out that this power to alter had never existed in relation to courts other than the county courts. The Liberal Democrat spokesperson, Lord Goodhart, said:

> The measure represents an important innovation. The Lord Chancellor has never had power to alter the rules made by the Civil Procedure Rule Committee or by its predecessor, the Supreme Court Rule Committee. He did at one time have power to alter the rules made by the County Court Rule Committee, but that power was given up some years ago. It is wrong to bring back the Lord Chancellor's powers in relation to county court rules and extend them so far beyond anything that existed before. [111]

The Conservative peer, Lord Hunt of Wirral, said:

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[111] HL Deb 11 February 2003 c653

> we share [Lord Goodhart's] concern about the power given the Lord Chancellor to alter rules. It gives the Lord Chancellor blanket discretion to rewrite the committees' proposals. In such circumstances, why have the committees in the first place?[112]

Baroness Scotland of Asthal, for the Government, insisted that this power would usually be exercised only where a minor alteration to rules was necessary.[113] However, at the report stage, a compromise solution put forward by the Government (in line with suggestions originally made by the opposition at committee stage) was accepted. This means that where the Lord Chancellor exercises the power to alter rules, those new rules would require the use of the affirmative resolution procedure for approval by each House of Parliament. The rules which are allowed by the Lord Chancellor would follow the negative resolution procedure.[114]

Information about the negative procedure and affirmative procedure is available in House of Commons Information Office fact sheet: *Statutory Instruments*.[115]

VIII Part 8: Miscellaneous

A. Court fees

1. The present position

The Lord Chancellor has power, under s128 of the *County Courts Act 1984* to make orders, with the concurrence of the Treasury, as to the fees to be paid in county court proceedings. Such orders have to be laid before both Houses of Parliament. Under s130 of the *Supreme Court Act 1981* he has power to prescribe the fees to be taken in the Supreme Court. These orders also require Treasury concurrence and have to be laid before Parliament. In addition, they require the concurrence of the Lord Chief Justice in relation to Crown Court fees, and also of the Master of the Rolls, the President of the Family Division and the Vice-Chancellor in relation to other court fees. Magistrates' courts fees are governed by s137 of the *Magistrates Courts Act 1980*: the Lord Chancellor has power to make such variations as seem to him proper, but must lay any draft order before Parliament.

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[112] HL Deb 11 February 2003 c654
[113] HL Deb 11 February 2003 c655
[114] HL Deb 11 February 2003 c658
[115] Factsheet L7 at http://www.parliament.uk/documents/upload/L07.pdf

2. The *Courts Bill*

Clause 92 would give the Lord Chancellor a general power, with Treasury consent, to prescribe the fees payable in the Supreme Court, county courts and magistrates' courts. The *Explanatory Notes* say:

> The Lord Chancellor will consult the most senior judiciary in relation to any proposed fees order, as well as the Civil Justice Council for civil proceedings only. The Lord Chancellor is placed under a duty to provide appropriate information on fees to those who might have to pay them. It is intended to use a variety of methods of displaying and disseminating this information. In cases of default, fees in the Supreme Court, county courts and magistrates' courts may be recovered summarily as a civil debt by the court. Unlike fees orders under the current legislation which are simply laid before Parliament, any order made under this clause will be subject to the negative resolution procedure. By virtue of subsection (2) the Lord Chancellor is required to have regard to the need to facilitate access to justice in setting fees and under subsection (11) is not allowed to set fees to recover judicial salaries.

Subsections 5 and **6** require the Lord Chancellor to consult the Heads of Division and the Civil Justice Council, but their concurrence is no longer required. **Clause 106**, as amended in response to concerns expressed by the Delegated Powers and Human Rights Committees, requires orders to be made under the negative resolution procedure, rather than merely to be laid before Parliament.

Both **subsections (2)** and **(11)** were added at Committee in the House of Lords despite government opposition.[116] Both amendments reflect concerns about the effect of the Government's policy, since 1992, of full cost recovery in civil proceedings. These have been summarised in a recent paper by the Civil Justice Council, an Advisory Public Body which was established by the *Access to Justice Act 1999*, with responsibility for over-seeing and co-ordinating the modernisation of the civil justice system as laid out in Lord Woolf's report *Access to Justice*. Its members include the Master of the Rolls, Lord Phillips of Matravers, the Deputy Head of Civil Justice and the Chairman of the Judicial Studies Board. The history is set out in the executive summary:

> Historically, the cost of court accommodation and the salaries and pension of judges was borne by the State, with the rest of the running costs being paid for through fees levied on litigants. This was the basis on which fees were set until the 1980s. In the early 1980s it was decided that accommodation costs should be borne by litigants, and in 1992 that judicial salaries should be included. This was a significant change in policy, made apparently without any formal announcement or debate in Parliament.

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[116] Subsection (2) was added on 18 Feb 2003, when the Hhouse divided 37/36, HL Deb 18 Feb 2003, c1126; subsection (11) was added on 27 March when the House divided 90/87 HL Deb 27 Mar 2003, c 917.

> The current government has maintained the policy that the full cost of the civil courts should be recovered from fee income, less a subsidy covering exemption and remission, and a further "family subsidy" in respect of Children Act applications, adoptions and domestic violence applications.[117]

After giving detailed consideration to the Government's policy of raising almost the full cost of the civil court courts through fees levied on users, the Council has concluded that the policy is not consistent with its aim of ensuring access to justice. It says that the policy is both wrong in principle and unfair in practice and that it has resulted in significant under funding of the courts which is serious danger of undermining the civil justice reforms. The Council has called on the Government to abandon this objective, suggesting four broad reasons that suggest that the government is wrong to consider that civil justice should be largely self-financing. These are:

- that the policy of full cost recovery through court fees is wrong in principle as it fails to recognise the public functions that civil law and civil litigation perform and the social or collective benefit in the provision of these services to individuals

- that it limits arbitrarily the nature and quality of the services provided within the civil justice system: fee increases may generate a vicious circle by dissuading potential litigants from using the courts, with the resultant reduced volume necessitating greater fee increases and more court closures

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- that it may limit access to the courts, a concern only partly allayed by the availability of exemption from, remission of, or reduction of fees on the ground of income; and

- that it is not possible in the absence of inappropriate forms of cross-subsidy: the existence of widespread cross subsidy between sizes of claim and types of work is unfair and undercuts the rationale for full cost recovery.

Full cost recovery is relatively recent in historical terms. It is not the approach followed in the major English-speaking common law jurisdictions, nor is it the approach followed in most, if not all, other European jurisdictions.

In March 2003, Lord Lester of Herne Hill asked:

> What action [HMG] will take to address the concern expressed by the Civil Justice Council in its report on Full Costs Recovery that the present level of fees

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[117] 'Wrong in principle and unfair in practice', November 2002, http://www.civiljusticecouncil.gov.uk/164.htm

> discourages access to the courts, particularly on the part of the low-wage employees and small business proprietors not eligible for legal aid.

Baroness Scotland of Asthal replied:

> My department is taking forward a wide-ranging programme of work on fees in civil court cases which will examine all the issues raised by the Civil Justice Council in its report on Full Costs Recovery. I welcome its contribution to the debate and my officials are already speaking to the council. The fee policy principles which the Lord Chancellor announced to this House on 19 November 1998 state that "Fees should not prevent access to justice" and that "Protection must be provided for litigants of modest means". This is afforded through exemption from fee payment for individuals qualifying for tax credits. Those who do not qualify for tax credits but would otherwise suffer hardship in meeting a fee may apply to the court for remission, whether or not they are a litigant in person or a litigant in person trading as a firm.[118]

The levels of civil court fees were most recently changed by orders which came into force in April 2003, following a consultation aimed at users of the civil courts, the judiciary, court staff, and representative groups in England & Wales.[119] The purpose of the consultation was to:

- identify whether the package reasonably spreads the increases without bearing overly heavily on a particular fee or set of fees;
- receive comment on whether an increase in an individual fee might have specific, untoward consequences for a particular group of users.

It was, however, emphasized that the twin policies of recovering the cost of services through fees and of protecting access to justice were both current Government policy, and comments were not sought on those policies.[120]

B. Costs

1. The present position

a. Civil litigation

In civil litigation, the general rule is that “costs follow the event” so that the unsuccessful party will be liable to pay the costs of the successful party, as well as bearing his own costs in the proceedings. But the costs payable by one party to the other are in the

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[118] HL Deb 10 Mar 2003 c149WA

[119] The *Supreme Court Fees (Amendment) Order 2003* SI 2003/ 646, The *County Court Fees (Amendment) Order 2003* Statutory Instrument SI 2003/ 648, The *Family Proceedings Fees (Amendment) Order 2003* Statutory Instrument SI 2003/ 645

[120] “Civil court fees: Consultation paper on fee changes”, Sept 2002, Court Service, http://www.courtservice.gov.uk/docs/fee_consultation.pdf

discretion of the court, and there are many circumstances in which the successful party will be deprived of all or some of his costs, for instance because of misconduct before or during the proceedings (such as exaggeration of the claim), because there had been a payment into court which exceeded the amount awarded, or because the unsuccessful party was publicly funded and protected from an adverse costs order.

Section 51(1) of the *Supreme Court Act 1981* provides that the costs of and incidental to the proceedings shall be in the discretion of the court, and subsection (3) provides:

> The court shall have full power to determine by whom and to what extent the costs are to be paid.

Although a similar power has been on the statute book since at least 1890, the court does not appear to have ordered costs to be paid by someone who was not a party to the proceedings until the case of *Aiden Shipping Ltd v Interbulk Ltd*, where the House of Lords considered and rejected submissions that there was an implied limitation restricting orders as to costs to orders made against parties to the relevant proceedings. It was recognised that:

> In the vast majority of cases, it would no doubt be unjust to make an award of costs against a person who is not a party to the relevant proceedings

and that it was difficult to imagine

> any case arising in which some order for costs is made, in the exercise of the court's discretion, against some person who has no connection with the proceedings in question.[121]

In *Symphony Group plc v Hodgson*, Balcombe LJ summarised various categories of case in which costs orders had been made against non-parties.[122] These included cases where a person had some management of the action, where a person had financed the action, or caused it, and group litigation where one or two actions had been selected as test actions. The exercise of the discretion was most recently considered by the Court of Appeal in *Hamilton v Al Fayad (No 2)*, which arose from Neil Hamilton's unsuccessful libel claim against Mohamed Al Fayad in the "cash for questions" scandal. A large part of Neil Hamilton's own costs had been contributed by a fighting fund conceived and raised by Lord Harris of High Cross. Mr Al Fayad sought to recover his costs against those who had backed the action, as Mr Hamilton was bankrupt. The Court held that pure funders would generally be exempt from liability under s51, because a party's ability to recover his costs if successful must yield to the funded party's right of access to justice: otherwise

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[121] *Aiden Shipping Ltd v Interbulk Ltd* [1986] A.C. 965 at 980,981 per Lord Goff of Chieveley
[122] *Symphony Group plc v Hodgson* [1994] Q.B. 179

those sympathetic to the plight of impecunious parties might be discouraged from assisting them.[123]

Since 1990, legal representatives may be made personally liable for costs under "wasted costs orders", where costs have been incurred by any party:

> (a) as a result of any improper, unreasonable or negligent act or omission on the part of any legal or other representative or any employee of such a representative; or
> (b) which, in the light of any such act or omission occurring after they were incurred, the court considers it is unreasonable to expect that party to pay. [124]

b. Criminal proceedings

There is no equivalent general rule in criminal proceedings, where the award of costs is largely governed by Part II of the *Prosecution of Offences Act 1985*. A defendant's costs order may be made, under s16, so that costs will be paid out of central funds, broadly when a prosecution is begun but not proceeded with, or ends in acquittal. The court has a discretion, and may order less than the full amount to be paid. The fact that the defendant has brought the prosecution on himself is one reason for not making an order.[125] There is power under s17 to order a private prosecutor's expenses to be paid out of central funds. Under s 18 the court may make an order for prosecution costs to be paid by a convicted person. If the court decides to make an order against an offender, his means should be taken into account.

> In [*R v Mountain* 68 Cr App R 41] , Lawton LJ referred to the principle that an order to pay the costs of the prosecution should not be imposed merely because a defendant has elected trial on indictment. He said that one relevant consideration was the conduct of the defence. Where that was of the type which involved allegations that everyone except the defendant was telling lies and the case against him was fabricated, an order for costs might very well be appropriate.
> It is not the case that every defendant who is convicted after a plea of not guilty should be ordered to pay the costs of the prosecution, but there is a discretion which the judge can exercise if he takes into account such matters as the fact that the defendant had chosen to contest a strong case against him or the fact that the defendant must have known the real truth of the matter.[126]

The Lord Chancellor has power, under s19, to make regulations empowering criminal courts when satisfied that one party to criminal proceedings has incurred costs as a result of an unnecessary or improper act or omission by, or on behalf of, another party to the

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123 *Hamilton v Al Fayad* (No 2) [2003] 2 W.L.R. 128
124 *Supreme Court Act 1981* s51(6) added by the *Court and Legal Services Act 1990*
125 as in *R v Spens*, 18 March 1992
126 Archbold's Criminal Pleading Evidence & Practice, 2003, 6-30

proceedings, to make an order as to the payment of those costs. Regulations provide that the court may, after hearing the parties, order that the party who has caused the costs should pay all or part of them to the party which incurred them.[127] Provision was added, by the *Courts and Legal Services Act 1990*, to enable the criminal courts to make wasted costs orders against legal representatives. "Wasted costs" are defined by s19A in the same way as they are in civil proceedings. There is, however, no other power for criminal courts to order any costs to be paid by a person who is not a party to the criminal proceedings.

2. The *Courts Bill*

Clause 93 would add a new section s19B to the *Prosecution of Offences Act*, headed "Award of costs against third parties". "Third party" does not have the same meaning here as it does in civil proceedings, where one of the original parties brings another party into the proceedings, but is (in effect) defined as:

> a person who is not a party to those proceedings *(subsection (2))*

the Lord Chancellor would have power to make regulations empowering the criminal courts to make "third party costs orders" if:

> a) there has been serious misconduct (whether or not constituting a contempt of court) by the third party, and
>
> (b) the court considers it appropriate, having regard to that misconduct, to make a third party costs order against him.

The regulations may in particular:

> (a) specify types of misconduct in respect of which a third party costs order may not be made;
> (b) allow the making of a third party costs order at any time;
> (c) make provision for any other order as to costs which has been made in respect of the proceedings to be varied on, or taken account of in, the making of a third party costs order;
> (d) make provision for account to be taken of any third party costs order in the making of any other order as to costs in respect of the proceedings.

Regulations made under the section *must* provide that the third party may appeal against a third party costs order (to the Crown Court against an order made by a magistrates' court, and to the Court of Appeal against an order made by the Crown Court).

According to the *Explanatory Notes*:

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[127] *Costs in Criminal Cases (General) Regulations 1986* (SI 1986 No 1335)

> 243. A power for courts to order third parties to pay costs is not novel. A broader power already exists in the civil courts. However, the power introduced by the Bill will be limited to instances of serious misconduct by a third party.

Although the clause is not expressly aimed at any particular group, two likely targets have been identified. Probably the most obvious is media coverage which results in a trial having to be stopped, as happened in 2001, when the *Sunday Mirror* published an interview with the alleged victim's father, so that the jury had to be discharged in the first trial of two Leeds United footballers. At the second trial, one of the footballers was acquitted but the other was found guilty of affray. Six months later, Mirror Group Newspapers was fined £75,000 for contempt of court. It was said that the aborted trial was thought to have cost £10 million.[128]

The other identified targets were the agencies which caused delay to criminal trials by failing to deliver prisoners to the court at the appropriate time. Lord Thomas of Gresford spoke of the scandalous situation which had arisen in the past two or three years in respect of the failure of the Prison Service and private security firms to deliver prisoners to court in time, and sometimes at all.[129]

Some peers were concerned to ensure that the third parties should have a right to be heard, and to appeal against any order made. The right to appeal to a higher court will not be subject to any requirement to obtain permission from the court which imposed the order. There is also a power to prescribe that certain categories of "serious misconduct" should not be subject to third party costs orders (although Baroness Scotland thought it unlikely that there would be need to exercise that power).

There continued to be concern – and consternation outside the House, particularly by organisations representing newspapers – up to Third Reading, about the uncertainty as to what the criminal courts might consider to be "serious misconduct", which might have a chilling effect on the reporting of court proceedings. Lord Hunt of the Wirrall tabled amendments at that stage. One amendment would have limited the circumstances in which an order could be made to cases where the misconduct amounted to a contempt of court. He said:

> Perhaps I may explain that the order-making power confers enormous discretion upon magistrates and trial judges to make orders that could require the payment of huge amounts of money by third parties. In those circumstances there should be legal certainty about the way in which the power can be exercised.

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[128] "New costs threat to press", 4 December 2002, Press Association
[129] HL Deb 27 Mar c 918

> I do not believe that we should allow legislation to be enacted which would make third parties vulnerable to third party costs orders for lawful behaviour. They must be able to regulate their behaviour and avoid any act of serious misconduct by reference to recognised and consistent standards. The circumstances in which the powers of the courts can be exercised should, therefore, be limited to behaviour which is recognised as unlawful, and the power should be exercised in a consistent, proportionate and reasonable fashion. The legislation introducing this power should, therefore, at least set legal preconditions that will safeguard against a degree of uncertain, arbitrary and inconsistent use, and certainly against the levying of disproportionate awards in circumstances that do not merit orders.
>
> We had a debate about rights of appeal. They are very valuable, and are vital as additional safeguards; but they can act as a check only after the event. The legislation, in defining the power, needs to delineate the circumstances more precisely, confine the courts' powers more tightly and ensure their consistent application. After all, third parties' successful appeals from the magistrates' court to the Crown Court will not set any legal precedent. Appeals alone, therefore, will not set the kind of consistent and binding standards on the courts which I believe are necessary to regulate their behaviour and prevent unjustified orders being made.[130]

Responding for the Government, Baroness Scotland of Asthal said:

> The clause has been welcomed in principle on all sides of this House. I think we all agree that it fills an important lacuna in the powers of the criminal courts, and seeks to address a real mischief. But these amendments—and I speak for the moment to both of them—would render the clause virtually ineffective.
> (…)
> Journalists engaged in court reporting have nothing to fear from the clause provided that they respect any reporting restrictions that may be in place, their own professional code of conduct and, of course, the law of contempt as it affects prejudicial publicity. Journalists are well aware of these things. To assist further, my noble and learned friend the Attorney-General will shortly be issuing for consultation guidance to editors and journalists on prejudicial publicity; and that guidance will touch on the impact of this clause.

She explained that limiting the power to cases of actual contempt would be over-restrictive:

> There are many forms of misconduct that might justify a costs order in circumstances that we cannot necessarily foresee. For example … the misconduct might be a crime that was not also a contempt or a tort or a breach of contract or professional code of conduct or none of these. Common law contempt requires intention to interfere with the course of justice, but misconduct that affected the

[130] HL Deb 19 May 2003, c

> costs of a case might have quite a different motive, with the perpetrator ignorant or reckless of the impact of his wrong actions on the proceedings.

Lord Hunt was persuaded by that, but pressed an alternative amendment limiting the misconduct to that which had caused substantial prejudice to the administration of justice in the criminal proceedings, such that it has been frustrated or rendered impracticable, and the criminal proceedings had thereby been significantly delayed or abandoned. In support, Lord Goodhart said:

> Nevertheless, this is a new and powerful weapon that is being deployed, in criminal cases at any rate, and I am well aware of the concerns expressed by the Newspaper Society, which I believe are justified. It would be right to emphasise that there must be serious interference with the course of justice, such as that outlined in the amendment, before it would be appropriate to impose an order for third party costs.

Baroness Scotland expanded on the guidance to be issued by the Attorney-General who would set it out only after he had been able to explore fully, through consultation, what the industry, the profession, the journalists and editors felt was appropriate. It was right that the profession had indicated that it would wish to have some indication as to what fell within and without. The amendment was rejected on a division, by 125 to 120.[131]

C. Register of judgments

1. The present position

The Register of County Court Judgments has been in existence since 1852, although the possibility of closure was considered in 1985. By then, however the purpose of the Register had widened - the spread of consumer credit creating a demand for information including consumer judgments. Following representations from the credit industry, the operation of the register was handed to a non-profit company, Registry Trust, which took over the operation of the register from the government and reimburses the Lord Chancellor's Department for the cost of providing the information.

Under the *Register of County Court Judgment Regulations 1985* the Registry receives judgments, satisfactions and cancellations daily from all the county courts in England & Wales. In 1993 details of consumer Administration Orders, made in the county courts, were added to the Register and in 1997, details of Child Support Agency Liability Orders, obtained in magistrates courts, were also added.

The Register of County Court Judgments is a statutory public Register, access to which is open to all. This allows anyone to check the information on any business or individual,

[131] HL Deb 19 May 2003, c 536

upon provision of the requisite search details and payment of the statutory fee, set by the Treasury.

The Lord Chancellor may make regulations as to the keeping of the register, fix the fees to be paid in respect of the making of any information contained in an entry in the register available for inspection in visible and legible form, the carrying out of any official search of the register and the supply of a certified copy of any information contained in an entry in the register. If there is in force an agreement between the Lord Chancellor and a body corporate relating to the keeping by that body corporate of the register and provision is made by regulations for the register to be kept in accordance with such an agreement, the register is to be kept by that body corporate. Where the register is so kept by a body corporate, the Lord Chancellor may recover from that body any expenses incurred by the Lord Chancellor in connection with the supply of information to that body for the purposes of the register.

The Register of County Court Judgments was in the news ten years ago when so-called 'credit repair' companies advertised a service of getting county court judgments removed from the register.

> THOUSANDS of debtors are exploiting a loophole in the law that allows them to wipe their records clean and apply for credit cards and mortgages undetected.
>
> "Credit repair" companies, which see themselves as consumer champions, are said to be facilitating what trading-standards officers say is often a scam.
> (…)
> The credit-repair companies are able to remove county-court judgments from the register by appealing against them. Once an appeal is lodged often on flimsy procedural grounds the judgment is "set aside" and struck off the register until the appeal is heard.[132]

When asked what action the then Government proposed to take, LCD Parliamentary Secretary John M.Taylor said:

> I am deeply concerned that consumers should think carefully before paying any fees for such a service. The procedures for having entries removed from the register are described in the leaflet sent to defendants on entry of judgment ; they are quite simple and can be followed easily and cheaply by defendants themselves. However, the circumstances in which entries can be deleted from the register are limited. Almost all judgments are registered on entry of judgment, the major exception being where judgment is given at a contested hearing which the losing party attended and at which he did not ask for time to pay. Most entries then stay on the register for six years, even where payment has been made ; they can be removed only where the defendant provides proof that the debt was paid within one month of judgment, where the court, through administrative error, has

[132] 'Bad debtors exploit legal loophole' 28 Nov 1993, *Sunday Times*

> wrongly registered the judgment, or where the defendant makes a successful application to have the judgment "set aside". But the court will not set the judgment aside simply because the debt has been paid subsequently ; a judgment will usually be set aside only on the ground that there is a defence to the claim which ought to be heard. Officials in my Department have already taken steps to warn the courts to be alert for potential abuses of this procedure and are also in contact with the Office of Fair Trading which is considering whether it would be appropriate to use any of its powers against these companies.[133]

No equivalent register is kept for High Court judgments, nor is there any central register of unpaid fines. The Criminal Records Bureau provides access to criminal record information, but is principally concerned with records of convictions, rather than sentences, and does not cover fine defaults.

2. The *Courts Bill*

The effect of **clause 96** (Register of judgments and orders etc.) is summarised in the Explanatory Notes:

> 268. A new register is set up by this provision to replace the county court register made under sections 73 and 73A of the CCA 1984. The new register expands the scope of the previous register, which was only concerned with county court judgments and orders. The new register is designed to incorporate judgments of the High Court and criminal court fines. This will bring defaults from all the civil and criminal courts under one register. In the case of civil proceedings all judgments and orders will be registered unless an exception applies. In the criminal courts only certain cases, decided on an individual basis, will be registered. The provision allows for the register to be kept in house or contracted out.

The rationale behind the new register, insofar as it is to include fines, is to improve fine collection, by making it more difficult for defaulters to obtain credit. There does not appear to have been any pressure to include High Court judgments but, although they are less likely than county court judgments to reflect simple consumer debts, they are likely to be for more substantial sums, and there does not appear to be any obvious logic in excluding them from a register of defaults in making payment pursuant to a court orders.

D. Damages

In 1978, the Pearson Commission recommended that the court should be obliged to award damages for future pecuniary loss caused by death or lasting serious injury in the form of

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[133] HC Deb 15 Jul 1992, c

periodical payments, unless satisfied that a lump sum was more appropriate.[134] The recommendation was not followed at that stage, and for some time there was some uncertainty as to whether the court had power to make an order for periodical payments, even with the consent of the parties. In 1991, the Law Commission began:

> an examination of the principles governing and the effectiveness of the present remedy of damages for monetary and non-monetary loss, with particular regard to personal injury litigation.[135]

In the first of a series of consultation papers, followed by reports, they considered the use of structured settlements, and made recommendations to facilitate that use, some of which were implemented in the *Damages Act 1996*. Section 2 confirms that the court has power to make an order for periodical payments, with the consent of the parties. They left aside-

> the larger question of whether the judiciary should have power to grant awards in the form of periodic payments. This is because the focus of this paper has been to look at the enhancement and effectiveness of existing techniques for awarding damages other than by way of lump sum. It may well be, however, that at some stage in the future, the question will be the subject of a specific review.[136]

In March 2000 the Lord Chancellor published a Consultation Paper *Damages: The Discount Rate and Alternatives to Lump Sum Payments*. The second part of the Paper sought views on structured settlements and periodical payments in personal injury cases. In March 2002, he issued a further Consultation Paper *Damages For Future Loss: Giving the Courts the Power to Order Periodical Payments for Future Loss and Care Costs in Personal Injury Cases*, with the conclusion that in most circumstances periodical payments were, in principle, the more appropriate means for paying compensation for significant future financial loss. It was suggested that periodical payments better reflect the purpose of compensation, which is to restore the claimant's prior position and they also placed the risks associated with life expectancy and investment on defendants rather than claimants. In the foreword, the Lord Chancellor said:

> This Consultation Paper seeks views on proposals to give courts a discretionary power to order periodical payments for future loss and care costs in personal injury cases.
>
> It is widely recognised that lump sum payments are not ideal. They are based on the predicted life expectancy of the claimant and they invariably provide under- or over- compensation, resulting in an injustice to either the claimant or the defendant.

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[134] Report of the Royal Commission on Civil Liability and Compensation for Personal Injury (1978) Cmnd.7054

[135] Fifth Programme of Law Reform (1991) Law Com 200, item 11

[136] "Structured Settlements and Interim and Provisional Damages" Law Commission Consultation Paper No.125

> The proposals set out in this paper will allow the courts to award periodical payments, in appropriate cases, either wholly or partly in place of a lump sum payment. This should help ensure that injured people receive the compensation to which they are entitled for so long as it is needed, without the worry of the award running out if they happen to live longer than was expected. Removing uncertainty should ensure that claimants are able to spend their money on providing the quality of life and the standard of care to which they are entitled.
>
> But the proposals are not just about claimants - there are benefits for defendants too. For example, periodical payments can save money for the NHS and the taxpayer, and might give insurers more choice on how payments are funded, all without penalising claimants. I am, of course, aware that the proposals might incur some additional costs and that, in particular, the issue of reviewability is a difficult one. This Paper explores those problems and the various ways in which reviews might be taken forward in a controlled way. It also seeks information so that the potential costs and benefits of the proposals can be measured.
>
> This Consultation Paper suggests a new approach. I believe that the proposals represent an important step forward in seeking to improve the current system for paying damages to injured people.

The Department published a post-consultation report reflecting the response on consultation, in November 2002, concluding that:

> The consultation demonstrated that there is widespread support for promoting the use of periodical payments to compensate for future loss and care costs. The majority of those who responded to the consultation agreed with the Government's proposal that the courts should have the power to order periodical payments without consent. The Government therefore intends to legislate to implement the proposal as soon as a suitable opportunity arises. It is intended that the power will extend to the Fatal Accidents Act 1976. The Government does not propose to include in the legislation a presumption in favour of periodical payments, but will consider how best to provide guidance on the use of periodical payments in order to facilitate their use wherever appropriate.
>
> Consultees welcome a more flexible approach to the funding of periodical payments, whilst recognising that annuity-backed periodical payments are likely to remain the norm in privately funded cases. The important issue is that the long-term security of payments can be guaranteed and the Government will consider what changes may be needed to the legislation and other regulations to facilitate this.
> (…)
> A majority of consultees support a system of review although there is a range of opinion on the extent to which review should be available. Most agree that applications for review should be closely controlled. The Government recognises that the right balance must be struck between ensuring that claimants receive compensation which accurately reflects their needs without imposing unacceptable burdens on the NHS and insurers. The Government is minded to

> adopt a cautious approach initially, retaining flexibility to make adjustments in the light of experience, and consulting widely on any subsequent changes. It is intended to liaise with Government departments, the judiciary, and other key stakeholders to help create an effective system that best reflects the balance required.[137]

Clauses 98 and **99** of the Bill enable the courts to order periodical payments for future loss and care costs without the consent of the parties, and give the Lord Chancellor power to enable awards or agreements for periodical payments to be varied under specified circumstances. The effect of the clauses is described in some detail in paragraphs 273 to 290 of the Explanatory Notes.

The new power has been generally welcomed and, as anticipated in the consultation, there have been concerns both about erosion of finality in judgments which the provisions (especially the prospect of awards being varied) would cause, and the selection of index to be used for index-linking.

At the Committee stage in the House of Lords, the Conservative Lord Hunt of Wirral expressed concern about the variation clauses:

> The variation clauses could cause much more litigation, endless uncertainty, constant scrutiny for claimants and financial instability for those who seek to compensate. I hope that the Minister will accept that there could be a fatal flaw in the system. If periodical payments are introduced with a suspicion that at some stage in the future they will be changed or varied, then I do not believe that the general welcome for periodical payments will continue.[138]

After outlining the concerns of various parties about the lack of finality and certainty, he continued:

> I shall end on the most serious point of all. Reviewability may inhibit rehabilitation. I believe that there is now a widespread consensus that what is most important in such claims is to ensure that, where appropriate, everyone's efforts concentrate on helping the individual to secure an early and prompt return to work or, in other circumstances, to an early and prompt return to the community. Later we shall address the question of future medical care, but surely the emphasis in all these structured settlements—we wish them well because a system of periodical payments is far better than the old lump sum damages system—should be that the interests of the claimant, the victim, are paramount.
>
> Lastly, as I mentioned earlier, those involved with organisations promoting disability rights feel strongly that in all this, the central focus must be placed on

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[137] http://www.lcd.gov.uk/consult/general/periodpayresp.htm#part5
[138] HL Deb 27 March 2003 c929

> getting an individual back into the work and back into the community. They fear that reviewability may well inhibit the process.

Lord Goodhart QC, Liberal Democrat Spokesperson for the Lord Chancellor's Department, agreed with some, but not all of the points made by Lord Hunt:

> What has to be shown before an order can be made is that in the original case it was proved or admitted that there was a chance at some definite or indefinite time in the future that the injured person would develop, as a result of the act or omission which gave rise to the cause of action, some serious disease or suffer some serious deterioration in his or her physical or mental condition and the court assessed the provisional damages on the assumption that the injured person would not develop the disease or suffer deterioration in his or her condition. That simply transposes those restrictions into periodical payments.
>
> A right to re-open a case in those limited circumstances, whether it be provisional damages or periodical payments, seems justifiable. There are clearly cases where a condition may develop and there may be a serious deterioration in the condition, but it is simply impossible at the time of the hearing to determine. In the past, before it was possible to claim provisional damages, it led to the case being delayed as long as possible so it was possible to ascertain as accurately as may be done, whether the condition was likely to develop or not. Introducing provisional damages has made it unnecessary to delay the case in those circumstances.
>
> There are cases where the damages cannot be easily assessed until a future date when it becomes clearer whether a condition will develop. If the court was forced to come to a final view at the original trial it might award a great deal too much in damages or a great deal too little. I entirely accept that in such circumstances a power of variation is needed both as regards provisional damages and periodical payments. I also believe that these are rare circumstances. I understand that few orders have been made for provisional damages.
>
> Therefore, I agree with most, but not all, of what the noble Lord, Lord Hunt of Wirral, said. The issue on which I disagree is retrospectivity. From what I have said it is obvious that I do not agree that there should be no power of variation, but it should be at a limited level…
>
> …if I thought that, in general, it would be for the benefit of claimants if they were allowed to reopen claims at a later date because of some change in their condition, I would support a general right. However, there is clear evidence—referred to by the noble Baroness, Lady Finlay of Llandaff—to show that a general right to reopen a claim for damages would not be in the interests of most claimants because of the importance of closure and the importance of the claimant, having received damages, being able to get on with his or her life.[139]

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[139] HL Deb 27 March 2003 c1001-2

Baroness Scotland of Asthal, for the Government, confirmed the position as follows:

> As stated in the Explanatory Notes, the order will, as far as practicable, adopt the mechanism currently applying to claims for provisional damages. The circumstances in which further damages may be requested shall be set out in the initial order of the court and relate only to the individual claimant's medical condition attributable to the original accident.
>
> There are two small but important differences when compared with provisional damages: the rules on variation will allow defendant's to apply, and the circumstances will include both deterioration and improvements. Circumstances sufficient to justify a variation will have to amount to a significant change, which will keep minor disputes away from the courts.
>
> Our intention is that the power to vary awards of periodical payments will be tightly drafted and carefully controlled—including a requirement for the court's permission before any application can be made. Any future exercise of the Lord Chancellor's power to specify the circumstances in which an order can be varied would be subject to consultation and affirmative resolution by Parliament.
>
> Such a restricted system of variation should not require additional compensation over and above that already payable. Insurers are already providing for such eventualities—usually by way of contingency payments—but because the amount of the award has to be calculated at the time of the original order, that can involve estimates of future need that may not be accurate. I am sure that your Lordships have known of many such instances. ….
>
> I reassure the Committee that we have no plans to extend the scope of variation after the initial order. We want to see how the intended regime works. But that should not prevent us from keeping open the option of extending or limiting further the extent of variation in the light of experience and future developments in the insurance market, or making any minor adjustments should that prove necessary. I believe that an order-making power provides the flexibility to do so and is the best way of dealing with variation. The need for consultation and affirmative resolution will ensure that any future proposal—and, as I have indicated, none is planned—is subjected to rigorous scrutiny and debate. We believe that the greater use of periodical payments will have benefits not only for claimants but also for defendants and their insurers and that the power to vary is a necessary and important part of the new system….
>
> Amendment No. 141A proposes the removal of the provision that allows an order for variation made by the Lord Chancellor under Section 2B(1) to have effect irrespective of the original terms and conditions of the court order or agreement. That provision is intended to ensure that the framework for the order-making power is wide enough to capture all possible eventualities for variation. Any such order would of course be subject to consultation and the affirmative resolution of Parliament under the terms of Section 2B(6).

> However, I recognise the concern outlined by noble Lords and the noble Baroness, Lady Finlay of Llandaff, about the provision. They fear that it could create unacceptably high levels of uncertainty, and the Government are therefore willing to accept the amendment.[140]

Concerns were raised about the retrospective effect of legislative change. At Report stage the cross bench peer Baroness Finlay of Llandaff said:

> As currently drafted, Clause 92(2)(b) will apply to all cases settled after the Bill comes into force even if the negligent act occurred over 20 years ago. There is often a significant time lag between when a negligent act occurs, when it is reported and when a claim for compensation is finally settled. According to the Medical Protection Society, one in five claims, where the claim was valued at £500,000 or more, made against their medical members between 1996 and 1999 related to incidents which occurred 10 or more years earlier.
>
> This is an important point for medical defence unions offering indemnity on an occurrence basis…….
>
> In contrast, the Health and Social Care (Community Health and Standards) Bill currently being considered in the House of Commons introduces the concept of recovery of NHS costs in clinical negligence cases. It will apply to injuries which have occurred only after the date the legislation comes into force. The Department of Health has accepted that it would be unfair on those insurance companies or not-for-profit organisations which fund the cost of claims to be "caught" for accidents that had taken place long before the measure was even conceived[141]

In reply, Baroness Scotland of Asthal explained the Government's position:

> In Committee I explained that although we recognise the general concerns expressed about the "retrospective" effect of legislative change, and the fact that these cases can sometimes take several years to settle, where the court makes a variable periodical payments order, insurers and medical defence organisations should be able to reserve or reinsure against it, as they do now in regard to provisional damages orders. I want to emphasise the fact that, in introducing periodical payments, we are not seeking to change the basis of liability, but rather we seek to change the way in which people are paid. So the issue of liability rests where it is.
>
> If the provisions relating to the court's power to vary periodical payments applied only to injuries occurring after the date of commencement, it could be several years, as the noble Baroness said, before the provisions took effect. In the meantime, in some cases where variation was appropriate, awards would continue to have to include provision for events which might never occur and claimants

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[140] HL Deb 27 March 2003 c1006
[141] HL Deb 12 May 2003 c70

> would continue to be left significantly under-compensated or over-compensated. In other cases, the court would be forced to order a provisional damages lump sum even though periodical payments were more suitable.
>
> I understand and recognise that the provisions of the Health and Social Care (Community Health and Standards) Bill relating to the recovery of NHS costs will take effect differently to the provisions in the Bill relating to periodical payments. However, I hope that the noble Baroness, Lady Finlay of Llandaff, will understand that different considerations can apply when deciding the most appropriate implementation date for any legislation. For example, the introduction of the recovery of NHS costs in clinical negligence cases is a new cost which insurers and medical defence organisations have not previously had to meet, whereas the limited degree of variation that we propose will not introduce any new liability for damages. It is simply a different, and we believe fairer, method of paying for uncertain future costs[142]

There was also some debate about the necessity to index link periodical payments at both Committee stage and Report stage. At the House of Lords Report stage, Lord Goodhart moved an amendment:

> Page 44, line 21, at end insert—
>
> "( ) Periodical payments shall, unless the court otherwise directs, be increased or decreased in accordance with the Retail Price Index."
>
> The noble Lord said: …….Amendment No. 148 is similar although not identical to an amendment which we tabled in Committee. The earlier amendment made the inflation proofing of orders for periodical payments an absolute requirement. This amendment states that inflation proofing is to apply unless the court directs otherwise.
>
> I believe that the need to inflation proof periodical payments is obvious. It is not clear on the face of the Bill that Clause 92 gives a power to order periodical payments of variable amounts which are uncertain at the time of the order because they are dependent on something which will happen later; namely, the rate of increase in the retail prices index. So, it seems to me that that needs clarification.[143]

Baroness Scotland of Asthal, for the Government, acknowledged the importance of inflation proofing payments against future loss and that there might be merit in removing any doubt that the court has power to index link periodical payments:

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[142] HL Deb 12 May 2003 c72-3
[143] HL Deb 12 May 2003 c56

> Therefore, if the House considers that it will act as a useful guide to the courts and parties, we are willing to consider bringing forward an amendment to make this power explicit, provided that—and I must emphasise this—a provision can be drafted in a way which is workable.
>
> The noble Lord, Lord Hunt, correctly identified the difficulties that we have had historically with setting the discount rate. Furthermore, on previous occasions, I—and others before me—have emphasised the need for certainty for claimants in this very difficult time. If we are moving to a more settled arrangement for them, we obviously want to limit the opportunity for added insecurity to be built in. Therefore, I add that caveat.
>
> There are several issues which we will need to consider—for example, when and how adjustments for inflation should be calculated and the most suitable definition of the retail prices index. It will also be necessary to ensure that any amendment does not affect out-of-court settlements where, of course, the parties should be able to settle on whatever terms they choose. [144]

At third reading, Baroness Scotland moved a Government amendment, which was supported generally:

> Page 49, line 41, at end insert—
>
> "(8) An order for periodical payments shall be treated as providing for the amount of payments to vary by reference to the retail prices index (within the meaning of section 833(2) of the Income and Corporation Taxes Act 1988 (c. 1)) at such times, and in such a manner, as may be determined by or in accordance with Civil Procedure Rules. (9) But an order for periodical payments may include provision—
>
> (a) disapplying subsection (8), or
> (b) modifying the effect of subsection (8)."
>
> The noble Baroness said: My Lords, Amendment No. 23 has been brought forward in response to an amendment tabled at Report stage by the noble Lord, Lord Goodhart. I am aware that the issue of indexation has been a cause of concern and I hope that this amendment is able to offer some reassurance. In moving the amendment, I shall also speak to Amendment No. 24, tabled by the noble Lord, Lord Hunt of Wirral.
>
> At Report stage, I explained that we did not think a provision to make explicit the court's power to index link periodical payments was necessary but agreed that such a provision might act as a useful guide to the courts and parties. Amendment No. 23 therefore provides that periodical payments orders shall be treated as providing for the amount of payments to vary by reference to the retail prices

[144] HL Deb 12 May 2003 c59

index. We expect that, as now, periodical payments will be linked to the retail prices index in the great majority of cases. However, subsection (9) preserves the court's existing power to make different provision where the court considers it appropriate in the circumstances.

I emphasise that the amendment is merely intended to reflect the current position in respect of indexation. The Bill addresses how payments of personal injury compensation are to be made. It does not seek to deal with how such claims are to be valued. As I said, we expect that the retail prices index will continue to be the norm and that the court will depart from it only where the particular circumstances of the case make it appropriate.

That position is parallel with that of the discount rate, which effectively incorporates the retail prices index in calculating the future loss element of lump sums. I am mindful of the reasons given by the noble and learned Lord the Lord Chancellor in 2001 when setting the discount rate using his powers under Section 1 of the Damages Act 1996. In his reasons, the Lord Chancellor emphasised the need for certainty for all parties while noting that it would remain open for the courts, under Section 1(2), to adopt a different rate in a particular case if there were exceptional circumstances which justified their doing so. That view has since been supported by the Court of Appeal. We would expect the courts to adopt the same approach in the analogous case of periodical payments when considering whether to exercise their discretion under subsection (9). [145]

[145] HL Deb 19 May 2003 c536-7